OFFICIAL

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Volume 168

PROCEEDINGS

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

SEPTEMBER, 2016—OCTOBER, 2016

BY

THOMAS G. SMITH
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* See General Statutes § 52-434c.

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ATTORNEY GENERAL

HON. GEORGE JEPSEN

NOTES

[1] Retired September 28, 2016, under constitutional limitation as to age.
[2] Retired September 16, 2016, under constitutional limitation as to age.

Unless otherwise indicated, the statute book referred to as the General Statutes in the opinions in this volume is the Revision of 1958, revised to 2015; the Practice Book is the Connecticut Practice Book (Current Ed.) as supplemented by rules of court published in the Connecticut Law Journal.

The month given at the top of each page is that within which the opinion was published in the Connecticut Law Journal.

* See General Statutes § 51-50i.

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defendant aunt of plaintiff was entitled to receive share of income from certain trust; whether it was necessary for court to turn to default rules of construction of wills; whether testator's intent was controlling; whether plaintiff's appeal in probate action was moot.

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Habeas corpus; claim that trial counsel was ineffective by failing to timely and meaningfully inform petitioner of favorable plea offer from state of ten years; whether habeas court properly granted habeas petition and determined that trial counsel provided ineffective assistance; whether trial counsel's decision to delay informing petitioner about plea offer was not within the realm of strategic decisions that attorney is allowed to make or involved matter of trial strategy; whether trial counsel had obligation to promptly inform petitioner of plea offer; whether defense counsel who violated duty to communicate timely to accused formal plea offer from prosecution failed to render effective assistance; whether trial counsel's actions prevented petitioner from properly exercising constitutional right to plead guilty and to make fully informed decision as to whether to testify on her own behalf; whether trial counsel's decision to delay communicating the plea offer could be considered reasonable and matter of sound trial strategy.

In re Probate Appeal of Heisinger. 467

Action for declaratory judgment; appeal from Probate Court order; claim that trial court erred in rendering summary judgments in favor of defendants; claim that court erred in determining that defendant aunt of plaintiff was entitled to receive share of income

from certain trust; whether it was necessary for court to turn to default rules of construction of wills; whether testator's intent was controlling; whether plaintiff's appeal in probate action was moot.

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Termination of parental rights; claim that trial court violated respondent mother's right to due process by failing to determine, during dispositional phase, that there would be some adverse effect to child by failing to terminate mother's parental rights; claim that trial court improperly determined that termination of respondent's parental rights was in child's best interests as required by statute (§ 45a-717 (h)); claim that trial court committed plain error by failing to conduct pretrial canvass of respondent in accordance with In re Yasiel R. *(317 Conn. 773), which was decided before her trial commenced; whether reversal of trial court's judgment was required under plain error doctrine when respondent did not demonstrate that failure to give canvass required by* In re Yasiel R. *resulted in manifest injustice and eroded public's confidence in integrity of judicial system.*

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Negligence; summary judgment; claim that apportionment defendant's counterclaim was barred by exclusivity provision of Workers' Compensation Act (§ 31-275 et seq.); whether trial court erred in concluding that intervening plaintiff had carried initial burden of proving nonexistence of any genuine issue of material fact; whether apportionment defendant was under obligation as nonmoving party to submit documents establishing existence of issue of material fact; whether apportionment defendant was agent of state and third party beneficiary of intervening plaintiff's contract with state.

Miller *v.* Dept. of Agriculture 255

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Mitchell *v.* Commissioner of Correction (Memorandum Decision) 903

Moye *v.* Commissioner of Correction. 207

Habeas corpus; whether habeas court abused discretion by denying petition for certification to appeal; whether court improperly determined that petitioner's trial counsel did not provide ineffective assistance; claim that trial counsel provided ineffective assistance by failing to request sequestration order; reviewability of claim that petitioner's right to due process was violated when habeas court stated during oral decision denying habeas petition that it did not review all evidence admitted at habeas trial; whether

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Murray *v.* Commissioner of Correction (Memorandum Decision) 904

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Nogueira *v.* Commissioner of Correction 803

Habeas corpus; kidnapping first degree; sexual assault first degree; respondent Commissioner of Correction's appeal from habeas court's judgment granting petition for writ of habeas corpus; whether failure of trial court to make factual finding in accordance with State *v.* Salamon *(287 Conn. 509) was harmless error; whether, pursuant to evidence in record, jury could have found that petitioner's restraint of victim was incidental to his sexual assault of victim.*

Pena *v.* Gladstone 141

Marital dissolution; claim that trial court improperly applied law in awarding postdissolution attorney's fees to plaintiff pursuant to statutes (§§ 46b-62 and 46b-82) to prosecute plaintiff's motion to modify custody and visitation; claim that trial court did not give sufficient weight to plaintiff's earning capacity; claim that trial court abused discretion in awarding attorney's fees by considering child's best interests and whether plaintiff would be deprived of his rights regarding custody and visitation due to his lack of funds; claim that trial court improperly determined whether defendant had liquid funds sufficient to pay plaintiff's attorney's fees; whether trial court abused discretion as to award of attorney's fees for past legal work unrelated to plaintiff's pending motion for modification; whether trial court abused discretion in awarding plaintiff sizeable retainer for future attorney's fees for pending motion for modification.

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Habeas corpus; whether habeas court properly denied petition for certification to appeal; whether habeas court properly determined that petitioner's trial counsel was not ineffective in presentation of petitioner's self-defense claim by advising petitioner not to

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Breach of contract; breach of fiduciary duty; spoliation of evidence; standing; limited liability companies; subject matter jurisdiction; claim that trial court improperly concluded that plaintiff had not proven claims of spoliation of evidence, breach of contract, or breach of fiduciary duty against defendant, who was only other member of parties' limited liability company; whether member of limited liability company had standing to sue in individual capacity to recover for damages based on injury or loss sustained by limited liability company; whether plaintiff alleged claim of direct injury sufficient to give him standing to pursue claims against defendant member and limited liability company when any injuries that arose from alleged improprieties by defendant were sustained by company and only flowed to plaintiff through company.

Sewell *v.* Commissioner of Correction 735

Habeas corpus; ineffective assistance of counsel; claim that trial counsel's pretrial investigation was deficient and resulted in prejudice to petitioner; whether petitioner presented direct evidence that further investigation would have yielded new evidence that would have affected outcome of trial.

Solairaj *v.* Mannarino Builders, Inc.. 1

Breach of contract; claim that trial court's factual findings were clearly erroneous; whether plaintiffs' demand for certain additional warranties not included in purchase agreement or they would terminate agreement to purchase home constituted breach of that agreement; claim that trial court improperly concluded that defendant had not breached purchase agreement when plaintiffs claimed that there were issues regarding flooring system and water in basement.

State *v.* Baker 19

Possession of weapon or dangerous instrument in correctional institution; motion to correct illegal sentence; claim that defendant's sentence violated double jeopardy clause of federal constitution in light of Department of Correction sanctions; whether trial court improperly excluded evidence regarding collateral consequences of sentence; claim that department sanctions constituted criminal punishment; whether legislature intended department sanctions to be civil penalties; whether Hudson *v.* United States *(522 U.S. 93) factors demonstrated clearest proof that department sanctions were punitive in purpose or effect.*

State *v.* Balbuena 194

Conspiracy to commit murder; whether trial court properly denied motion for judgment of acquittal; whether there was sufficient evidence from which jury could have found beyond reasonable doubt that defendant conspired to kill victim; whether jury reasonably could have found that defendant and cohorts had agreed to

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State *v.* Best 675

Murder; attempt to commit murder; assault first degree; criminal possession of firearm; claim that defendant was deprived of constitutional right to establish defense when trial court improperly rejected his request for jury instruction on self-defense.

State *v.* Blaine 505

Conspiracy to commit robbery first degree; reviewability of claim that evidence was insufficient to sustain conviction of conspiracy to commit robbery first degree; whether trial court erred in denying request to provide third party culpability instruction to jury; harmless error; claim that court erred by declining to instruct jury in accordance with State *v.* Pond *(138 Conn. App. 228); waiver.*

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Felony murder; attempt to commit robbery first degree; conspiracy to commit robbery first degree; criminal possession of firearm; claim that trial court misapplied statute (§ 54-47a) that permitted state to grant immunity from prosecution to certain witnesses; claim that defendant was denied his constitutional rights to due process and fair trial when court permitted state to revoke grant of immunity to certain witnesses; whether court abused discretion in sustaining invocation by certain witnesses of fifth amendment right to remain silent when defendant questioned them during his case-in-chief; harmless error; whether court improperly admitted certain uncharged misconduct evidence; whether court improperly admitted certain prior inconsistent statement; whether court improperly permitted detective to testify about certain witnesses' statements to police; unpreserved claim that court improperly lengthened defendant's sentence as punishment for defendant's having elected to go to trial.

State *v.* Cunningham 519

Murder; carrying pistol without permit; criminal possession of firearm; claim that trial court violated defendant's sixth amendment right to present complete defense; whether court abused discretion by precluding defendant from listing, orally or by slide, all elements of manslaughter first degree during closing argument to jury when defendant had not been charged with manslaughter first degree and neither state nor defendant had requested jury instruction on manslaughter first degree as lesser offense included within crime of murder.

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Sexual assault first degree; sexual assault second degree; sexual assault fourth degree; risk of injury to child; unpreserved claim that trial court violated defendant's state and federal constitutional rights by excusing juror before trial commenced without first notifying defendant; reviewability of claim that defendant

was entitled under state constitution to notice prior to excusal of juror and to voir dire juror; claim that dismissal of juror constituted plain error under statute (§ 54-82h (c)) that governs excusal of certain jurors; reviewability of claims pertaining to constancy of accusation testimony and court's jury instruction on constancy of accusation testimony; claim that court committed plain error when it refrained from striking sua sponte certain constancy of accusation testimony; reviewability of unpreserved claim that prosecutor committed impropriety during cross-examination of defendant; whether prosecutor's remarks during closing argument to jury improperly appealed to jurors' emotions and passions.

State *v.* Erick L. 386

Sexual assault fourth degree; risk of injury to child; whether trial court abused discretion and violated defendant's rights to confrontation and to present defense by denying his motions to admit into evidence testimony from victim and certain letters from victim's boyfriend that pertained to victim's sexual relationship with boyfriend; claim that evidence of victim's sexual relationship with boyfriend was material and relevant under rape shield statute (§ 54-86f); claim that exclusion of evidence of victim's sexual relationship with boyfriend violated defendant's rights to confrontation and to present defense; whether trial court abused discretion by seating juror whom defendant claimed had stated during voir dire that children were less likely to lie than adults.

State *v.* Kinch 62

Possession of narcotics with intent to sell by person who is not drug-dependent; failure to appear first degree; claim that trial court improperly denied defendant's motion to suppress certain evidence seized by police from vehicle in which defendant was passenger; whether investigatory stop by police was supported by reasonable and articulable suspicion of criminal activity; whether defendant had standing to challenge legality of search of vehicle; whether defendant satisfied burden of proving existence of reasonable expectation of privacy in area of vehicle searched.

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Motion to correct illegal sentence; claim that trial court improperly denied defendant's motion to correct illegal sentence; whether defendant qualified for exemption in persistent serious felony offender statute (§ 53a-40); whether language of exemption was ambiguous; whether word "and" as used in exemption is disjunctive; claim that conjunctive reading of word "and" would lead to illogical result and create disharmony in statute's hierarchical structure.

State *v.* Quail. 743

Murder; larceny fifth degree; claim that trial court improperly denied motion to suppress physical evidence that police seized during warrantless search of residence of defendant's sister as well as results of forensic testing thereon; whether any erroneous admission into evidence of fruits of warrantless search was harmless

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State *v.* Robert H. 419

Risk of injury to child; corpus delicti or corroboration rule; claim that evidence was insufficient to prove that defendant masturbated in front of minor victim on two occasions because common-law corpus delicti rule prevented defendant from being convicted of charge absent independent proof regarding second incident solely on basis of his uncorroborated confession that more than one such incident occurred.

State *v.* Torres 611

Murder; claim that trial court abused discretion by admitting evidence of defendant's prior misconduct; whether trial court provided incorrect jury instruction regarding standard of proof beyond reasonable doubt; whether prosecutor engaged in impropriety during closing and rebuttal arguments; claim that trial court erred in failing to disclose certain portions of witness' psychiatric records following in camera review; whether prior misconduct testimony was relevant to establishing defendant had means to commit murder; whether revolver witness observed in defendant's possession was suitable to carry out murder; claim that trial court abused discretion in determining prejudicial effect of witness' testimony did not outweigh probative value; claim that limiting instruction exacerbated prejudicial effect of witness' testimony; whether defendant waived challenge to reasonable doubt jury instructions.

Tomey Realty Co. *v.* Buzzuto's, Inc.. 637

Breach of lease agreement; assignment of lease; claim that trial court improperly granted defendant's motion for summary judgment; whether there was genuine issue of material fact as to whether parties to subject assignment intended to eliminate, from calculation of base rent due for sixth year of lease and thereafter, fifth year cumulative rent increase; whether "whereas" clause in preamble of assignment negated obligation set forth in lease or modified operative provisions of parties' amendment and assignment.

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Habeas corpus; whether habeas court properly denied petition for writ of habeas corpus; whether court properly determined that petitioner failed to establish that he was prejudiced by alleged deficient performance of habeas trial counsel and habeas appellate counsel; claim that case should be remanded for consideration of merits of petition for certification to appeal.

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Foreclosure; motion to dismiss; subject matter jurisdiction; claim that trial court improperly denied defendants' motion to dismiss; whether notice requirement in statute (§ 8-265ee) was applicable under facts of case; whether when original plaintiff commenced action, subject mortgage related to property that was defendants' principal residence.
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Workers' compensation; motion to preclude; appeal from decision of Compensation Review Board remanding case to Workers' Compensation Commissioner to reconsider findings on plaintiff's motion to preclude defendant employer from contesting compensability for plaintiff's injury; whether board abused discretion in remanding matter to commissioner; whether board improperly reassessed credibility of witnesses and weighed evidence.
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Workers' compensation; claim that Compensation Review Board improperly determined that equitable doctrine of laches did not apply to plaintiff's motion to preclude barring defendant employer, pursuant to statute (§ 31-294c (b)), from contesting liability for plaintiff's injury.

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

MANIVANNAN SOLAIRAJ ET AL. *v.* MANNARINO BUILDERS, INC.
(AC 37988)

DiPentima, C. J., and Beach and Pellegrino, Js.*

Syllabus

The plaintiffs brought this action against the defendant home building company alleging, inter alia, that it had breached the parties' purchase agreement for the construction of a new home. During the construction of the home, the plaintiffs notified the defendant of their concerns regarding the quality of the flooring and water in the basement. In an e-mail sent to the defendant, they demanded that the defendant provide certain guarantees and additional warranties not included in the purchase agreement, or they would not close on the purchase of the home as scheduled and would terminate the purchase agreement. After a series of e-mails, the plaintiffs commenced this action and filed a notice of lis pendens on the town's land records, which the trial court later discharged after finding that the plaintiffs were not ready, willing, and able to buy the house. Although certain discussions continued over another series of e-mails, the defendant decided to sell the home to another buyer. After a trial to the court, the court determined, inter alia, that the plaintiffs had breached the purchase agreement and that the defendant had not breached the agreement. The trial court rendered

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* This appeal originally was argued before a panel of this court consisting of Chief Judge DiPentima and Judges Prescott and Pellegrino. Thereafter, Judge Prescott recused himself and did not participate in the consideration of the case. Judge Beach was added to the panel and has read the record and briefs, and listened to a recording of the oral argument prior to participating in this decision.

judgment for the defendant. On appeal to this court, the plaintiffs claimed that the trial court's factual findings were clearly erroneous and that it had improperly concluded that they breached the purchase agreement. They also claimed that the court erred in concluding that the defendant had not breached the purchase agreement in light of the alleged construction deficiencies. *Held*:

1. The trial court's conclusion that the plaintiffs had informed the defendant that they would not be purchasing the house and that they had breached the purchase agreement was not clearly erroneous: prior to the closing, the plaintiffs had demanded certain guarantees and additional warranties not included in the purchase agreement, and although the defendant had provided certain assurances that the floor joist system complied with the requirements of the town building code and that the waterproofing product used for the basement included a ten year warranty, the plaintiffs' additional demands went well beyond what was required by the purchase agreement; furthermore, the plaintiffs' e-mail stating that they would not close on the house until their conditions were met constituted evidence in the record from which the trial court could have found that the plaintiffs stated that they would not purchase the house.
2. Contrary to the plaintiffs' claim, there was evidence in the record from which the trial court could have concluded that the defendant did not breach the purchase agreement, including evidence that the house passed all building inspections by the town and that a certificate of occupancy had been issued; moreover, the trial court was entitled to discredit the testimony of the plaintiffs' expert, who had requested certain information from the defendant that was not required for residential construction in support of his claim that the construction was deficient, and to discredit testimony presented by the plaintiffs that they were never told that the basement water issues had been fixed.

Argued May 19—officially released September 6, 2016

Procedural History

Action for, inter alia, breach of a real estate purchase agreement, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Aurigemma*, *J.*, granted the defendant's application for the discharge of the plaintiffs' notice of lis pendens; thereafter, the defendant filed a counterclaim; subsequently, the plaintiffs withdrew certain counts of the amended complaint; thereafter, the matter was tried to the court, *Peck*, *J.*; judgment for the defendant on the complaint and for the plaintiffs on the counterclaim, from which the plaintiffs appealed to this court. *Affirmed.*

Doris B. D'Ambrosio, for the appellants (plaintiffs).

James H. Howard, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The plaintiffs, Manivannan Solairaj and Malini Manivannan, appeal from the judgment rendered after a trial to the court in favor of the defendant, Mannarino Builders, Inc. On appeal, the plaintiffs claim that the court's findings underlying its conclusions that (1) the plaintiffs breached the purchase agreement and (2) the defendant did not breach the agreement were clearly erroneous. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court in its memorandum of decision, and procedural history, are relevant to our determination of this appeal. On November 20, 2010, the parties entered into a purchase agreement for the construction of a new house located in the town of South Windsor (town). Pursuant to the purchase agreement, the defendant agreed to construct and sell the house to the plaintiffs, and the plaintiffs agreed to purchase the house. The purchase price of the house was $594,000 to be paid in the following increments: $2500 at the time of signing the purchase agreement, $56,800 additional deposit at the time of signing the final house plan, and $534,700 at closing.[1] The purchase agreement provided for a closing date on or about March 6, 2011. During the construction, the plaintiffs notified the defendant of their concerns regarding the quality of the flooring and the water in the basement. A dispute as to the quality of the construction ensued and the parties' relationship deteriorated.

[1] At the time of dispute, the plaintiffs had paid the initial $2500 deposit at signing and the $56,800 additional deposit at the time of signing the final house plan. Therefore, the total deposit paid by the plaintiffs was $59,300.

On March 30, 2011, the plaintiffs filed a notice of lis pendens on the town land records and, shortly thereafter, commenced this action. The defendant filed an application to discharge the lis pendens, and a hearing was held on June 7, 2011. At the hearing on the lis pendens, the court, *Aurigemma*, *J.*, determined that the plaintiffs were not "ready, willing and able to purchase the property as required in order to maintain an action for specific performance." Therefore, the court discharged the lis pendens. Shortly thereafter, the defendant sold the house to a third party.

The plaintiffs' original complaint alleged the following causes of action: specific performance, breach of the purchase agreement, a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., intentional infliction of emotional distress and negligent infliction of emotional distress. Thereafter, the defendant filed an answer, special defense and counterclaim alleging tortious interference "with prospective economic gain." The plaintiffs amended their complaint to delete the count alleging specific performance. The trial was held in October, 2013; a hearing on the posttrial briefs was held on December 8, 2014, at which time the plaintiffs withdrew their emotional distress claims.

In its April 7, 2015 memorandum of decision, the court, *Peck*, *J.*, made the following findings. In January, 2011, the plaintiffs notified the defendant of their concerns regarding the water in the basement and the vibration of the floor in the family room. On January 31, 2011, Robert Mannarino, the president of the defendant, sent an e-mail responding to the plaintiffs' concerns. Mannarino assured the plaintiffs that he had identified the issue concerning the water in the basement, which was leaking in from the water collected in the front stoop, and he would address it. Mannarino further

stated that he did not find any issue with the flooring, but it could be inspected at the next site visit.

On February 4, 2011, the site visit took place and soon after, on February 10, 2011, the plaintiffs e-mailed the defendant further expressing their concerns regarding the quality of the flooring and the water leaks in the basement. In the plaintiffs' e-mail, they demanded that the defendant meet a list of conditions including (1) a detailed explanation of the cause of the floor vibrations and a resolution through engineering means, (2) waterproofing of the basement to be done from the exterior of the house, (3) a certificate of inspection on the waterproofing of the basement walls, (4) a certificate from the engineering team as to the waterproofing done from the exterior, and (5) an additional ten year warranty on the structure of the house at no additional cost and warranting that the defendant will remedy any issues within one month. The plaintiffs further stated, in their e-mail, that they were not willing to close on the house until all their conditions were met and that they would terminate the purchase agreement and seek the return of their deposit if the defendant did not agree to satisfy their conditions.

In an e-mail sent on February 14, 2011, Mannarino responded to each one of the plaintiffs' demands. In response to the plaintiffs' first demand, Mannarino stated that he had consulted with the defendant's structural engineer and confirmed that the floor joist system exceeded all of the requirements of the South Windsor Building Code. As to the plaintiffs' second demand, Mannarino explained that the defendant had installed the waterproofing product on the exterior walls. As to the plaintiffs' third demand, Mannarino explained that the waterproofing had passed inspection as required by the South Windsor Building Department and that he would not hire an outside source to verify their

inspection. As to the plaintiffs' fourth demand, Mannarino explained that the defendant's structural engineer had confirmed that the basement walls were "wet due to the pouring of the basement floor [during the winter and] the wet propane heat . . . ." In responding to the plaintiffs' fifth demand, that is, their request for an additional warranty, Mannarino explained that the waterproofing product came with "a ten year warranty and all other state warranties will apply." Mannarino suggested that the plaintiffs hire a structural engineer and/or legal counsel to verify these findings, as the defendant could not meet their demands, but could "provide documentation that verifies the basement and floor system [were] built correctly."

On February 17, 2011, Attorney Doris B. D'Ambrosio, the plaintiffs' counsel, wrote to Attorney Gerald W. Brady, the defendant's counsel, explaining that the plaintiffs would not be closing on March 7, 2011, because the plaintiffs needed additional time to retain an expert to verify the statements made by Mannarino.[2] D'Ambrosio's e-mail further stated that the plaintiffs would not be closing on the house until "they are satisfied that those conditions have been satisfactorily rectified."

On March 3, 2011, Brady replied to the plaintiffs' counsel and stated that the plaintiffs were in breach of the purchase agreement, and that unless the plaintiffs made final selections to the house prior to closing, the defendant would place the house on the market. The final selections the plaintiffs were requested to make in preparation of closing included selecting (1) the kitchen countertops, (2) the bathroom countertop, (3) the light fixtures, (4) the fireplace design finish, (5) the bathroom vanity, (6) the closet shelving and (7) the brick walkway selections.

[2] As the court's memorandum of decision highlights, March 7, 2011 was one day after the expected closing date stated in the purchase agreement.

On April 13, 2011, Attorney James H. Howard, the defendant's new counsel, sent a letter that provided the plaintiffs the option to buy the house if they made "the necessary selections by the close of business Friday (April 15th)" and the closing date would be "on or before May 6." The plaintiffs neither responded to Howard's letter nor did they make the necessary finishing selections requested by the defendant.

Nearly two months later, on June 9, 2011, Howard and D'Ambrosio began a course of communications with the plaintiffs' offering to buy the house "as is." Howard responded by requesting that the plaintiffs make a "very specific proposal" setting forth the closing date, purchase price and conditions. On June 15, 2011, D'Ambrosio e-mailed Howard not with a "very specific proposal" of the plaintiffs offer, but rather, stating in general terms that "[i]t is urgent we complete this matter as soon as possible . . . my clients are interested in enforcing the contract." In response, Howard, for a second time, requested a "very specific proposal" of the closing date, purchase price and the conditions of the plaintiffs' offer. The plaintiffs failed to respond to this second request.

On June 28, 2011, however, D'Ambrosio corresponded with Howard asking him why she had not heard anything regarding the sale of the house. On July 1, 2011, Howard responded stating that because the plaintiffs "were not ready willing and able to buy the house, the defendant has decided to sell the house to another buyer."

Based on the preceding findings of fact, the court concluded that "the plaintiffs failed to demonstrate by a preponderance of the evidence that they performed the contract or that the defendant breached the contract." Accordingly, the court found that the additional conditions the plaintiffs demanded in February and

March, 2011, "went well beyond the requirements of the contract." Therefore, by the time the plaintiffs offered to purchase the house "as is," in June, 2011, the court determined that they had breached the purchase agreement and the defendant had no obligation to accept the offer.

The court further determined that because "the plaintiffs have failed to prove a breach of contract, their CUTPA claim set forth in count two necessarily also fail[ed] . . . [and] that there [was] utterly no evidentiary basis for a CUTPA claim." As for the counterclaim, the court found that the defendant failed to prove its claim of tortious interference "with prospective economic gain" by the preponderance of the evidence.[3] This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiffs claim that the court's factual findings underlying its conclusions that (1) the plaintiffs had breached the purchase agreement and (2) the defendant had not breached were clearly erroneous. Thus, they argue, the court's conclusions were improper. We disagree.

At the outset, we set forth the relevant standard of review that guides our analysis. A finding of breach of contract is subject to the clearly erroneous standard of review. *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 146 Conn. App. 169, 180, 78 A.3d 167 (2013), aff'd, 322 Conn. 541, 153 A.3d 574 (2016). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id.

[3] The defendant did not file a cross appeal challenging the court's finding on its tortious interference counterclaim.

"The resolution of conflicting factual claims falls within the province of the trial court. . . . The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witness." (Internal quotation marks omitted.) *Carroll* v. *Perugini*, 83 Conn. App. 336, 339, 848 A.2d 1262 (2004). Moreover, when the factual basis of the trial court is challenged, this court reviews the record to determine "whether the facts set out in the memorandum of decision are supported by the evidence . . . in the whole record . . . ." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 181, 117 A.3d 876, cert. denied, 318 Conn. 902, 123 A.3d 882 (2015).

We now set forth the applicable law for breach of contract. "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Treglia* v. *Santa Fuel, Inc.*, 148 Conn. App. 39, 45, 83 A.3d 1222 (2014). In our case law, "even a mere statement indicating unwillingness to perform a contractual duty owed to another may constitute a total breach of contract." *Carroll* v. *Perugini*, supra, 83 Conn. App. 341. Once a party repudiates a contract, the nonbreaching party is excused from its obligations under the contract. *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, supra, 157 Conn. App. 161.

We are guided further by a case both factually and legally analogous to the present case. As in the present case, the plaintiff and defendant in *Carroll* v. *Perugini*, supra, 83 Conn. App. 338, entered into an agreement for the construction of a house. In *Carroll*, however, the contract stated that the defendant was not responsible for any delays that were beyond his control. During

the course of the construction process, due to an architect's design errors in the placement of the water heater, heating, ventilation and air conditioning units, the certificate of occupancy was denied and "[a]s a result, major revisions were necessary before the certificate of occupancy could be issued." Id., 339. The plaintiff refused to pay the defendant for the necessary "corrective work caused by the architect's errors," which led to a dispute between the parties concerning who breached the contract. Id., 340. The trial court found that "the plaintiff breached the contract by failing and refusing to pay the defendant for work necessary to revise and complete the project as a result of the architect's errors." Id., 339. On appeal, this court concluded that there was evidence to support the trial court's finding "that the plaintiff was in breach due to his refusal to pay the defendant to complete the job" and that the defendant was not in breach. Id., 341. Therefore this court held that the trial court's factual findings were not clearly erroneous. Id.

With the foregoing principles in mind, we turn to the specific claims on appeal in the present case. Preliminarily, the plaintiffs contend that it was not clear why the court found them in breach of the purchase agreement. The plaintiffs surmise that "[i]t can be assumed that Judge Peck has found them in breach of contract because they did not purchase the premises." The court's decision, however, sets forth the bases for its finding the plaintiffs in breach of the purchase agreement including its finding that the plaintiffs demanded conditions prior to closing that went beyond the scope of the purchase agreement. Thus, we disagree that the reasons for the court's conclusion that the plaintiffs breached the purchase agreement are not clear. Further, we find support in the record for the court's factual findings and therefore are not persuaded that they are clearly erroneous.

I

The plaintiffs first claim that the court improperly concluded that they had breached the purchase agreement. Specifically, the plaintiffs make several challenges to the court's factual findings (1) as to whether the plaintiffs breached the purchase agreement and (2) that the plaintiffs told the defendant that they would not be purchasing the house.

The following additional facts are necessary for our determination that the court properly found that the plaintiffs breached the purchase agreement. On February 10, 2010, the plaintiffs sent an e-mail to the defendant demanding it meet their specific conditions.[4] In its memorandum of decision, the court noted that "[i]n their February 20,[5] 2011 e-mail to Mannarino, in no uncertain terms, the plaintiffs said: '[w]e will not be closing on the house until all of these conditions are met, if you were not going to be able to meet these conditions, we will terminate the contract and look for an immediate return of our deposits and any other payments that we have put into the house . . . .' " The court found that "those conditions went well beyond the requirements of the contract . . . ." The basis of the court's determination focused on the evidence of the plaintiffs' conduct presented at trial, including various e-mails, testimony and the requirements under the purchase agreement.

[4] The conditions that the plaintiffs demanded from the defendant included (1) a detailed explanation on the cause of the floor vibrations and a resolution through engineering means, (2) waterproofing of the basement from the exterior of the house, (3) requiring the defendant to provide a certificate of inspection on the waterproofing of the basement walls, (4) a certificate from the engineering team certifying the waterproofing done from the exterior, and (5) an additional ten year warranty on the structure of the house at no additional cost and warranting that the defendant would remedy any issues within one month.

[5] We assume that the court's reference to the February 20, 2011 e-mail was a scrivener's error and that the court was referencing the plaintiffs' e-mail dated February 10, 2011.

Pursuant to the purchase agreement, the defendant was obligated to "construct a single family residence in . . . good and workmanlike manner and in accordance with state and local codes and regulations" and the plaintiffs agreed to purchase the house at the agreed upon purchase price. The purchase agreement expressly stated that "[the defendant] makes no warranties under this [a]greement, except those required by law." The warranties required by law are set forth in the General Statutes §§ 47-117 and 47-118.[6]

After a thorough review of the record, we conclude that the evidence at trial supports the court's finding that the plaintiffs' demands in February and March, 2011, went beyond the scope of the purchase agreement. First, the additional ten year structural warranty demanded by the plaintiffs was not included in the purchase agreement. Next, as the defendant explained in its February 14, 2011 responsive e-mail, the waterproofing product came with a ten year warranty, the foundations, i.e., the waterproofing, had passed inspection and that a certificate from the engineering team was beyond the terms of the purchase agreement. Mannarino further told the plaintiffs' structural engineer that he would "double up every other floor joist" to make the floor stiffer, even though he did not believe there to be a building code violation with the floor.

Accordingly, based on the evidence and testimony presented at trial, the plaintiffs were protected by the waterproofing product's ten year warranty and entitled to the express and implied warranties pursuant to §§ 47-117 and 47-118. In addition, as the plaintiffs indicated in their February 10, 2011 e-mail "[w]e will not be closing on the house until all of these conditions are met,

[6] General Statutes §§ 47-117 and 47-118, provided both express and implied warranties for newly constructed residential houses that terminate one year after delivery of the deed or taking possession.

if you were not going to be able to meet these conditions, we will terminate the contract . . . .'' This demand for conditions that went beyond the scope of the purchase agreement constituted the breach at issue here.[7] For those reasons, the record supports the court's finding that the plaintiffs breached the purchase agreement by demanding that the defendant satisfy conditions that went beyond the scope of the purchase agreement.

Next we address the plaintiffs' challenge to the court's finding that they told the defendant that they would not purchase the house. We are not persuaded by the plaintiffs' contention. We conclude that there was evidence to support the court's finding. In the February 10, 2011 e-mail, sent by the plaintiffs to Mannarino, the plaintiffs explicitly stated that they would ''not be closing on the house until all of these conditions are met, if you were not going to be able to meet these conditions, we will terminate the contract . . . .'' In addition, D'Ambrosio's February 17, 2011 e-mail stated that the plaintiffs would not be closing on the house until ''they are satisfied that those conditions have been satisfactorily rectified.'' The conditions demanded in February and March, 2011, however, were not required under the purchase agreement. Thus, the defendant was not required to meet the plaintiffs' additional demands that went beyond the scope of the purchase agreement.

Both of the plaintiffs' e-mails established that they would not close on the house unless the defendant had satisfied their conditions. The record supports the court's finding that the plaintiffs stated that they would not purchase the house; therefore, this finding was not clearly erroneous.[8]

[7] Similarly, on February 17, 2011, D'Ambrosio sent an e-mail to Brady further stating that the plaintiffs would not be closing on the house until ''they are satisfied that those conditions have been satisfactorily rectified.''

[8] The plaintiffs challenge other findings of facts as to events that occurred *after* the breach of the purchase agreement; we do not address them.

II

The plaintiffs next claim that the court improperly found that the defendant did not breach the purchase agreement. Specifically, the plaintiffs challenge the court's factual findings (1) that the plaintiffs' structural engineer admitted that the documents he requested were not necessary for residential construction, and (2) that it was "unconvinced of the sincerity of" the plaintiffs' argument that the defendant had failed to tell them the water leak in the basement had been repaired. We disagree.

The following additional facts are necessary for our determination that the court properly found that the defendant did not breach the purchase agreement. In January, 2011, the plaintiffs communicated to the defendant their concerns regarding the quality of the floors and the basement. In response to an e-mail sent by the plaintiffs on February 10, 2011, Mannarino replied and explained that the defendant identified the issue regarding the water leak in the basement and stated how the issue would be rectified. Mannarino's e-mail further responded to the plaintiffs' additional concerns regarding the waterproofing, floors and warranties that came with the waterproofing product and identified the warranties provided by state and local laws.

At trial, however, Solairaj testified that he did not accept Mannarino's assurance that there was not a water issue in the basement.[9] As suggested by Mannarino, the plaintiffs decided to hire Robert J. Gambino, a structural engineer, to verify the defendant's reason as to why there was water in the basement and the quality of the floors. Gambino identified twenty-four items he believed needed further inspections in the

[9] Mannarino stated these reasons in his February 14, 2011 e-mail, which was in response to the conditions the plaintiffs demanded in their February 10, 2011 e-mail.

house. Moreover, the plaintiffs further alleged that the defendant did not communicate with the plaintiffs that the repair to the leak in the basement was remedied. Therefore, the plaintiffs contend that the evidence at trial showed that the defendant was in breach of the purchase agreement for not initially providing them a house without a leak in the basement.

We now address the plaintiffs' challenge to the court's finding that Gambino "admitted and testified that the documents he was requesting from the [d]efendant were not necessary for residential construction and not required by town or state building codes." Specifically, the plaintiffs contend that the evidence at trial showed that Gambino testified that if the house had been built correctly, "then there is no reason [as to] why the [defendant] would not have access to such documents." After reviewing the record, we find support for the court's finding, and therefore, we are not persuaded by the plaintiffs' challenge.

As the record reveals, Gambino identified twenty-four items that he believed needed further inspection in the plaintiffs' house.[10] Gambino testified at trial that

[10] Some of the items identified in Gambino's twenty-four itemed informational request included further information regarding the "Design Wind Speed . . . Design Wind Exposure Category . . . Design Wind Uplift Load . . . Design Roof Dead Load . . . Design Roof Live Load . . . Design Attic Dead Load . . . Design Attic Live Load . . . Design Floor Dead Loads . . . Design Floor Live Loads . . . Load-Bearing Dimensional Lumber Certificate of Inspection Issued by Lumber Grading or Inspection Agency . . . As-Built Drawing Defining Structure's Design 'Load-Path' Thru the Structure . . . As-Build Drawing & Details Defining Structure's 'Force-Resistant' System . . . Wall Bracing Location & As-Built Details All Braced Wall Locations From The Foundation Up To The Roof . . . Floor Hazards Classification Zone . . . Soil Characteristics . . . Design Soil Bearing Capacity . . . Footing & Foundation Wall Concrete Designs . . . Copy of Concrete Delivery Tickets Showing Conformance with Concrete Designs . . . Footing & Foundation Reinforcement Drawings . . . As-Built Foundation Drain Layout Plan & Details . . . As-Built Foundation Waterproofing System Design & Details . . . ."

the list he provided to the plaintiffs in March, 2011, was based on his review of the purchase agreement, contract drawings and specifications. Gambino further testified that once the plaintiffs had provided Mannarino a copy of his letter, Mannarino called him expressing concern for the requested information because of the time, effort, and the costs associated with putting it all together, and inquiring as to why Gambino needed all this information.

During the cross-examination, however, Gambino conceded that approximately one-half of the items were not required for residential construction and the other items were only required at the discretion of the town building official.[11] Although Gambino explained that all the information he requested should have been readily available if the structure was designed correctly, he acknowledged that all inspections on the house had passed the requirements of the town in March, 2011, when he was conducting his review. Gambino further agreed that "despite all this information that [he] claim[ed] [was] required and was never done, a certificate of occupancy was issued on the property." Considering that Gambino explicitly stated that various information he requested was not required for residential construction and that the other items were discretionary, we find support for the court's finding. Therefore, the recordreveals that the court's finding that "Gambino's extensive list of items that he would

[11] As to items one through thirteen, Gambino testified on cross-examination that "it's up to the town building official to decide whether he wants this information provided or not . . . ." As to item fifteen, Gambino stated that it "refers to flood hazard clarification zone." Pertaining to item eighteen, Gambino testified that it was "somewhat subjective . . . ." As to item nineteen, Gambino testified that it referred to the concrete delivery tickets which he conceded were not necessary, but "Mannarino said he [could] easily provide [them] . . . ." Gambino further testified that item "[t]wenty, again [was] subjective. [That] [t]wenty-one, [twenty-two, and twenty-three] . . . refer[red] to as-built, which would be after the construction and therefore do not pertain . . . prior to construction."

need to comply with his engagement with the plaintiffs included items, which by his own admission, are not necessary for residential construction,'' was supported by Gambino's testimony and thus not clearly erroneous.

Finally, we address the plaintiffs' challenge to the court's factual finding that the water leak in the basement was repaired by the defendant. Specifically, the plaintiffs contend that the evidence at trial showed "that the [d]efendant never told them that the water problem had been repaired . . . ." The court's memorandum of decision, however, states that it is "unconvinced of the [argument's] sincerity . . . ."

The basis of the court's finding was that Mannarino's e-mail on February 14, 2011, explicitly stated how the water leak in the basement would be addressed. Mannarino explained that the water leak was emerging from the front stoop and that the leak would be rectified by removing the water that collected in the stoop and sealing the holes with an injection grout that would prevent moisture from entering the basement. Mannarino further explained that the waterproofing product they were using on the house came with a ten year warranty.

The court also heard testimony, relating to the basement leak, from Mannarino and the chief building official for the town. In reviewing the testimony presented at trial, we are mindful that this court is limited in its review because "[w]e cannot retry the facts or pass on the credibility of the witness.'' (Internal quotation marks omitted.) *Carroll* v. *Perugini*, supra, 83 Conn. App. 339. As our case law has recognized, the "resolution of conflicting factual claims falls within the province of the trial court.'' (Internal quotation marks omitted.) Id.

At trial, Mannarino's testimony explained the process of how the defendant removed the water from the front

stoop, which he also stated in his e-mail to the plaintiffs on February 14, 2011. Mannarino testified that "[w]e got the water out of the stoop which eventually would have a concrete cap on it and would not leak. I explained that to the customer . . . . I mentioned the product in one of the e-mails . . . and that stopped the leak instantly . . . ." Also, Mannarino testified that he "could not just immediately stop the leak. I wanted to make sure that all the water was out of the stoop . . . and there was no harm in the water leaking into [the] basement cause it wasn't a finished product yet." Furthermore, Mannarino testified that the waterproofing product was used on the exterior of the house and it came with a ten year warranty that the plaintiffs would receive at closing.

In addition, the testimony from Christopher Dougan, the chief building official for the town, established that the certificate of occupancy was issued on May 12, 2011. Dougan also testified that other inspections throughout the construction process of the house passed the requirements set by the town, including the waterproofing system and the underground drainage system.[12]

The evidence established that throughout the construction process of the house the defendant had satisfied the South Windsor Building Code for residential construction at the time the plaintiffs breached the purchase agreement. Because there is evidence to support the court's conclusion that the defendant did not breach the purchase agreement and because only that court resolves conflicting factual claims, we conclude that

[12] The inspection of the foundations passed on December 2, 2010, and the inspection of the framing passed on February 16, 2011. Importantly, in the comments section of the framing inspection sheet, the inspector verified that he rechecked the family room framing for a bounce, which passed. Also, in Dougan's testimony he stated that all elements of the waterproofing system and underground drainage system passed the requirements for the town's inspection on the foundation on December 2, 2010.

the court's findings of facts were not clearly erroneous. See *Carroll* v. *Perugini*, supra, 83 Conn. App. 339.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMES BAKER (AC 37441)

Alvord, Mullins and Pellegrino, Js.

Syllabus

The defendant inmate was convicted, following a guilty plea, of possessing a weapon or dangerous instrument in a correctional institution, and appealed to this court from the trial court's denial of his motion to correct an illegal sentence. The defendant had been involved in an altercation in a correctional facility and was found in possession of a shank. He pleaded guilty in a Department of Correction administrative proceeding and was given multiple disciplinary sanctions. Subsequently, he was convicted of possession of a dangerous instrument in a correctional institution. The defendant then filed a motion to correct an illegal sentence, claiming that, in light of the department sanctions, his sentence violated the double jeopardy clause of the federal constitution because it constituted multiple punishments for the same offense. The trial court denied the motion, concluding that the department sanctions were not grossly disproportionate to the department's interest in maintaining prison order and discipline. On appeal, the defendant claimed that the trial court improperly concluded that his sentence did not violate his constitutional right against double jeopardy, and that the trial court improperly excluded evidence regarding the collateral consequences of his sentence. *Held*:

1. The trial court properly found that the defendant's sentence did not violate the double jeopardy clause, as the department sanctions did not constitute criminal punishment and, therefore, that court properly denied the defendant's motion to correct an illegal sentence: the department sanctions were not criminal in nature because the legislature intended those sanctions to be civil penalties, and the relevant factors for consideration as set forth in *Hudson* v. *United States* (522 U.S. 93) did not demonstrate the clearest proof that the sanctions were so punitive in purpose or effect so as to override that intent, given that the sanctions were not excessive in relation to their alternative purpose of maintaining safety, order and discipline within the prison; moreover, the defendant's claim that the sanctions only served to promote the traditional aims of punishment was unavailing, as any deterrence resulting from those

sanctions permissibly furthered the remedial purpose of allowing prison officials to maintain order and discipline.

2. This court declined to review the defendant's claim that the trial court improperly excluded evidence regarding the collateral consequences of his sentence, the defendant having failed to address on appeal how that evidentiary ruling was harmful.

Argued April 14—officially released September 6, 2016

Procedural History

Information charging the defendant with the crime of possession of a weapon in a correctional institution, brought to the Superior Court in the judicial district of Danbury, where the defendant was presented to the court, *Carroll*, *J.*, on a plea of guilty; judgment of guilty; thereafter, the court, *Wenzel*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court, which affirmed the judgment of the trial court; subsequently, the Supreme Court denied the defendant's petition for certification to appeal; thereafter, the court, *Roraback*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed*.

Deborah G. Stevenson, assigned counsel, for the appellant (defendant).

Jacob L. McChesney, special deputy assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Sean P. McGuinness*, assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, James Baker, appeals from the judgment of the trial court denying his motion to correct an illegal sentence filed pursuant to Practice Book § 43-22.[1] After pleading guilty under the *Alford*

[1] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

doctrine[2] to possessing a weapon or dangerous instrument in a correctional institution in violation of General Statutes § 53a-174a (a),[3] the defendant was sentenced to eighteen months of imprisonment. The defendant claims on appeal that the trial court (1) improperly denied his motion to correct the eighteen month sentence because the sentence violates the double jeopardy clause[4] of the federal[5] constitution, and (2) abused its discretion by excluding evidence that was relevant to the disposition of the motion to correct. We affirm the judgment of the trial court.[6]

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

[3] General Statutes § 53a-174a provides: "(a) A person is guilty of possession of a weapon or dangerous instrument in a correctional institution when, being an inmate of such institution, he knowingly makes, conveys from place to place or has in his possession or under his control any firearm, weapon, dangerous instrument, explosive, or any other substance or thing designed to kill, injure or disable.

"(b) Possession of a weapon or dangerous instrument in a correctional institution is a class B felony."

[4] The fifth amendment to the United States constitution provides in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

[5] The defendant also invokes the protections of our state constitution. "[When] . . . the defendant has not presented a separate analysis of his double jeopardy claim under the state constitution, we confine our analysis to the application of the federal constitution's double jeopardy bar." (Internal quotation marks omitted.) *State* v. *Butler*, 262 Conn. 167, 174 n.6, 810 A.2d 791 (2002). Therefore, we analyze the defendant's claim only under the fifth amendment to the federal constitution.

[6] On appeal, the defendant argues for the first time that the sentence also violates the prohibition against cruel and unusual punishment under the eighth amendment to the federal constitution. Although the defendant asserts that this claim is adequately preserved for our review, we disagree. The defendant's operative motion that is the subject of this appeal did not contain an eighth amendment claim. Moreover, the parties did not address an eighth amendment claim at trial, and the trial court neither considered nor ruled upon any such claim. "This court previously has recognized that [i]t is not appropriate to review an unpreserved claim of an illegal sentence for the first time on appeal." (Internal quotation marks omitted.) *State* v. *Crump*, 145 Conn. App. 749, 766, 75 A.3d 758, cert. denied, 310 Conn. 947, 80 A.3d 906 (2013). Furthermore, we have declined to review in other appeals such unpreserved claims under *State* v. *Golding*, 213 Conn. 233, 567 A.2d

The following facts and procedural history are relevant to this appeal. On February 16, 1999, the defendant, who was an inmate at the Garner Correctional Institution, was involved in a physical altercation with other inmates. At the time of the altercation, the defendant was serving a thirty-two year sentence of imprisonment for two 1994 murder convictions. Department of Correction (department) officers observed the defendant attempt to assault another inmate by charging at the inmate with a sharp object in his hand. Department officers ordered the defendant to drop the object, but the defendant ignored their commands and charged at several other inmates with the object in his hand. After suppressing the altercation, department officers recovered the sharp object and determined that it was a shank that had been fabricated from white cloth, masking tape, and two metal prongs.

On the same day of the incident, department investigators interviewed the defendant, who pleaded guilty in a department administrative proceeding to three violations of prison policy: (1) impeding order; (2) contraband (dangerous instrument); and (3) fighting. Department officials then imposed the following disciplinary sanctions on the defendant: (1) three disciplinary reports; (2) loss of 120 days of statutory good time credit; (3) loss of commissary privileges for ninety days; (4) loss of visits for sixty days; (5) confinement to quarters for thirty days; (6) punitive segregation for seven days; (7) loss of telephone privileges for forty days; and (8) loss of mail privileges for sixty days. Furthermore, sometime in March or April of 1999, after determining that the defendant was a security risk, the department transferred him to the maximum security prison at Northern Correctional Institution (Northern). The

823 (1989), or the plain error doctrine. *State* v. *Starks*, 121 Conn. App. 581, 592, 997 A.2d 546 (2010). Accordingly, we decline to review the defendant's unpreserved eighth amendment claim.

defendant was incarcerated at Northern for approximately one year.

On April 28, 1999, the state charged the defendant with one count of possessing a weapon or dangerous instrument in a correctional institution in violation of § 53a-174a (a). On October 13, 1999, the defendant pleaded guilty to that charge. The court sentenced the defendant to a period of eighteen months of incarceration to run consecutive to the sentence he already was serving for his previous murder convictions.

On August 9, 2013, the defendant filed a motion to correct an illegal sentence, which was amended on August 29, 2013 (amended motion). In the amended motion, the defendant asserted that the eighteen month sentence of incarceration violated the double jeopardy protections of the state and federal constitutions because the sentence and department sanctions constituted multiple punishments for the same offense. The defendant listed fourteen items that he alleged the department had imposed as administrative sanctions for his conduct in the 1999 prison incident. The first eight items were set forth previously in this opinion. The remaining six items related to (1) the defendant's transfer to Northern and (2) the effect of the eighteen month sentence on the defendant's ability to enter a halfway house.

Following an evidentiary hearing on the amended motion, the trial court, *Roraback*, *J.*, denied the defendant's motion. The court concluded that the eighteen month sentence was not imposed in violation of the defendant's protections against double jeopardy. In particular, the court ruled that the department sanctions were not "grossly disproportionate to the government's interest in maintaining prison order and discipline." Thereafter, the defendant filed a motion to reargue the matter, which the court granted. The court, however,

affirmed its original ruling and denied the relief requested by the defendant. The court reiterated that the department sanctions did not violate the double jeopardy clause because they were not grossly disproportionate to the government's remedial interest in maintaining order and discipline. This appeal followed. Additional facts will be provided as necessary.

I

In his first claim, the defendant asserts that the trial court erred in denying the amended motion because the eighteen month sentence of imprisonment violates his constitutional right against double jeopardy. Specifically, he argues that imposing this sentence after the department already had sanctioned him violated the double jeopardy clause's prohibition on imposing multiple criminal punishments for the same offense. The state responds that, because the department sanctions did not constitute criminal punishment, the double jeopardy clause did not preclude the court from imposing the eighteen month sentence. We agree with the state and conclude that trial court properly denied the defendant's amended motion.

We begin with the standard of review and relevant legal principles. "Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard." *State* v. *Tabone*, 279 Conn. 527, 534, 902 A.2d 1058 (2006). A double jeopardy claim, however, "presents a question of law, over which our review is plenary." *State* v. *Burnell*, 290 Conn. 634, 642, 966 A.2d 168 (2009). "[C]laims of double jeopardy involving multiple punishments present a question of law to which we afford plenary review." *State* v. *Tabone*, 292 Conn. 417, 439, 973 A.2d 74 (2009). "Because the issue of whether an administrative sanction constitutes

punishment for purposes of double jeopardy is a question of law, [our] review [is] de novo." (Internal quotation marks omitted.) *State* v. *Duke*, 48 Conn. App. 71, 74, 708 A.2d 583, cert. denied, 244 Conn. 911, 713 A.2d 829 (1998).

Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." Accordingly, "the trial court and this court, on appeal, have the power, at any time, to correct a sentence that is illegal." (Internal quotation marks omitted.) *State* v. *Constantopolous*, 68 Conn. App. 879, 882, 793 A.2d 278, cert. denied, 260 Conn. 927, 798 A.2d 971 (2002). "An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory." (Internal quotation marks omitted.) *State* v. *McNellis*, 15 Conn. App. 416, 443–44, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988).

The double jeopardy clause of the fifth amendment to the federal constitution provides in relevant part that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The double jeopardy clause guarantees three specific protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (Footnotes omitted.) *North Carolina* v. *Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by *Alabama* v. *Smith*, 490 U.S. 794, 798–99, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). The defendant has invoked the third of those protections—the prohibition on imposing multiple punishments for the same offense.

The multiple punishments protection, however, does not "prohibit the imposition of all additional sanctions that could, in common parlance, be described as punishment." (Internal quotation marks omitted.) *Hudson* v. *United States*, 522 U.S. 93, 98–99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). "The Clause protects only against the imposition of multiple *criminal* punishments for the same offense . . . ." (Emphasis in original.) Id., 99. "[A legislature] may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell*, 303 U.S. 391, 399, 58 S. Ct. 630, 82 L. Ed. 917 (1938). Accordingly, we must determine whether the department sanctions constitute criminal punishment for double jeopardy purposes.

The United States Supreme Court has prescribed a two-pronged test for determining whether a sanction constitutes criminal punishment. *Hudson* v. *United States*, supra, 522 U.S. 99–100; see *State* v. *Jimenez-Jaramill*, 134 Conn. App. 346, 368–73, 38 A.3d 239 (applying *Hudson*'s two-pronged test in determining that infraction for public disturbance was not criminal punishment for double jeopardy purposes), cert. denied, 305 Conn. 913, 45 A.3d 100 (2012). The first prong is statutory construction. *Hudson* v. *United States*, supra, 99. "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. . . . A court must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." (Citation omitted; internal quotation marks omitted.) Id. The fact that the power to issue sanctions "was conferred upon administrative agencies is prima facie evidence that [the legislature] intended to provide for a civil sanction." Id., 103.

Under the second prong, the court must ask "whether the statutory scheme was so punitive either in purpose or effect . . . as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty." (Citation omitted; internal quotation marks omitted.) Id., 99. The court should make this inquiry even if it determines under the first prong that the legislature "indicated an intention to establish a civil penalty . . . ." (Internal quotation marks omitted.) Id. In making the second determination, the United States Supreme Court has articulated seven "useful guideposts" that a court should consider. Id. These factors include: "(1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." (Internal quotation marks omitted.) Id., 99–100 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–69, 83 S. Ct. 554, 9 L. Ed. 2d 644 [1963]). These factors are "neither exhaustive nor dispositive." *United States* v. *Ward*, 448 U.S. 242, 249, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

"It is particularly appropriate to apply the factors flexibly in the context of prison discipline cases, which do not fit neatly into the matrix of double jeopardy doctrine . . . because in the prison context, virtually any form of sanction seems criminal and punitive as we commonly understand those terms." (Internal quotation marks omitted.) *Porter* v. *Coughlin*, 421 F.3d 141, 147 (2d Cir. 2005). "It is important to note . . . that these factors must be considered in relation to the statute on

its face . . . .” (Internal quotation marks omitted.) *Hudson* v. *United States*, supra, 522 U.S. 100. “[O]nly the *clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty . . . .” (Emphasis added; internal quotation marks omitted.) Id.

Turning to the present case, *Hudson* first requires us to ask whether our legislature designated the statutory mechanism by which the department imposes sanctions as criminal or civil. We conclude that the legislature intended for the statutory mechanism to be civil in nature.

General Statutes § 18-81 provides in relevant part: “The Commissioner of Correction shall administer, coordinate and control the operations of the department and shall be responsible for the overall supervision and direction of all institutions, facilities and activities of the department. . . . The commissioner shall be responsible for establishing disciplinary . . . programs throughout the department. . . .” “Section 18-81 expressly permits the commissioner to promulgate the prison’s administrative rules.” *Beasley* v. *Commissioner of Correction*, 50 Conn. App. 421, 434–35, 718 A.2d 487 (1998), aff’d, 249 Conn. 499, 733 A.2d 833 (1999). Although the statute does not expressly label prison disciplinary sanctions as either criminal or civil, it implies that such sanctions are civil. The fact that the legislature has delegated the power to impose prison sanctions to an agency such as the department is prima facie evidence that the sanctions are civil. *Hudson* v. *United States*, supra, 522 U.S. 103; see *State* v. *Duke*, supra, 48 Conn. App. 77 (“because our legislature conferred the power to sanction on an administrative agency, we consider it prima facie evidence that the sanctions were intended to be civil rather than criminal in nature”); *Gelinas* v. *West Hartford*, 65 Conn. App. 265, 284, 782 A.2d 679 (“that the clear intent of the

legislature in conferring the power to sanction on local zoning authorities is prima facie evidence that those daily fine sanctions are civil, and not criminal, in nature''), cert. denied, 258 Conn. 926, 783 A.2d 1028 (2001).

Moreover, the sanction mechanism is not located within our state's Penal Code, as it instead relates to the "remedial purpose of allowing . . . prison officials to maintain order and discipline." *State* v. *Santiago*, 240 Conn. 97, 102, 689 A.2d 1108 (1997), overruled in part on other grounds by *State* v. *Crawford*, 257 Conn. 769, 779–80 and 779 n.6, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002). Indeed, our state Supreme Court previously observed that prison sanctions do not generally give rise to double jeopardy violations because they are "administrative sanctions . . . [that] serve the purpose of maintaining institutional order and security . . . ." Id., 101.

Having determined that our legislature intended to designate prison sanctions as civil penalties, we turn to *Hudson*'s second prong. The second prong requires us to determine whether the statutory scheme is "so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty . . . ." (Citation omitted; internal quotation marks omitted.) *Hudson* v. *United States*, supra, 522 U.S. 99. We note at the outset that only the "*clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty . . . ." (Emphasis added; internal quotation marks omitted.) Id., 100. We conclude that the defendant has not provided the *clearest proof* that the department sanctions are so punitive in effect or purpose that they override the legislature's designation of the sanctions as civil.

The seven factors that the United States Supreme Court has identified as helpful in making this second

inquiry are only "useful guideposts"; id., 99; and "we need not apply them rigidly." *Porter* v. *Coughlin*, supra, 421 F.3d 147. The factors are "neither exhaustive nor dispositive"; *United States* v. *Ward*, supra, 448 U.S. 249; and they "are to be applied flexibly." *Porter* v. *Coughlin*, supra, 148.

In the present case, the defendant received several department sanctions after the department found that he had engaged in fighting, the possession of a dangerous weapon, and the impediment of order. In particular, the department imposed the following sanctions: (1) three disciplinary reports; (2) loss of 120 days of statutory good time credit; (3) loss of commissary privileges for ninety days; (4) loss of visits for sixty days; (5) confinement to quarters for thirty days; (6) punitive segregation for seven days; (7) loss of telephone privileges for forty days; (8) loss of mail privileges for sixty days; and (9) transfer to the maximum security facility at Northern.

Although the defendant has not provided a substantive analysis of the relevant factors, a few of the factors appear to support the defendant's contention that some of the sanctions are criminal in nature. In particular, the first, fourth, and fifth factors weigh in the defendant's favor.[7] Because the defendant already was incarcerated, most of the sanctions involve an "affirmative disability or restraint." (Internal quotation marks omitted.) *Hudson* v. *United States*, supra, 522 U.S. 99. All of the sanctions seem to "promote the traditional aims of punishment—retribution and deterrence," and the "behavior to which [they] apply is already a crime . . . ." Id.

[7] The record does not indicate whether the sanctions implicate the third factor, which asks whether the sanctions were imposed only after a finding of scienter. *Hudson* v. *United States*, supra, 522 U.S. 99. Similarly, the defendant did not address the second factor, which asks whether the sanctions have been historically regarded as punishment. Id.

The defendant relies mainly on the fourth factor, arguing that the sanctions "only [serve] to promote the traditional aims of punishment—retribution and deterrence." We note, however, that the "mere presence of [deterrence] is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals." (Internal quotation marks omitted.) *Hudson* v. *United States*, supra, 522 U.S. 105. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation of institutions . . . ." Id. "[A] civil or administrative sanction that serves a legitimate remedial purpose . . . does not give rise to a double jeopardy violation even if the sanction has some deterrent effect." *State* v. *Hickam*, 235 Conn. 614, 623, 668 A.2d 1321 (1995), cert. denied, 517 U.S. 1221, 116 S. Ct. 1851, 134 L. Ed. 2d 951 (1996), overruled on other grounds by *State* v. *Crawford*, 257 Conn. 769, 779–80 and n.6, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002). We conclude that the defendant's reliance on the fourth factor is unavailing because any deterrence resulting from the sanctions permissibly furthers the "remedial purpose of allowing . . . prison officials to maintain order and discipline." *State* v. *Santiago*, supra, 240 Conn. 102.

The sixth and seventh factors weigh heavily against a finding that the sanctions are criminal. Courts that have applied the factors to prison sanctions generally have afforded greater weight to the last two factors than to the first five factors. See *Porter* v. *Coughlin*, supra, 421 F.3d 148 ("[a]lthough several of the factors suggest that [the defendant's] sanction was punitive in nature, others suggest so strongly the presence of a legitimate, nonpunitive purpose that we must conclude the sanction was civil in nature"); *United States* v. *Mayes*, 158 F.3d 1215, 1223, 1224 (11th Cir. 1998) ("[I]n

the prison context, virtually any form of sanction seems criminal and punitive as we commonly understand those terms. With that in mind, we recognize that many of the . . . factors may weigh in the [prisoner's] favor . . . . In this unique setting, we must take into account the fact that a prison's remedial and punitive interests are inextricably related. . . . [W]e factor into our analysis the importance of granting some deference to the judgments of prison authorities in determining what is necessary and proper to preserve institutional order and discipline, and to encourage good conduct." [Internal quotation marks omitted.]), cert. denied, 525 U.S. 1185, 119 S. Ct. 1130, 143 L. Ed. 2d 123 (1999).

Regarding the sixth factor, the department sanctions clearly have "an alternative purpose to which [they] may rationally be connected . . . ." *Hudson* v. *United States*, supra, 522 U.S. 99. Indeed, our Supreme Court expressly has recognized that prison sanctions serve the "remedial purpose of allowing the prison officials to maintain order and discipline." *State* v. *Santiago*, supra, 240 Conn. 102. "The institutional consideration of internal security in the correction facilities themselves is essential to all other correction goals." *State* v. *Walker*, 35 Conn. App. 431, 435, 646 A.2d 209, cert. denied, 231 Conn. 916, 648 A.2d 159 (1994). "Correction authorities must be allowed to take appropriate action to ensure the safety of inmates and correction employees; they must be permitted promptly to sanction misconduct within the institution so as to preserve order and discipline." Id., 436–37. Therefore, "[e]nsuring security and order at the institution is a permissible nonpunitive objective . . . ." *Bell* v. *Wolfish*, 441 U.S. 520, 561, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). "The need to maintain order . . . is a legitimate nonpunitive interest, even if it sometimes requires that prison officials take action of a punitive character." *Porter* v. *Coughlin*, supra, 421 F.3d 148. Accordingly, we conclude that the

sixth factor militates against a conclusion that the department sanctions are criminal because they are rationally connected to the nonpunitive purpose of maintaining safety, order, and discipline within the prison.

Regarding the seventh factor, the department sanctions are not "excessive in relation to the alternative purpose assigned." (Internal quotation marks omitted.) *Hudson* v. *United States*, supra, 522 U.S. 100. The types of sanctions the department may impose are not excessive in light of how inmate misconduct, like the defendant's violent behavior in this case, seriously undermines discipline, safety, and order within the prison. See, e.g., *State* v. *Walker*, supra, 35 Conn. App. 436–37 (reasonable to segregate inmate for "the serious offense" of assaulting correction employee because "violent behavior could be detrimental to maintaining control throughout the correction facility . . . [and] [c]orrection authorities must be allowed to take appropriate action to ensure the safety of inmates and correction employees"). "Because the realities of running a correctional institution are complex and difficult, the courts give wide-ranging deference to the decisions of prison administrators in considering what is necessary and proper to preserve order and discipline." Id., 435.

Our courts regularly have held that sanctions similar to those imposed on the defendant, for misconduct similar to the defendant's actions, are not disproportionate to the department's remedial interests. See *State* v. *Santiago*, supra, 240 Conn. 99–102 (ten days of punitive segregation, thirty days loss of telephone and mail privileges, and loss of forty-five days of good time credit for possessing shank); *State* v. *Walker*, supra, 35 Conn. App. 432, 435–37 (placement in administrative isolation, fifteen days of punitive segregation, and thirty days confinement to quarters for punching correction officer in head and jaw); *State* v. *King*, Superior Court, judicial

district of New London, Docket No. CR-01-89268-S (May 15, 2003) (thirty days of punitive segregation, ninety days loss of phone privileges, ninety days loss of commissary privileges, sixty days loss of visits, and transfer to administrative segregation at Northern for assaulting correction officer).[8]

In sum, under *Hudson*'s first prong, we conclude that the legislature intended the department sanctions to be civil in nature, not criminal. Under *Hudson*'s second prong, a careful weighing of the relevant factors demonstrates that the *clearest proof* that the department sanctions are so punitive in purpose or effect as to override the legislature's intent does not exist in this case. We conclude that the department sanctions were not criminal in nature and that they therefore did not constitute punishment for double jeopardy purposes.

Accordingly, because we conclude that the department sanctions do not constitute criminal punishment, the trial court properly found that the eighteen month prison sentence did not violate the double jeopardy clause's prohibition on imposing multiple punishments for the same offense, and, therefore, properly denied the motion to correct an illegal sentence.

II

The defendant's second claim on appeal is that the trial court improperly excluded evidence regarding the

[8] Regarding the defendant's transfer to Northern, which the defendant emphasized on appeal, courts in other jurisdictions consistently have held that the disciplinary transfer of an inmate is not a criminal punishment that implicates the double jeopardy clause. See, e.g., *United States* v. *Colon*, 246 Fed. Appx. 153, 155–56 (3d Cir. 2007) (disciplinary transfer of inmate who attempted to smuggle heroin into prison), cert. denied, 552 U.S. 1128, 128 S. Ct. 948, 169 L. Ed. 2d 780 (2008); *United States* v. *Mayes*, supra, 158 F.3d 1217, 1224–25 (disciplinary transfer to high security facility for inmates who participated in prison riot); *United States* v. *Newby*, 11 F.3d 1143, 1144–46 (3d Cir. 1993) (disciplinary transfer of prisoners who assaulted prison guards), cert. denied, 513 U.S. 834, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994); *State* v. *Beck*, 545 N.W.2d 811, 812, 816 (S.D. 1996) (transfer to higher security facility for inmate who was in possession of three marijuana cigarettes).

collateral consequences of the eighteen month prison sentence. Specifically, he argues that evidence suggesting that the eighteen month sentence had the consequence of delaying his release to a halfway house was relevant to the double jeopardy analysis. We do not reach the merits of this claim because the defendant has not briefed how he was harmed by the allegedly improper evidentiary ruling. Accordingly, we decline to review it.

The following additional facts and procedural history are relevant to this claim. At two points in the evidentiary hearing, defense counsel attempted to admit evidence relating to how the eighteen month sentence affected the defendant's ability to enter a halfway house. First, during direct examination of a department record specialist, counsel asked the witness "if the defendant could go to a halfway house as a result of this eighteen month sentence," and "if the defendant has a detainer because of this eighteen months." The state objected, arguing that the testimony was irrelevant. The court sustained the state's objection and explained: "The consequences of the sentence, I don't think, are relevant. It's the fact that the sentence was imposed that is at the heart of this matter. . . . I don't think the court is going to be looking to the severity of the sentence or the duration of the sentence. Rather . . . I think the inquiry is going to be whether any sentence was appropriate because, if double jeopardy is to be implicated, it would necessarily mean that no sentence could be imposed."

Subsequently, with the defendant on the witness stand, defense counsel attempted the following examination:

"Q. [T]his eighteen months, that's consecutive to the current sentence?"

"A. Yes.

"Q. Okay. Now does that affect your time that you're now serving—I mean, in a halfway house—can you get out to a halfway house?

"A. No."

After the state objected, the court sustained the objection and stated: "Okay. And again, the court believes the inquiry goes not to the severity of any sentence that might be imposed, but as to the question of whether any sentence could lawfully have been imposed. So I'm going to sustain the objection."

"The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010). "[I]n order to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse. . . . This requires that the defendant demonstrate that it is more probable than not that the erroneous action of the court affected the result." (Citations omitted; internal quotation marks omitted.) *State* v. *Kirsch*, 263 Conn. 390, 412, 820 A.2d 236 (2003).

"It is well settled that, absent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. An improper ruling must also be harmful to justify such relief. . . . The harmfulness of an improper ruling is material irrespective of whether the ruling is subject to review under an abuse of discretion standard or a plenary review standard. . . . When the ruling at issue is not of constitutional dimensions, the party challenging the ruling bears the burden of proving harm." (Internal quotation marks omitted.) *In*

re James O., 160 Conn. App. 506, 527, 127 A.3d 375 (2015), aff'd, 322 Conn. 636, 142 A.3d 1147 (2016).

In the present case, the defendant has briefed a claim that the court erred in precluding evidence regarding the potential collateral consequences of his eighteen month sentence and has failed to address how the evidentiary ruling was harmful. Accordingly, we decline to review the claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SCOTT PALMENTA (AC 37891)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant had pleaded guilty to six felonies under two separate dockets. He also admitted to being a persistent serious felony offender. After finding that the defendant was a persistent serious felony offender, the trial court enhanced his sentence on his burglary in the second degree and burglary in the third degree counts on that basis. Thereafter, the defendant filed a motion to correct an illegal sentence claiming, inter alia, that the trial court improperly sentenced him as a persistent serious felony offender because he fell within the exemption in the persistent serious felony offender statute (§ 53a-40). Subsection c of § 53a-40 permits exemption from persistent serious felony offender status if the present conviction was for a crime enumerated in subdivision (1) of subsection (a) of the statute, and the prior conviction was for a crime other than those enumerated in subsection (a). The trial court denied the defendant's motion, and the defendant appealed to this court. *Held* that the defendant could not prevail on his claim that the trial court improperly denied his motion to correct an illegal sentence because he qualified for the statutory exemption, and, therefore, the sentencing court improperly sentenced him as a persistent serious felony offender: this court found unpersuasive the defendant's assertions that the word "and" in the exemption could be construed conjunctively or disjunctively, that it was ambiguous, and, therefore, that we should apply the rule of lenity and narrowly construe the exemption in his favor by adopting a disjunctive

construction, as the language of the exemption was unambiguous, and, accordingly, pursuant to the plain language of § 53a-40, the exemption did not apply to the defendant because he was not convicted of a crime enumerated in subdivision (1) of subsection (a) of that statute; moreover, even if this court were to conclude that the statutory language was ambiguous, the legislative intent did not support the defendant's interpretation of the exemption that the word "and" as used in the exemption was disjunctive, and a disjunctive reading of the exemption would lead to bizarre and irrational results.

Argued May 12—officially released September 6, 2016

Procedural History

Two part information in the first case charging the defendant, in the first part, with the crimes of burglary in the second degree, criminal mischief in the second and attempt to commit larceny in the third degree, and, in the second part, with being a persistent serious felony offender, and two part information in the second case charging the defendant, in the first part, with the crimes of burglary in the third degree, identity theft in the third degree and larceny in the fifth degree, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, where the defendant was presented to the court, *Gill*, *J.*, on pleas of guilty; judgments of guilty in accordance with the pleas; thereafter, the court, *Ginnochio*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed*.

David B. Bachman, assigned counsel, for the appellant (defendant).

Toni M. Smith-Rosario, senior assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Dawn Gallo*, supervisory assistant state's attorney, for the appellee (state).

Opinion

JONGBLOED, J. The defendant, Scott Palmenta, appeals from the judgment of the trial court denying

his motion to correct an illegal sentence. On appeal, the defendant claims that he falls within the exemption set forth in General Statutes § 53a-40 (c), and, therefore, the court improperly sentenced him as a persistent serious felony offender. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history, as set forth in the court's memorandum of decision, are relevant to this appeal. "On May 8, 2009, in Docket No. CR-07-124076-S, the defendant [pleaded] guilty to burglary in the second degree in violation of General Statutes § 53a-102 (a) (2); attempt [to commit] larceny in the third degree in violation of General Statutes §§ 53a-124 (a) (2) and 53a-49; and criminal mischief in the second degree in violation of General Statutes § 53a-116 (a) (1). The defendant also admitted to being a persistent [serious] felony offender in violation of General Statutes § 53a-40 (c) and (j).[1]

"On May 8, 2009, in Docket No. CR-07-125614-S, the defendant [pleaded] guilty to burglary in the third degree in violation of General Statutes § 53a-103; identity theft in the third degree in violation of General Statutes § 53a-129d; and larceny in the fifth degree in violation of General Statutes § 53a-125. The defendant also admitted to being a persistent [serious] felony offender in violation of General Statutes § 53a-40 (c) and (j). On August 7, 2009, the defendant was sentenced to a total effective sentence of thirty years, execution suspended after ten years of incarceration, followed by five years of probation."[2]

[1] As amended by No. 15-2 of the 2015 Public Acts, subsection (j) of § 53a-40 became subsection (k).

[2] The court's memorandum of decision provides: "[I]n Docket No. CR-07-124076-S, the defendant was sentenced on the count of burglary in the second degree, to twenty years, execution suspended after ten years of incarceration, followed by five years of probation; on the count of larceny in the third degree, to five years to serve, concurrent; and on the count of criminal mischief in the second degree, to one year to serve, concurrent. In Docket No. CR-07-125614-S, the defendant was sentenced on the count of burglary in the third degree, to ten years, execution suspended, consecutive,

On March 20, 2014, the defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22. In that motion, the defendant argued that the court improperly enhanced his sentence on the charge of burglary in the second degree after finding him to be a persistent serious felony offender. He argued that his sentence was illegal because his admission that he was a persistent serious felony offender was not knowing, intelligent and voluntary. He further argued that the sentencing court had no factual or legal basis for its finding that he should be sentenced as a persistent serious felony offender. Specifically, the defendant contended that he fell within the exemption set forth in § 53a-40 (c), and, therefore, could not be considered a persistent serious felony offender. The state filed an objection to the motion. Following a hearing, the trial court denied the defendant's motion by memorandum of decision dated August 21, 2014.[3] The defendant then filed the present appeal in which he claims that the court improperly denied his motion to correct an illegal sentence. Specifically, he argues that he falls within the exemption set forth in § 53a-40 (c) and, therefore, the court improperly sentenced him as a persistent serious felony offender.[4]

followed by five years of probation; on the count of identity theft in the second degree, to five years to serve, concurrent; and on the count of larceny in the fifth degree, to six months to serve, concurrent."

[3] On January 23, 2015, the court issued an amended memorandum of decision correcting the docket numbers in the heading of the decision.

[4] The defendant frames his argument by claiming that the court violated his right to due process of law under the United States and Connecticut constitutions because he lacked fair warning that he could be sentenced as a persistent serious felony offender. The defendant, however, did not raise a claim of lack of fair warning in his motion to correct an illegal sentence. He relied solely on his statutory construction claim. At oral argument before this court, the defendant indicated that he was not pursuing a separate claim regarding lack of fair warning. Rather, the fair warning claim was intended to undergird his argument that, because § 53a-40 is ambiguous, the rule of lenity requires that the exemption be narrowly construed in his favor. We, therefore, restrict our analysis to the statutory construction argument raised in the trial court and properly raised on appeal.

Before commencing our review of the defendant's claim, we first set forth the applicable standard of review. "[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is [typically] reviewed pursuant to the abuse of discretion standard. . . . In the present case, however, the defendant's motion to correct an illegal sentence raises a question of statutory construction. Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . .

"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." (Citations omitted; internal quotation marks omitted.) *State* v. *Adams*, 308 Conn. 263, 269–70, 63 A.3d 934 (2013).

Section 53a-40 (c) provides: "A persistent serious felony offender is a person who (1) stands convicted of a felony, and (2) has been, prior to the commission of the present felony, convicted of and imprisoned under

an imposed term of more than one year or of death, in this state or in any other state or in a federal correctional institution, for a crime. This subsection shall not apply where the present conviction is for a crime enumerated in subdivision (1) of subsection (a) of this section *and* the prior conviction was for a crime other than those enumerated in subsection (a) of this section."[5] (Emphasis added.)

The issue to be resolved in this appeal is whether the word "and" in the exemption contained in § 53a-40 (c) should be interpreted conjunctively or disjunctively. The defendant contends that he had no prior conviction for crimes enumerated in § 53a-40 (a) (1) and, therefore, satisfied the second condition required for the exemption contained in § 53a-40 (c). He concedes, however, that because the present conviction was for crimes other than those enumerated in § 53a-40 (a) (1), he did not satisfy the first portion of the exemption. According

[5] General Statutes § 53a-40 (a) provides in relevant part: "A persistent dangerous felony offender is a person who: (1) (A) Stands convicted of manslaughter, arson, kidnapping, robbery in the first or second degree, assault in the first degree, home invasion, burglary in the first degree or burglary in the second degree with a firearm, and (B) has been, prior to the commission of the present crime, convicted of and imprisoned under a sentence to a term of imprisonment of more than one year or of death, in this state or in any other state or in a federal correctional institution, for any of the following crimes: (i) The crimes enumerated in subparagraph (A) of this subdivision or an attempt to commit any of said crimes; or (ii) murder, sexual assault in the first or third degree, aggravated sexual assault in the first degree or sexual assault in the third degree with a firearm, or an attempt to commit any of said crimes; or (iii) prior to October 1, 1975, any of the crimes enumerated in section 53a-72, 53a-75 or 53a-78 of the general statutes, revision of 1958, revised to 1975, or prior to October 1, 1971, in this state, assault with intent to kill under section 54-117, or any of the crimes enumerated in sections 53-9, 53-10, 53-11, 53-12 to 53-16, inclusive, 53-19, 53-21, 53-69, 53-78 to 53-80, inclusive, 53-82, 53-83, 53-86, 53-238 and 53-239 of the general statutes, revision of 1958, revised to 1968, or any predecessor statutes in this state, or an attempt to commit any of said crimes; or (iv) in any other state, any crimes the essential elements of which are substantially the same as any of the crimes enumerated in subparagraph (A) of this subdivision or this subparagraph . . . ."

to the defendant, because the word "and" in the exemption can be construed conjunctively or disjunctively, it is ambiguous; we, therefore, should apply the rule of lenity and narrowly construe the exemption in his favor by adopting a disjunctive construction. In response, the state argues that the court properly construed the exemption contained in § 53a-40 (c) and, therefore, properly denied the defendant's motion to correct an illegal sentence. We agree with the state.

"Our Supreme Court has held that the term 'and' may be construed to mean 'or,' especially if construing 'and' in the conjunctive would lead to an illogical or unreasonable result." *Kayla M.* v. *Greene*, 163 Conn. App. 493, 502, 136 A.3d 1 (2016). In support of his argument that "and" should be construed disjunctively in § 53a-40 (c), the defendant relies on *Bania* v. *New Hartford*, 138 Conn. 172, 83 A.2d 165 (1951), and *Commission on Hospitals & Healthcare* v. *Lakoff*, 214 Conn. 321, 572 A.2d 316 (1990). In *Bania*, our Supreme Court construed the word "and" disjunctively in a statute that prohibited Sunday sales of liquor but further provided that "any town may . . . allow the sale of alcoholic liquor on Sunday between the hours of twelve o'clock noon and nine o'clock in the evening in hotels, restaurants *and* clubs." (Emphasis added.) *Bania* v. *New Hartford*, supra,173. In *Lakoff*, our Supreme Court construed disjunctively the word "and" in the phrase "prevention, diagnosis and treatment" in General Statutes (Rev. to 1987) § 19a-145 so that an entity performing only one of the three functions would meet the definition of a "health care facility or institution." *Commission on Hospitals & Healthcare* v. *Lakoff*, supra, 328;[6] see also *Kayla M.* v. *Greene*, supra, 503 (construing

[6] The court in *Lakoff* also noted that the legislature recently had amended § 19a-145 so that the statute would read "prevention, diagnosis *or* treatment." (Emphasis added.) *Commission on Hospitals & Healthcare* v. *Lakoff*, supra, 214 Conn. 330.

"and" disjunctively in General Statutes § 46b-16a [a] so that "an applicant for a civil protection order on the basis of stalking is required to prove only that there are reasonable grounds to believe that a defendant stalked and will continue to stalk, as described in [General Statutes] §§ 53a-181c, 53a-181d *or* 53a-181e." [emphasis in original]).

Unlike the statutes at issue in the previously cited cases, § 53a-40 (c) addresses two preconditions that must be fulfilled before a defendant is entitled to the exemption. *State* v. *Bell*, 283 Conn. 748, 931 A.2d 198 (2007), is instructive on this point. In *Bell*, our Supreme Court considered whether General Statutes (Rev. to 2007) § 53a-40 (h) was unconstitutional because it allowed for a finding by the trial court, rather than the jury, that imposing extended incarceration would best serve the public interest. Id., 784–85. As part of its analysis of this claim, the court stated: "In examining the text of the statute, we note at the outset that, by its use of the conjunctive 'and,' the statute appears to impose two preconditions for an enhanced sentence to be imposed in lieu of the lesser sentence prescribed for the offense for which the defendant stands convicted: (1) the jury's determination that the defendant is a persistent offender; and (2) the court's determination that the defendant's history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration will best serve the public interest. See *Penn* v. *Irizarry*, 220 Conn. 682, 687, 600 A.2d 1024 (1991) ('[t]he use of the conjunctive, "and," indicates that both conditions must be fulfilled before a new primary [election] may be ordered [pursuant to General Statutes § 9-329a]'); *Nicotra Wieler Investment Management, Inc.* v. *Grower*, 207 Conn. 441, 455, 541 A.2d 1226 (1988) ('we find significance in the use of the word "and" between the two stated conditions')." *State* v. *Bell*, 796.

Similarly, § 53a-40 (c) appears to impose two preconditions to qualify for the exemption from persistent serious felony offender status: (1) the present conviction must be for a crime enumerated in subdivision (1) of subsection (a) of § 53a-40, and (2) the prior conviction must be for a crime other than those enumerated in subsection (a) of § 53a-40. Pursuant to the plain language of the statute, the exemption does not apply to the defendant because he was not convicted of a crime enumerated in § 53a-40 (a) (1).

Even if we were to conclude, however, that the statutory language is ambiguous, the legislative intent does not support the defendant's interpretation of the exemption contained in § 53a-40. The 1971 commission comment to § 53a-40 provides in relevant part: "This section creates a new scheme for sentencing relating to recidivists. It singles out three types of recidivists for special treatment: (1) persistent dangerous felony offender; (2) persistent felony offender; and (3) persistent larceny offender. . . . A persistent felony offender . . . is one who stands convicted of a felony and who has at least once before been convicted of a felony and imprisoned therefor for more than one year. The consequence of being found to be a persistent felony offender is that the court may, in its discretion, impose the sentence authorized for the next more serious degree of felony. Thus, a person convicted of a class C felony who has a prior felony conviction and imprisonment on his record may be sentenced as a class B felon. *The purpose of the last section of subsection* (*b*) [presently subsection (c)] *is to make clear*, *however*, *that this escalation to the next higher degree does not apply where the present conviction is for one of the dangerous felonies listed in subsection* (*a*) (*1*), *since the authorized maximum sentences for those offenses are already high*, *and it would otherwise be possible to reach a life sentence*

under subsection (b) where the requirements of subsection (a) had not been met." (Emphasis added.) Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-40 (West 2012) commission comment, p. 661. Because the defendant has not been convicted of any of the felonies listed in § 53a-40 (a) (1) (A), application of the exemption to the defendant would frustrate the stated purpose of the statute.

Finally, we disagree with the defendant's contention that a conjunctive reading of the word "and" will lead to an illogical result and create disharmony in the statute's hierarchical structure. In rejecting this argument, the trial court stated: "Interpreting the word 'and' in the disjunctive would frustrate the legislative intent of the statute and create a bizarre result in that it would exempt large classes of repeat felony offenders from persistent serious felony offender status based on whether they meet one precondition or the other. In adopting the defendant's interpretation, a defendant's prior conviction of a crime *other than*, e.g., manslaughter, arson, kidnapping, etc., would automatically prevent the court from imposing a sentence enhancement on a defendant's present conviction. In addition, a defendant would be exempt if his or her present conviction is for a crime enumerated in subdivision (1) of subsection (a). Therefore, a defendant presently convicted of, e.g., arson, would automatically be exempt from sentence enhancement, even if the defendant has a prior conviction of arson. Such results would directly contradict the statute's purpose in allowing our sentencing courts to impose a more severe penalty for particular present convictions *based upon* a defendant's prior conviction(s)." (Emphasis in original.) We equally are persuaded that a disjunctive reading of the exemption contained in § 53a-40 would lead to a bizarre and irrational result. See *State* v. *Burns*, 236 Conn. 18, 27, 670

A.2d 851 (1996) (presumption that legislature intends to accomplish reasonable and rational result rather than difficult and possibly bizarre result).

On the basis of the foregoing, we conclude that the court correctly construed the word "and" in a conjunctive manner in § 53a-40 (c). The plain language of the statute, as well as the commission comment and the case law interpreting another portion of the same statute, support this interpretation. In light of this conclusion, the defendant cannot prevail on his claim that the court improperly denied his motion to correct an illegal sentence and that the rule of lenity requires that the exemption be read disjunctively. "[T]he touchstone of this rule of lenity is statutory ambiguity. . . . [W]e . . . [reserve] lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute. . . . Because we conclude that, after full resort to the process of statutory construction, there is no reasonable doubt as to the meaning of the statute, we need not resort to the rule of lenity." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ledbetter*, 240 Conn. 317, 331 n.12, 692 A.2d 713 (1997).

The judgment is affirmed.

In this opinion the other judges concurred.

NANCY HELFANT, EXECUTRIX (ESTATE OF IRWIN HELFANT), ET AL. *v.* YALE-NEW HAVEN HOSPITAL ET AL.

(AC 37569)

Alvord, Prescott and West, Js.

Syllabus

The plaintiff, individually and as executrix of the estate of her decedent husband, sought to recover damages for medical malpractice from the

defendant hospitals and the defendant physician, L, in connection with the alleged wrongful death of the decedent. The trial court granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. She claimed that the trial court improperly determined that she had failed to comply with the statute (§ 52-190a [a]) that requires a party in a medical malpractice action to file a written opinion of a similar health care provider that there appears to be negligence on the part of the defendants. Specifically, the plaintiff claimed that the trial court improperly determined that the opinion letter she had filed failed to demonstrate that its author, P, was a similar health care provider, as defined by statute (§ 52-184c [c]). *Held* that the trial court properly granted the defendants' motion to dismiss and determined that the opinion letter filed by the plaintiff was not authored by a similar health care provider with respect to L: because L was board certified in emergency medicine, was trained and experienced in emergency medicine and held himself out as a specialist, pursuant to the plain language of §§ 52-190a (a) and 52-184c (c), a similar health care provider with respect to L would be a physician who is not only trained and experienced in emergency medicine, but one who also was certified by the appropriate American board in emergency medicine, and, therefore, because P was not board certified in emergency medicine, he did not fall within the statutory definition of a similar health care provider as set forth in § 52-184c (c); moreover, the plaintiff could not prevail on her claim that because L was not providing treatment to the decedent solely within his claimed specialty of emergency medicine, and because she did not allege that L was acting within his medical specialty of emergency medicine, an exception contained in § 52-184c (c) regarding providing treatment or diagnosis for a condition not within a provider's specialty was applicable, as L's alleged conduct in improperly interpreting chest X-rays of the decedent was done within his role as an emergency medicine physician rendering treatment in an emergency room setting, and, therefore, the exception did not apply; furthermore, given that the plaintiff did not allege that the liability of the hospital defendants arose from anything other than vicarious liability for the negligent conduct of L as their agent, and in light of the fact that P was not properly qualified to author the opinion letter as against L, the letter was insufficient as against the hospital defendants as well and did not support allegations directed at any subordinate providers whose negligence would be imputed to the hospital defendants.

Argued March 1—officially released September 6, 2016

Procedural History

Action to recover damages for, inter alia, the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of

New Haven, where the court, *Wilson*, *J.*, denied the motion to dismiss filed by the defendant Middlesex Hospital et al.; thereafter, the court granted the motion to reargue filed by the defendant Middlesex Hospital et al., and granted the motion to dismiss filed by the defendant Middlesex Hospital et al. and rendered judgment thereon; subsequently, the plaintiffs withdrew the action as against the named defendant et al., and the plaintiffs appealed to this court. *Affirmed.*

John T. Bochanis, for the appellants (plaintiffs).

S. Peter Sachner, with whom, on the brief, was *Amy F. Goodusky*, for the appellees (defendant Middlesex Hospital et al.).

Opinion

WEST, J. The plaintiff, Nancy Helfant, in her capacity as the executrix of the estate of Irwin Helfant, the decedent, and in her individual capacity,[1] brought this medical negligence action against the defendants, Middlesex Hospital,[2] Middlesex Hospital Shoreline Medical Center, Yale-New Haven Hospital, and the agents, servants, and employees of these institutions, and against John Lynch and Henry Cabin, both physicians, individually.[3] The plaintiff appeals from the judgment of the trial court dismissing the action on the ground that the plaintiff

[1] We refer in this opinion to Nancy Helfant in both capacities as the plaintiff.

[2] Middlesex Hospital maintained and operated a public hospital in the city of Middletown and state of Connecticut known as Middlesex Hospital, and in the town of Essex, known as Middlesex Hospital Shore Line Medical Center.

[3] The plaintiff resolved her case against Yale-New Haven Hospital and Henry Cabin prior to filing this appeal. Therefore, the remaining defendants in this appeal, Middlesex Hospital, Middlesex Hospital Shoreline Medical Center, and John Lynch, will be referred to collectively as the defendants, and individually by name when appropriate. The defendants Middlesex Hospital and Middlesex Hospital Shoreline Medical Center will be collectively referred to as the institutional defendants.

failed to satisfy General Statutes § 52-190a[4] by filing a written opinion of a similar health care provider that there appears to be negligence on the part of the defendants. The plaintiff claims that the court improperly determined that the opinion letter filed in the present case failed to demonstrate that the author of the letter was a similar health care provider as defined by General Statutes § 52-184c.[5] Because we conclude that the opinion letter submitted by the plaintiff was not from a

[4] General Statutes § 52-190a provides in relevant part: "(a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . .

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

[5] General Statutes § 52-184c provides in relevant part: "(a) In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

similar health care provider, we affirm the judgment of the trial court.

The record discloses the following relevant procedural history. The plaintiff filed a complaint against the defendants on March 20, 2008, and a revised complaint on November 12, 2008, in which she, in her capacity as executrix, asserted a wrongful death claim on the basis of the defendants' medical malpractice. In her revised complaint, the plaintiff alleged the following facts, the truth of which we assume for purposes of her appeal. On December 5, 2005, the plaintiff's decedent was admitted for treatment by Lynch at Middlesex Hospital Shoreline Medical Center, was subsequently transferred to Yale-New Haven Hospital, where Cabin rendered care, and the decedent later died.

The plaintiff alleged that the decedent's death was caused by the negligence, carelessness, and breach of the duty of care of the institutional defendants through their agents, servants, and employees.[6] The plaintiff also

"(b) If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similar health care provider' is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

"(c) If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider'. . . ."

[6] The plaintiff alleged that the defendant hospitals breached their duties in the following ways:

"(a) In that [they] failed to use the care and skill ordinarily used by hospitals in the state of Connecticut.

alleged that the decedent's death was caused by the negligence, carelessness, and breach of the duty of care of the defendant physicians, Lynch and Cabin.[7] Furthermore, the plaintiff alleged that as a result of the breach of the duty of care by the defendants, the decedent died on December 5, 2005. The plaintiff additionally alleged that as a result the decedent sustained pain and suffering, incurred various medical care, funeral, and burial expenses, and lost his capacity to earn wages and carry out life's activities. Additionally, the plaintiff, in her individual capacity, alleged that as a result of the defendants' breach of the duty of care owed the decedent, she suffered a loss of companionship, support, love and consortium with her husband, the decedent.

Attached to the complaint was a good faith certificate signed by the plaintiff's attorney. The plaintiff's attorney represented therein that, following a reasonable inquiry by him, he believed in good faith that grounds existed for a medical malpractice action against the defendants. Additionally, the plaintiff attached a document entitled "Medical Evaluation Report" authored by Robert Pieroni, a physician. The letter stated in relevant part: "The communication between Doctors Lynch and Cabin and

"(b) In that [their] agents, servants and/or employees failed to properly diagnose and treat the [decedent] while he was a patient in the defendants' hospitals.

"(c) In that [their] agents, servants and/or employees failed to take a proper history of the decedent;

"(d) In that [their] agents, servants and/or employees failed to properly diagnose the decedent's condition;

"(e) In that [their] agents, servants and/or employees failed to conduct proper diagnostic testing of the decedent's condition;

"(f) In that [their] agents, servants and/or employees failed to properly monitor the decedent's condition;

"(g) In that [their] agents, servants and/or employees failed to use the proper treatment, care and skills ordinarily used by hospitals in the state of Connecticut."

[7] The plaintiff alleged that the defendant physicians breached their duties in the same ways as articulated against the defendant hospitals.

agents of their hospitals was frankly abysmal, and their actions and inactions in their 'treatment' of [the decedent] were distinctly substandard."[8] The opinion letter set forth the specific facts related to the decedent's condition at the time he arrived at Middlesex Hospital Shoreline Medical Center. Additionally, the letter delineated the ways in which the defendants failed to provide adequate or appropriate care, which allegedly led to the decedent's demise. The letter's stationary indicated that Pieroni was certified as a specialist by various American boards of medicine, however, a specialty of emergency medicine was not one of the many listed.

Thereafter, the defendants moved to dismiss the plaintiff's revised complaint on the grounds that the opinion letter submitted by the plaintiff did not comply with § 52-190a, because it was not authored by a "similar health care provider," and that it was insufficiently detailed in that it did not provide for how the defendants

[8] The full text of the letter read as follows: "I have reviewed in detail, and on several occasions, medical records forwarded to me pertaining to the treatment of Irwin Helfant by [Lynch] and agents of Middlesex Hospital on 10/4/05 and by [Cabin] and agents of Yale-New Haven Hospital until his premature demise on 12/5/05.

"[The decedent] was known to have a history of surgery for esophageal rupture. He presented to Middlesex Hospital Emergency Department with complaints o[f] nausea and vomiting, chest and abdominal pain, shortness of breath, diaphoresis and anorexia. His lab values included normal cardiac enzymes but markedly elevated WBC with a left shift, elevated liver and kidney function tests and an abnormal chest X-ray, with a large area of consolidation.

"Despite the extremely high likelihood that the [decedent] was infected from a repeat esophageal disruption, Doctor Lynch failed to make this diagnosis and transferred [the decedent] to Yale-New Haven Hospital's cardiac catheterization lab for further evaluation and intervention by Henry S. Cabin, M.D. and his Yale team, who again failed to appropriately diagnose and treat the [decedent].

"The communication between Doctors Lynch and Cabin and agents of their hospitals was frankly abysmal, and their actions and inactions in their 'treatment' of [the decedent] were distinctly substandard. More likely than not [the decedent] would have survived had he been properly diagnosed and treated."

deviated from the standard of care. In support of their motion to dismiss, the defendants submitted as an exhibit an affidavit executed by Lynch. In the affidavit Lynch averred that he "[was] an emergency room physician . . . and [had] been board certified by the American Board of Emergency Medicine since June 18, 2004."

The plaintiff filed an objection to the motion and attached as exhibits an affidavit made by the opinion letter author, Pieroni, as well as his curriculum vitae. In the affidavit, Pieroni averred that he "previously and currently [performs] physician responsibilities in a hospital emergency room department and [has] experience in providing emergency medical care." Pieroni further stated that he "[had] been previously called upon to assist emergency room physicians in the diagnosis and treatment of patients . . . ." He also declared that "[a]s a board certified physician in internal medicine, family medicine, and other specialty areas, [he had] been trained to perform medical diagnosis and treatment in different settings including emergency department settings . . . ."

On October 5, 2009, the trial court, *Wilson*, *J.*, entered an order sustaining the plaintiff's objection to the defendants' motion to dismiss. Subsequently, the defendants filed a motion to reargue their motion to dismiss, citing, inter alia, *Bennett* v. *New Milford Hospital*, *Inc.*, 117 Conn. App. 535, 979 A.2d 1066 (2009), aff'd, 300 Conn. 1, 12 A.3d 865 (2011). The court later granted the defendants' motion to reargue, vacated its order of October 5, 2009, and heard reargument on the defendants' motion to dismiss. In an April 6, 2010 memorandum of decision, the court granted the defendants' motion to dismiss.

The court summarized the key arguments advanced by the parties as follows: "[Lynch] argue[d] that the plaintiff's complaint must be dismissed pursuant to

§ 52-190a (c) because the author of the plaintiff's opinion letter [was] not a 'similar health care provider' as defined by § 52-184c (c). [He] further [contended] that the letter [was] not sufficiently detailed to allege medical negligence, in that it neither [stated] a standard of care nor [illustrated] how [he] breached that standard. Lastly, [Lynch argued] that the letter [was] conclusory in its entirety.

"The plaintiff [countered] that § 52-190a (c) provides for dismissal only where a plaintiff neglects to attach an opinion letter to a complaint. In addition, she [argued] that the opinion author is a similar health care provider because he has sufficient experience in the field of emergency medicine, which is unlike other medical specialties in that it is defined solely by the setting in which the care is rendered. The plaintiff further [argued] that the sufficiency of the detail of a medical opinion letter is not properly raised in a motion to dismiss; and that, if the court [were to find] that it is, the letter is sufficiently detailed.

"The plaintiff filed a supplemental objection to the defendants' motion to dismiss, in which she [countered], inter alia, that the care rendered by [Lynch] was outside of his specialty. Therefore, the plaintiff [contended] that the opinion letter author [Pieroni] is a similar medical provider under § 52-184c (c), although [Pieroni] is not board certified in emergency medicine. In reply, the defendants [asserted] that *Bennett* [v. *New Milford Hospital, Inc.*, supra, 117 Conn. App. 535] still controls this issue, focusing on [Lynch's] board certification relative to that of [Pieroni]. The defendants also [argued] in reply that the substance of the letter at issue is lacking, and that it is deficient as against the institutional defendants . . . ."

The trial court concluded that this court's decision in *Bennett* v. *New Milford Hospital, Inc.*, supra, 117

Conn. App. 535, was "controlling as to the validity of the opinion letter as against [Lynch]." The court noted that "[n]owhere in the record is there any indication that [Pieroni] is board certified in emergency medicine." The court concluded, therefore, that "since [Lynch] is board certified in emergency medicine, §§ 52-190a (a) and 52-184c (c) require that a similar health care provider be board certified in emergency medicine." The court further concluded that "[u]nder the standard set forth in *Bennett*, and § 52-190a (a), the letter cannot be determined to have been authored by a similar health care provider."[9] Accordingly, the court granted the defendants' motion to dismiss pursuant to § 52-190a (c) inasmuch as it related to Lynch.

The court separately addressed "whether the opinion letter, although insufficient as to [Lynch] [remained] sufficient as against the institutional defendants . . . ." Noting that the plaintiff's revised complaint alleged vicarious liability against only the institutional defendants for the negligent conduct of Lynch as their agent, the court concluded that because it found the opinion letter deficient as offered against Lynch individually, it must follow that it was also deficient as against the institutional defendants as Lynch's principals.

"We begin by noting the well established standard of review on a challenge to a ruling on a motion to dismiss. When the facts relevant to an issue are not in dispute, this court's task is limited to a determination of whether, on the basis of those facts, the trial court's conclusions of law are legally and logically correct. . . . Because there is no dispute regarding the basic material facts, this case presents an issue of law, and we exercise plenary review. . . . Similarly, the meaning of a statute

[9] The court concluded that "[b]ecause [it found] that the opinion letter submitted by the plaintiff was not authored by a 'similar health care provider' as to the institutional defendants, it need not reach the issue of whether the substance [of the] letter [was] sufficient."

is a question of law over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, supra, 117 Conn. App. 541.

On appeal, the plaintiff claims that the court improperly dismissed the action on the ground that the opinion letter was not authored by a similar health care provider. The plaintiff argues that the opinion letter complies with § 52-190a, and, therefore, is sufficient to support a claim against Lynch and the institutional defendants. Thus, the plaintiff asserts that the dismissal of the action was unwarranted. The defendants claim that the court properly applied the holding of *Bennett* in concluding that the opinion letter's author did not meet the objective standard imposed by § 52-190a, requiring that the attesting expert be a similar health care provider to Lynch.

General Statutes § 52-190a (a) provides in relevant part that "[n]o civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless . . . the claimant or the claimant's attorney . . . obtain[s] a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . ."

"To interpret the requirements of § 52-190a (a), we must read it together with § 52-184c, the statute regarding similar health care providers. Subsections (b) and (c) of § 52-184c define a 'similar health care provider' for purposes of the statute. For physicians who are

board certified or hold themselves out as specialists, subsection (c) of § 52-184c defines 'similar health care provider' as 'one who: (1) [i]s trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty . . . .' " *Bennett* v. *New Milford Hospital, Inc.*, supra, 117 Conn. App. 546.

Because Lynch is certified by the American Board of Emergency Medicine, is trained and experienced in emergency medicine, and holds himself out as a specialist, pursuant to the plain language of §§ 52-190a (a) and 52-184c (c), a "similar health care provider" with respect to Lynch would be a physician who is not only trained and experienced in emergency medicine, but one who is also "certified by the appropriate American board" in emergency medicine. General Statutes § 52-184c (c). Accordingly, before bringing an action alleging medical negligence on Lynch's part, the plaintiff or her attorney needed to obtain and file a written and signed opinion from such a physician indicating that there appears to be evidence of such negligence. Because the plaintiff's expert is not board certified in emergency medicine, he does not fall within the statutory definition of a similar health care provider as set forth in § 52-184c (c).

The plaintiff, citing § 52-184c (c), contends that the opinion letter author is a similar health care provider for purposes of § 52-190a, even if his board certification is not in the exact same certification as that of Lynch. The plaintiff argues that the exception contained in § 52-184c (c)[10] is applicable because Lynch was not providing treatment to the decedent solely within his claimed

[10] The portion of § 52-184c (c) that the plaintiff refers to as the exception states: "[P]rovided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.' "

specialty of emergency medicine. Specifically, the plaintiff notes that Lynch's diagnosis and treatment of the decedent's condition—air in the chest cavity—was not caused by any trauma and, thus, was a condition outside of his emergency medicine specialty. The plaintiff also relies on the fact that she did not assert any allegations in the complaint based on Lynch's specialization in emergency medicine, and further argues that the facts of this case are different than those in *Bennett*. The plaintiff contends that this case, therefore, is distinguishable from *Bennett* simply because the plaintiff in *Bennett* alleged that the defendant physician was specialized in emergency medicine, whereas the plaintiff in this case did not. She asserts that by not alleging that Lynch was acting within his medical specialty of emergency medicine while negligently treating the decedent, the exception in § 52-184c (c), regarding providing treatment or diagnosis for a condition not within a provider's specialty, applies.

It is important to note, however, that the plaintiff did not allege in her revised complaint that Lynch was acting outside of his medical specialty when he rendered treatment to the decedent. Furthermore, the plaintiff did not restrict her claims against Lynch to properly interpreting a chest X-ray. Rather, the revised complaint alleges that Lynch failed to take a proper history of the decedent, properly diagnose, and conduct the proper diagnostic testing on the decedent, which would fall within the specialty of emergency medicine. See footnotes 5 and 6 of this opinion. Moreover, the plaintiff essentially is arguing that merely by omitting language regarding Lynch's specialty, the exception in § 52-184c (c) applies; however, if that assertion were accepted, it would seem that by omitting such language regarding a defendant's specialty, a plaintiff could always plead his or her way around the statute. Additionally, even if the plaintiff's proposition that the

alleged negligence of Lynch was limited to the improper interpretation of a chest X-ray were accepted, this act would not appear to fall outside of his field of specialization as a board certified emergency medicine physician. Indeed, there were no facts alleged in the revised complaint to demonstrate that the interpretation of X-rays falls outside the purview of the emergency medicine specialty. The fact that Lynch was interpreting the chest X-ray in an emergency room setting also leads us to the conclusion that it was within his specialty of emergency medicine.

In *Farrell* v. *Bass*, 90 Conn. App. 804, 812–13, 879 A.2d 516 (2005), this court upheld the trial court's finding that a plastic surgeon's direction to his patient to discontinue taking the medication Coumadin, a blood thinner, for two days prior to surgery was not sufficient to conclude that the plastic surgeon was providing treatment or diagnosis for a condition which is not within his specialty, as stated in § 52-184c (c). The trial court had concluded that any direction to the patient to discontinue Coumadin for a time was given in the physician's role as a plastic surgeon. Id., 814. Similarly, in this case, Lynch's interpretation of the decedent's X-ray was done within his role as an emergency medicine physician rendering treatment in an emergency room setting. Thus, we conclude that Lynch was not providing treatment or diagnosis for a condition that was not within his specialty and, therefore, the exception in § 52-184c (c) does not apply to the facts of this case. Accordingly, pursuant to §§ 52-190a (a) and 52-184c (c), the plaintiff's medical opinion letter should have been authored by a physician who is both trained and experienced and board certified in emergency medicine.

Additionally, the plaintiff contends that the medical opinion letter was sufficient to support a claim against the institutional defendants; however, as the trial court concluded, the plaintiff did not allege that the liability of

the institutional defendants arose from anything other than vicarious liability for the negligent conduct of Lynch as their agent. The plaintiff cites several Superior Court cases to support the proposition that a written opinion that addresses only the negligence of the physicians is sufficient to withstand a motion to dismiss in an action in which the alleged medical malpractice of a hospital or similar entity is premised on the conduct of its individual physicians, employees, or staff. The plaintiff argues that the fact that Lynch was the only agent specifically named in the complaint does not limit the allegations in the complaint against the institutional defendants to just his negligent acts and argues that because they alleged negligence on the part of the institutional defendants' "agents, servants, and employees," the written opinion letter authored by Pieroni is sufficient to support a claim against those defendants.

Our Supreme Court in *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 727, 104 A.3d 671 (2014), concluded that, under certain circumstances, an opinion letter from a *properly qualified physician* in support of a complaint may also support allegations directed against subordinate providers practicing in the same medical specialty. In the present case, however, because Pieroni was not properly qualified to author the opinion letter as against Lynch, the letter would not support allegations directed at any subordinate providers whose negligence would be imputed to the institutional defendants. Accordingly, because we conclude that the medical opinion letter was insufficient as offered against Lynch, we conclude that it was insufficient as against the institutional defendants as well.

On the basis of the foregoing, because the opinion letter submitted by the plaintiff was not authored by a similar health care provider pursuant to §§ 52-190a (a)

and 52-184c (c), we conclude that the court properly dismissed the action.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PHIL KINCH
(AC 37433)
(AC 37434)

Beach, Alvord and Gruendel, Js.

Syllabus

Convicted, after jury trials, of the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent and failure to appear in the first degree, the defendant appealed to this court. He claimed that the trial court improperly denied his motion to suppress certain evidence seized by the police from a vehicle in which he was a passenger. The defendant alleged that the investigatory stop by the police was not supported by a reasonable and articulable suspicion of criminal activity. On appeal to this court, *held*:

1. The trial court properly denied the defendant's motion to suppress the evidence seized by the police, the defendant having lacked standing to challenge the legality of the search of the vehicle; the defendant was a mere passenger in the vehicle from which the evidence was seized, and, as such, he had the burden of proving the existence of a reasonable expectation of privacy in the area of the vehicle searched, which he failed to do, as he presented no evidence of such an expectation of privacy, and the seized evidence was in the plain view of the police from outside of the vehicle.
2. In light of this court's disposition of the defendant's claim with respect to his motion to suppress, he could not prevail on his ancillary claim that his conviction for failure to appear in the first degree must be vacated.

Argued April 12—officially released September 6, 2016

Procedural History

Substitute information charging the defendant with the crime of possession of narcotics with intent to sell by a person who is not drug-dependent, brought to the Superior Court in the judicial district of Fairfield,

geographical area number two, where the court, *Cronan*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury; verdict of guilty; subsequently, upon the defendant's failure to appear for sentencing, the state filed an information charging the defendant with failure to appear in the first degree and the matter was tried to the jury; verdict of guilty; judgments of guilty in accordance with the verdicts, from which the defendant filed separate appeals with this court; thereafter, the appeals were consolidated. *Affirmed.*

Gwendolyn S. Bishop, assigned counsel, for the appellant (defendant).

Matthew R. Kalthoff, deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Richard L. Palombo, Jr.*, senior assistant state's attorney, and *Marc R. Durso*, assistant state's attorney, for the appellee (state).

Opinion

GRUENDEL, J. This case involves an investigatory stop of a motor vehicle. The defendant, Phil Kinch, appeals from the judgments of conviction, rendered after jury trials, of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b) and failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1). On appeal, the defendant claims that the trial court improperly denied his motion to suppress certain evidence. He further maintains that, should he prevail on that claim, his conviction for failure to appear also must be set aside. We affirm the judgments of the trial court.

The relevant facts are largely undisputed. On the evening of July 12, 2011, members of the Bridgeport Police Department were conducting surveillance in the vicinity

of 740 Ellsworth Street (property), which was considered a "hot zone" due to the prevalence of violent crime in that area. A multistory apartment complex with a small parking lot was located on the property.

From an unmarked police vehicle, Sergeants Bradford Seely and Ronald Mercado were on the lookout for an individual with a "weird walk . . . a weird gait" who allegedly "had been robbing people in this neighborhood numerous times within the past few weeks . . . ." At approximately 11 p.m., they observed an individual with a distinctive gait wearing a red shirt and black pants, who met with a "black male, a white male and a white female" as he approached the property. At that time, Seely placed a request over police radio for the assistance of a marked police vehicle to "help identify the individual wearing the red shirt and the black pants."[1]

Officers Manual Santos and Bobby Jones, who were on patrol in a marked police vehicle, responded to Seely's request. When they arrived at the property, they observed three individuals walking toward a black Toyota Scion XD (vehicle) in the parking lot. Those individuals then entered that vehicle. At that time, the officers were "acting on orders to stop parties in that [parking] lot." Santos observed a white male in the driver's seat, a white female in the front passenger seat, and a black male in the rear passenger seat of the vehicle. At the suppression hearing, Santos identified the defendant as the individual in the rear passenger seat.

As they parked their patrol car behind the vehicle, the officers observed "a lot of movement going on" in

[1] In his testimony, Seely explained that he requested the assistance of a marked police vehicle because "we had an unmarked police vehicle that we didn't want to, what we call, burn. The vehicle [is] used to conduct surveillances and . . . [we] try to stay undercover throughout the operation."

the vehicle. Santos testified that "both the driver and the front right passenger, the female, they just kept looking towards the rear of the vehicle, the rear compartment to the passenger that was in the rear, [their] hands were moving, their heads were moving, they kept looking at us and . . . looking at this rear seated passenger." Santos, who was dressed in full uniform, exited his patrol car and approached the driver's side of the vehicle with a flashlight in hand. As Santos "was looking at the rear passenger [from outside the vehicle, he] observed on the floor next to his feet . . . a small digital scale, a clear plastic Ziploc type sandwich bag which had a white or off-white type substance inside it. [He] observed . . . a blood cigarette, which . . . is a cigarette wrapper with contraband in it that someone would smoke. [He] also observed a brown paper bag that had cigar tubes kind of protruding from it." All three individuals then exited the vehicle and were placed under arrest. At that time, the police seized various items from the vehicle.

The defendant was charged with possession of narcotics with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b). He thereafter filed a motion to suppress the evidence seized from the vehicle.[2] In that motion, the defendant alleged that the "seizure and search *of the vehicle* occupied by the defendant were conducted by members of the Bridgeport Police Department without a valid warrant, without probable cause, without reasonable and articulable suspicion, and not incident to a lawful arrest." (Emphasis added.)

[2] Specifically, the defendant sought to suppress "(1) [o]ne large plastic sandwich bag containing an off-white substance; (2) [o]ne brown colored blunt type cigarette; (3) [o]ne brown paper bag containing three green colored cigar tubes; (4) [o]ne AMW digital scale; (5) [o]ne medium sized ziplock clear plastic bag with a red apple print on it and containing numerous smaller red tinted ziplock type clear plastic baggies and five clear sandwich bags; (6) [o]ne hundred and sixty ($160.00) dollars in US currency."

At the outset of the June 27, 2013 suppression hearing, the state claimed that the defendant lacked standing to contest the validity of the search of the vehicle, arguing that "[i]t was not his car and prior court cases have indicated that a person who's a backseat passenger in a car that he does not own does not have standing to object to the search of that vehicle." In response, the defendant argued that he was entitled to proceed pursuant to *Brendlin* v. *California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Perhaps mindful that a reasonable expectation of privacy analysis entails a fact specific inquiry; see *State* v. *Boyd*, 295 Conn. 707, 718, 992 A.2d 1071 (2010), cert. denied, 562 U.S. 1224, 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011); the court did not act on the state's motion at that time, stating, "All right. I'll allow the matter to go forward."[3]

The only two witnesses at that hearing were Seely and Santos. At the conclusion of their testimony, the state renewed its claim that the defendant lacked standing to contest the seizure of the evidence in question. The state argued that the present case was "very similar" to *State* v. *Thomas*, 98 Conn. App. 542, 550–51, 909 A.2d 969 (2006), cert. denied, 281 Conn. 910, 916 A.2d 53 (2007), in which this court recognized that "[a] passenger in a motor vehicle, who fails to demonstrate a possessory interest in the car itself or in any of the seized evidence, has no reasonable expectation of privacy in the area of the vehicle searched, and . . . is precluded from contesting the validity of the search." (Internal quotation marks omitted.) In response, the defendant again directed the court's attention to *Brendlin* v. *California*, supra, 551 U.S. 249. In rendering its oral decision, the court stated, "I'm . . . denying the state's motion on the standing, and I'm going to deny the motion to suppress." The court then detailed the

[3] In so doing, the court provided the defendant with the opportunity to establish his standing to contest the validity of the search of the vehicle.

basis of its determination that the officers possessed a reasonable and articulable suspicion of criminal activity at the time of their encounter with the defendant.

A jury trial followed, at the conclusion of which the defendant was found guilty of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b). The defendant was scheduled to be sentenced on September 11, 2013, but did not appear at that proceeding. Approximately two months later, the court sentenced the defendant to a term of twelve years incarceration, execution suspended after eight years, with four years of special parole.

As a result of his failure to appear for sentencing on September 11, 2013, the defendant was arrested and charged with one count of failure to appear in the first degree. The defendant pleaded not guilty to that charge. After a trial, the jury found the defendant guilty. The court rendered judgment accordingly and sentenced the defendant to a term of two years incarceration, to be served consecutive to his sentence on his conviction for possession of narcotics with intent to sell. This consolidated appeal of the judgments of conviction for possession of narcotics with intent to sell and failure to appear followed.

I

The defendant first claims that the court improperly denied his motion to suppress the evidence seized from the vehicle because the investigatory stop by police was not supported by a reasonable and articulable suspicion of criminal activity. The state concedes that "the seizure of the vehicle's occupants was not supported by a reasonable and articulable suspicion that criminal activity was afoot." The state nonetheless maintains that, because the defendant did not establish a reasonable expectation of privacy in the vehicle, the court's

ruling on the motion to suppress must be affirmed on the alternate ground that the defendant lacked standing to contest the search of the vehicle.[4] We agree with the state.[5]

"[S]tanding is a fundamental requirement of jurisdiction." (Internal quotation marks omitted.) *State* v. *Johnson*, 301 Conn. 630, 642, 26 A.3d 59 (2011). "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject

[4] It is well established that we may "affirm the court's judgment on a dispositive alternate ground for which there is support in the trial court record." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 188, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); see also *State* v. *John*, 210 Conn. 652, 679–80, 557 A.2d 93 (appellate court "is free to sustain a ruling on a different basis from that relied upon by the trial court"), cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989).

[5] Because we conclude that the defendant lacked "standing to challenge the legality of a search and seizure under both the fourth amendment to the United States constitution and article first, § 7, of the constitution of Connecticut"; *State* v. *Kimble*, 106 Conn. App. 572, 582, 942 A.2d 527, cert. denied, 287 Conn. 912, 950 A.2d 1289 (2008); we do not consider the merits of such a challenge. See, e.g., *Minnesota* v. *Carter*, 525 U.S. 83, 91, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) ("[b]ecause we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observation constituted" illegal search); *State* v. *Jevarjian*, 307 Conn. 559, 566–67, 58 A.3d 243 (2012) (declining to reach merits of challenge to legality of search when "the defendant lacked standing to contest the search of the recreational vehicle because he did not have a reasonable expectation of privacy therein"); *State* v. *Pierre*, 139 Conn. App. 116, 128–29, 54 A.3d 1060 (2012) (declining to address defendant's claim that statement should be suppressed as "fruit of the poisonous tree" where defendant did not have reasonable expectation of privacy in area searched), aff'd, 311 Conn. 507, 88 A.3d 489 (2014); *State* v. *Manson*, 13 Conn. App. 220, 221–22, 535 A.2d 829 (1988) (where defendant passenger claimed that police lacked sufficient articulable grounds to conduct investigatory stop and that court improperly denied motion to suppress, court held that "[u]nless this defendant can establish . . . that he had a reasonable expectation of privacy in the area of the vehicle searched, we need not reach those claims with respect to him").

matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . .'' (Internal quotation marks omitted.) *State* v. *Long*, 268 Conn. 508, 531, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). The question of standing presents an issue of law over which our review is plenary. *Weiss* v. *Smulders*, 313 Conn. 227, 239, 96 A.3d 1175 (2014); see also *State* v. *Kalphat*, 285 Conn. 367, 374, 939 A.2d 1165 (2008) (issues raising questions of law in context of motion to suppress subject to plenary review).

In conducting that plenary review, the factual findings underlying a court's decision on a motion to suppress ''will not be disturbed unless [they are] clearly erroneous in view of the evidence and pleadings in the whole record. . . . [H]owever, when a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence.'' (Internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 519, 88 A.3d 491 (2014).

A

As a preliminary matter, we note that the parties presented differing views of the applicable legal standard at the suppression hearing. The state relied on Connecticut precedent, and *State* v. *Thomas*, supra, 98 Conn. App. 542, in particular. In *Thomas*, this court held in relevant part that ''[i]n order to challenge a search or seizure on fourth amendment grounds, a defendant must show that he has a reasonable expectation of privacy in the place searched. . . . A passenger

in a motor vehicle, who fails to demonstrate a possessory interest in the car itself or in any of the seized evidence, has no reasonable expectation of privacy in the area of the vehicle searched, and thus, he is precluded from contesting the validity of the search. . . . [B]ecause the defendant did not establish an expectation of privacy in the areas of the automobile that were searched, he has no standing to challenge the constitutionality of the search." (Citations omitted; internal quotation marks omitted.) Id., 550–51; see also *State* v. *Gonzalez*, 278 Conn. 341, 348–49, 898 A.2d 149 (2006) ("the [United States] Supreme Court has long held that a reasonable expectation of privacy in the subject of a search is a prerequisite for fourth amendment protection" [footnote omitted]).

By contrast, the defendant at the suppression hearing submitted that he possessed standing to contest the validity of the search of the vehicle pursuant to *Brendlin* v. *California*, supra, 551 U.S. 249. In *Brendlin*, the United States Supreme Court addressed the question of whether, when a police officer makes a traffic stop, a passenger in the motor vehicle "is seized within the meaning of the [f]ourth [a]mendment." Id., 251. The court answered that query in the affirmative, stating that "a passenger is seized . . . and so may challenge the constitutionality of the stop." Id. The defendant in that case was a passenger in a motor vehicle that was stopped to verify the validity of a temporary operating permit. Id., 251. During the course of the investigatory stop, the police discovered that the defendant "was a parole violator with an outstanding no-bail warrant for his arrest." Id., 252. The police thus ordered the defendant to exit the vehicle and placed him under arrest. Id. When they then conducted a search "incident to [that] arrest, they found an orange syringe cap on his person." Id. A subsequent search of the vehicle disclosed "tubing, a scale, and other things used to produce methamphetamine." Id.

Significantly, *Brendlin* concerned only the seizure of a passenger, and not the search of the vehicle itself. As the United States Supreme Court made clear, the defendant "moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop. He did not assert that his Fourth Amendment rights were violated by the search of [the] vehicle, cf. *Rakas* v. *Illinois*, [439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)],[6] but claimed *only* that the traffic stop was an unlawful seizure of his person." (Emphasis added; footnote added.) *Brendlin* v. *California*, supra, 551 U.S. 253. *Brendlin* therefore has little bearing on the question of whether a passenger has standing to challenge the search of a motor vehicle and the seizure of items contained therein.[7] See, e.g., *United States* v. *Wilbourn*, 799 F.3d 900, 908 (7th Cir. 2015) ("Passengers in cars stopped by police are deemed 'seized' for Fourth Amendment purposes and are entitled to challenge the constitutionality of the detention. *Brendlin* v. *California*, [supra, 249]. This principle, however, does not extend so far that it recognizes a legitimate expectation of privacy for passengers who do not have a possessory interest in a vehicle."); *United States* v. *Symonevich*, 688 F.3d 12, 19 (1st Cir. 2012) (explaining that *Brendlin* does "not extend Fourth Amendment rights to passengers who

[6] In *Rakas* v. *Illinois*, supra, 439 U.S. 143, the United States Supreme Court recognized that a person has standing to raise a fourth amendment challenge to a search of a motor vehicle only if that person can demonstrate "a legitimate expectation of privacy in the invaded place." As our Supreme Court has observed, "[a]bsent such an expectation, the subsequent police action has no constitutional ramifications." (Internal quotation marks omitted.) *State* v. *Mooney*, 218 Conn. 85, 94, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991).

[7] We reiterate that the defendant, in his June 17, 2013 motion to suppress, challenged the "search and seizure *of the vehicle* occupied by the defendant . . . ." (Emphasis added.) That motion contains no claim regarding any seizure of the defendant himself.

challenge only the search of the vehicle in which they were traveling"); *Atkins* v. *Commonwealth*, 57 Va. App. 2, 12, 698 S.E.2d 249 (2010) ("[b]y its own language, *Brendlin* does not address whether a passenger can challenge the legality of a search of the vehicle in which he is a passenger").

It therefore is not surprising that, in the years since *Brendlin* was decided, the appellate courts of this state have adhered to the reasonable expectation of privacy standard in assessing whether a defendant possesses the requisite standing to contest the search of a motor vehicle or items discovered therein. See, e.g., *State* v. *Boyd*, supra, 295 Conn. 718; *State* v. *Michael D.*, 153 Conn. App. 296, 304–305, 101 A.3d 298, cert. denied, 314 Conn. 951, 103 A.3d 978 (2014); *State* v. *Jevarjian*, 124 Conn. App. 331, 338, 4 A.3d 1231 (2010), appeal dismissed, 307 Conn. 559, 58 A.3d 243 (2012); *State* v. *Vallejo*, 102 Conn. App. 628, 635–36, 926 A.2d 681, cert. denied, 284 Conn. 912, 931 A.2d 934 (2007). Accordingly, to "meet this rule of standing, the defendant must demonstrate that he had a reasonable expectation of privacy in the area or subject of the search." *State* v. *Kimble*, 106 Conn. App. 572, 583, 942 A.2d 527, cert. denied, 286 Conn. 912, 950 A.2d 1289 (2008).

B

With that legal standard in mind, we turn our attention to the present case. Following a suppression hearing, the court orally denied the state's request to deny the motion to suppress for lack of standing. Because a determination that the defendant possessed a reasonable expectation of privacy was a necessary prerequisite to the court's conclusion that the defendant had standing to contest the search of the vehicle; see *State* v. *Davis*, 283 Conn. 280, 313, 929 A.2d 278 (2007) ("a defendant may not invoke the fourth amendment to challenge the legality of a search unless he first can establish a legitimate

expectation of privacy in the area searched"); the issue is whether such a determination is substantiated by the record before us.

"The burden of proving the existence of a reasonable expectation of privacy rests on the defendant." *State* v. *Gonzalez*, supra, 278 Conn. 349; see also *State* v. *Kalphat*, supra, 285 Conn. 375 (defendant bears burden of establishing facts necessary to demonstrate basis for standing). To establish a reasonable expectation of privacy, the defendant bore the burden of demonstrating both (1) that he manifested a subjective expectation of privacy in the area of vehicle searched and (2) that his expectation was one that society would consider reasonable. See *State* v. *Boyd*, supra, 295 Conn. 718. Yet the defendant did not offer any testimonial or documentary evidence whatsoever at the suppression hearing. The defendant did not testify at that hearing and at no time did he assert a possessory interest in either the vehicle or the items discovered therein.[8] Put simply, the record is bereft of any evidence of such an interest.

Our precedent instructs that "[p]assengers in an automobile, neither claiming nor demonstrating a possessory interest in the automobile, generally are regarded as lacking a reasonable expectation of privacy in the automobile." *State* v. *Kimble*, supra, 106 Conn. App. 584; accord *United States* v. *Anguiano*, 795 F.3d 873, 878 (8th Cir. 2015) ("a mere passenger does not have standing to challenge a vehicle search where he has neither a property nor a possessory interest in the automobile" [internal quotation marks omitted]); *State* v. *Burns*, 23 Conn. App. 602, 612, 583 A.2d 1296 (1990) ("[t]he defendant acknowledges that he was merely a passenger and that mere passengers in an automobile are generally regarded as lacking a legitimate expectation of privacy in that

[8] Santos indicated at the suppression hearing that the defendant was not the owner of the vehicle.

car"); *State* v. *Delarosa*, 16 Conn. App. 18, 32, 547 A.2d 47 (1988) ("[a] passenger in a motor vehicle, who fails to demonstrate a possessory interest in the car itself or in any of the seized evidence, has no reasonable expectation of privacy in the area of the vehicle searched, and thus, he is precluded from contesting the validity of the search"); cf. *Rakas* v. *Illinois*, supra, 439 U.S. 148–49 (passenger in vehicle generally does not have expectation of privacy in vehicle's glove compartment, trunk, or underseat area); *United States* v. *Barber*, 777 F.3d 1303, 1305 (11th Cir. 2015) (distinguishing between passenger's "expectation of privacy in a car" and "a passenger's expectation of privacy in a bag within a car" and holding that defendant "had standing to challenge the search of his bag, even if he lacked standing to contest the search of the car"); *People* v. *Lewis*, 217 App. Div. 2d 591, 593, 629 N.Y.S.2d 455 (1995) ("the defendant had a reasonable expectation that the privacy of the locked briefcase entrusted to him [by his uncle] would be maintained" when found on backseat of vehicle he was driving).

In addition, it is a fundamental tenet of fourth amendment jurisprudence that a defendant has no reasonable expectation of privacy in contraband that plainly is visible to officers outside the vehicle. See *Texas* v. *Brown*, 460 U.S. 730, 740, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) ("[t]here is no legitimate expectation of privacy . . . shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by . . . diligent police officers" [citation omitted]); *United States* v. *Rascon-Ortiz*, 994 F.2d 749, 754 (10th Cir. 1993) ("there is no legitimate expectation of privacy in a car's interior if an officer looks through the car's window and observes contraband in plain view"); *United States* v. *Ramos*, 960 F.2d 1065, 1067 (D.C. Cir. 1992) ("the fourth amendment provides protection to the owner of only a container that conceals its contents from plain view").

A review of the record reveals that the defendant was merely a passenger in a vehicle in which contraband was discovered, which contraband Santos observed from the outside of the vehicle. We agree with the state that the present case is materially indistinguishable from *State* v. *Thomas*, supra, 98 Conn. App. 542, in which "[t]he defendant conceded . . . that he was merely a passenger and claimed neither an ownership nor a possessory interest in the [vehicle] or in any of the seized items. He also has not shown a reasonable expectation of privacy in the areas of the [vehicle] that were searched." Id., 551. For that reason, this court concluded that the defendant "has no standing to challenge the constitutionality of the search." Id. That logic compels a similar conclusion in the present case.

Because the issue of standing was raised at the outset of the suppression hearing, it was incumbent on the defendant to provide an evidentiary basis on which the trial court reasonably could conclude that he possessed an expectation of privacy in the rear floor area of the vehicle where the evidence was seized.[9] See *State* v. *Gonzalez*, supra, 278 Conn. 348–49 ("a reasonable expectation of privacy in the subject of a search is a prerequisite for fourth amendment protection" [footnote omitted]). It nevertheless remains that the defendant presented no evidence of such an expectation of privacy. Cf. *United States* v. *McCaster*, United States Court of Appeals, Docket No. 94-599968 (6th Cir. October 19, 1995) (defendant "lacked a reasonable expectation of privacy in . . . the bag of cocaine found in plain view on floorboard" of acquaintance's vehicle); *State* v. *Reldan*, 100 N.J. 187, 203, 495 A.2d 76 (1985) (floor of vehicle not area "entitled to a justifiable expectation

[9] Santos testified at the suppression hearing that the digital scale, the plastic bag containing an off-white substance, the cigarette containing contraband, and the bag containing cigar tubes all were located "[o]n the floor board of the vehicle . . . near the [defendant's] feet."

of privacy"). Given that dearth of evidence, the defendant cannot meet his burden of establishing a reasonable expectation of privacy in the area of the vehicle searched. See *State* v. *Burns*, supra, 23 Conn. App. 612 (defendant lacked standing to contest search because "there was no evidence to show" he possessed reasonable expectation of privacy); *State* v. *Haynes*, 7 Conn. App. 550, 553, 509 A.2d 557 (1986) ("[T]he defendant did not show that he subjectively believed that the bag would remain hidden either by introducing direct evidence of his belief, or by introducing circumstantial evidence from which the trial court could have inferred such a belief. Nor did he introduce evidence showing that any subjective expectation of privacy that he had was reasonable."). Indeed, the defendant has not identified any evidence of such an expectation in his appellate brief.[10]

On our careful review of the record of the suppression hearing, we conclude that there is no basis on which the court could find that the defendant satisfied his burden of proving the existence of a reasonable expectation of privacy in the area of the vehicle searched. He thus lacked standing to challenge the legality of that search. Accordingly, the denial of the defendant's motion to suppress was not improper.

II

In light of our resolution of that claim, the defendant cannot prevail on his ancillary contention that his conviction for failure to appear must be vacated because it stems from an improper verdict on the underlying charge of possession of narcotics with intent to sell. As the defendant acknowledges in his appellate brief, that claim is entirely dependent on the success of his fourth amendment challenge to the search of the vehicle and seizure of the evidence recovered therefrom. Given

[10] The defendant did not file a reply brief in this appeal.

our disposition in part I of this opinion, this ancillary claim too must fail.[11]

The judgments are affirmed.

In this opinion the other judges concurred.

JOHN M. WIBLYI, JR. *v.* MCDONALD'S CORPORATION ET AL.
(AC 37303)

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

Syllabus

The plaintiff employee appealed to this court from the decision of the Workers' Compensation Review Board remanding his claim for certain benefits to the Workers' Compensation Commissioner to reconsider his findings on the plaintiff's motion to preclude the defendant employer, M Co., from contesting the compensability of an injury the plaintiff allegedly sustained at work. The commissioner had denied the motion to preclude on the basis of M Co.'s assertion of laches and prejudice. The commissioner found, inter alia, that the plaintiff was responsible for workers' compensation matters while working for M Co., and that although he timely filed a form 30C notifying M Co. that he was seeking compensation for the injury, the matter had been dormant for eleven years until the plaintiff filed the motion to preclude. The commissioner further found that M Co. had failed to timely notify the plaintiff of its intent to contest liability by filing the form 43 required by statute (§ 31-294c) within twenty-eight days of receipt of the form 30C. The plaintiff appealed to the board, claiming that the commissioner had erred, as a matter of law, by applying the equitable defense of laches to deny the motion to preclude. M Co. cross appealed, claiming that the plaintiff had failed to prove that he timely filed the form 30C so as to trigger the twenty-eight day limitation for filing the form 43. The board determined that the equitable defense of laches was not applicable, but that the commissioner failed to provide subordinate findings to support his conclusion that the plaintiff had filed the form 30C with M Co. The board also determined that certain evidence was lacking to support the plaintiff's testimony that he mailed the form 30C to M Co. Although the board noted that it was the commissioner's responsibility to assess witness credibility, the board further determined that there were ambiguities in the record that did not necessarily support the inferences that

[11] We therefore express no opinion as to the viability of the defendant's claim.

the commissioner drew from the plaintiff's testimony to support the finding that the plaintiff properly served the form 30C on M Co. On appeal to this court, the plaintiff claimed that the board abused its discretion by ordering the commissioner to reconsider his findings as to the motion to preclude. The plaintiff claimed that the commissioner's findings were supported by the evidence and, thus, were binding on the board. *Held* that the board abused its discretion in remanding the matter to the commissioner on the ground that it found ambiguity in the evidence, the board having improperly reassessed the credibility of witnesses and weighed the evidence: although the record contained conflicting evidence, the commissioner's findings were not inconsistent or contradictory, but were supported by evidence that he credited and from which he drew reasonable inferences that the plaintiff timely filed a form 30C notice of claim and that M Co. did not timely file a form 43 notice of intent to contest liability; furthermore, the evidence in the record showed that the plaintiff was responsible for workers' compensation matters while he worked for M Co., that a coworker was aware of the injury and the form 30C, that the plaintiff mailed the form 30C to M Co. and to the commissioner, that the commissioner had received the form 30C from the plaintiff and an untimely form 43 from M Co., and that testimony indicated M Co. had destroyed the plaintiff's records; accordingly, the decision of the board was reversed and the matter was remanded to the board with direction to affirm the commissioner's decisions and to remand the matter to the commissioner for further proceedings.

Argued April 6—officially released September 6, 2016

Procedural History

Appeal and cross appeal from the decision of the Workers' Compensation Commissioner for the Eighth District denying the plaintiff's motion to preclude the defendants from contesting liability as to his claim for certain workers' compensation benefits, brought to the Workers' Compensation Review Board, which found error in the commissioner's decision and remanded the matter to the commissioner for further proceedings, and the plaintiff appealed to this court. *Reversed; decision directed; further proceedings.*

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellant (plaintiff).

John B. Cantarella, for the appellees (defendants).

MULLINS, J. The plaintiff, John M. Wiblyi, Jr., appeals from the decision of the Workers' Compensation Review Board (board)[1] remanding, in part, and ordering the Workers' Compensation Commissioner (commissioner) to conduct further proceedings on the plaintiff's motion to preclude the form 43 disclaimer[2] filed by the defendant McDonald's Corporation.[3] We conclude that the board improperly remanded the matter with direction that the commissioner, essentially, reconsider his findings on the ground that there were "ambiguities in the record . . . ."

We begin with the underlying facts as found by the commissioner. After hearing the evidence presented on the plaintiff's motion to preclude, the commissioner issued the following written decision:

[1] General Statutes § 31-301b provides: "Any party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263."

We note that although § 31-301b has been amended since the events at issue here, that amendment is not relevant to this appeal. For convenience, we refer to the current revision of § 31-301b.

[2] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.2, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012). The form 43 generally must be filed within twenty-eight days of receiving written notice of the claim. See General Statutes § 31-294c, cited in footnote 12 of this opinion.

[3] Additional defendants on appeal are Bridgestone Firestone and Gallagher Bassett Services, the defendant's insurer. For simplicity, however, we refer to McDonald's Corporation as the defendant in this appeal.

We also note that the defendant has filed a separate appeal challenging that portion of the board's decision affirming the commissioner's determination that laches and prejudice did not apply to this case. See *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 144 A.3d 530 (2016).

"1. This matter has been the subject of many hearings, including a [Workers' Compensation Review Board] appeal that affirmed a bifurcation issue in regards to the motion to preclude issue before the undersigned.

"2. In regards to this motion to preclude issue, the [plaintiff], citing case law, contends [that] the [defendant] . . . should be precluded from contesting the liability of this claim and seeks an award of benefits.

"3. The [defendant] . . . contends the motion to preclude should be denied based on several grounds, particularly laches and prejudice, and the liability of this matter should be determined on the merits.[4]

"4. The [plaintiff] properly filed a timely notice of claim on [June 28, 2000] for a [September 8, 1999] injury.

"5. The [defendant] . . . did not file a form 43 denial within twenty-eight days of receipt of the form 30C.[5]

"6. The claim was dormant for many years. Many of the original handlers of the claim for the [defendant] are no longer available and some documents no longer exist.

"7. Testimony from both sides was heard, as well as oral argument. Exhibits A through F, and one through four, were entered into the record.

"WHEREFORE, BASED ON ALL THE EVIDENCE, I HEREBY . . . CONCLUDE THAT:

"8. Based on the totality of the circumstances, I hereby deny the [plaintiff's] motion to preclude. I am

[4] The record reveals that the defendant opposed the plaintiff's motion to preclude on the basis of "(1) Improper service of the motion to preclude; (2) a timely denial was filed under General Statutes § 31-294c (b); and (3) laches."

[5] "A form 30C is the name of the form prescribed by the workers' compensation commission of Connecticut for use in filing a notice of claim under the [Workers' Compensation Act, General Statutes § 31-275 et seq.]." *Russell* v. *Mystic Seaport Museum, Inc.*, 252 Conn. 596, 619 n.11, 748 A.2d 278 (2000).

persuaded by the [defendant's] position on this issue, particularly as to the laches and prejudice claim, as this motion to preclude was filed eleven years after the filing of the [September 8, 1999] injury claim. See *Kalinowski* v. *Meriden*, [No. 5028, CRB-8-05-11 (January 24, 2007)]. See also prejudice section in General Statutes § 31-294.[6] The *Harpaz/Donahue* line of cases do not apply, as this may now constitute an exception. [See *Harpaz* v. *Laidlaw Transit, Inc.*, 286 Conn. 102, 942 A.2d 396 (2008), and *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 970 A.2d 630 (2009).]

"9. This matter shall now proceed on the merits.

"10. This matter shall remain open subject to future hearings at the request of the parties or district office.

"IT IS SO ORDERED." (Footnotes added.)

Following the commissioner's denial of the motion to preclude, both the plaintiff and the defendant filed motions to correct. The plaintiff requested that the commissioner delete paragraph six of his decision and delete paragraph eight and change his conclusion. The defendant requested that the commissioner modify paragraph four to state, in part, that there was no credible evidence that the plaintiff properly served notice of claim on the defendant, and delete paragraph five in its entirety. The commissioner entered simple denials on both motions.

Thereafter, both the plaintiff and the defendant appealed to the board. The plaintiff appealed on the ground that the commissioner erred as a matter of law by applying the equitable defense of laches. The defendant cross appealed on the ground that the plaintiff failed to prove, as a matter of law and fact, that a "form 30C was filed upon the [defendant] . . . according to

[6] We note that § 31-294 was repealed in 1991. We assume, without deciding, that the commissioner actually was referring to General Statutes § 31-294c.

Connecticut law such that the 28 [day] rule to file a denial was triggered . . . ."

After hearing the appeal, the board agreed with the plaintiff that the equitable doctrine of laches did not apply, holding: "Nowhere in [§ 31-294c (b)] did the legislature indicate that a [defendant] can defeat an otherwise valid motion to preclude through the affirmative defense of laches . . . ."[7]

In considering the defendant's claim that the plaintiff had failed to prove that he had filed a form 30C with the defendant, which would have triggered the defendant's obligation to file a form 43 disclaimer within twenty-eight days, the board found that the record contained ambiguities and that the case needed to be remanded for further proceedings. Specifically, the board concluded that the commissioner failed to provide the "subordinate findings in support of [his] conclusion . . . [and that] . . . [its] review of the totality of the evidence reveals ambiguities in the record [that] would not necessarily support the inferences apparently drawn by the trier." The board noted that there were no "green cards" in evidence to support the plaintiff's assertion that he mailed both form 30Cs by certified mail and that, therefore, it was likely that the commissioner relied on the plaintiff's testimony to support a finding that the plaintiff properly served the form 30C.

The board also correctly pointed out that it is the responsibility of the commissioner to assess the credibility of witnesses, but it then stated that "in the instant matter, there exist inconsistencies in the testimony which do not allow us to afford the customary deference we generally extend to credibility findings." The board

[7] This determination is the subject of a separate appeal brought by the defendant. See *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 144 A.3d 530 (2016).

then examined areas of inconsistencies in the record,[8] and found that "the documentary evidence submitted into the instant record is not consistent with either the stipulation[9] offered by [the defendant's] counsel or the [plaintiff's] testimony. In light of this ambiguity, it simply cannot be determined whether the [plaintiff] provided sufficient notice of his claim to the [defendant]." (Footnote added.) The board then concluded that the commissioner should not have denied the motions to correct "insofar as the trial commissioner's denial of the proposed corrections was inconsistent with the findings presented herein," and it remanded the case "for additional proceedings consistent with [its] opinion." Both parties then appealed to this court.[10] The plaintiff's appeal is considered herein; the defendant's

[8] The board pointed to conflicting evidence in the record, such as the variance between some of the documentary evidence and the parties' stipulation of facts. We note that although the commissioner may decline, in some instances, to accept such a stipulation or to permit a withdrawal or modification thereof, the mere fact that there is contradictory evidence does not render the stipulation incompetent evidence. "A formal stipulation of facts by the parties to an action constitutes a mutual judicial admission and under ordinary circumstances should be adopted by the court in deciding the case. . . . A party is bound by a judicial admission unless the court, in the exercise of a reasonable discretion, allows the admission to be withdrawn, explained or modified." (Citation omitted; internal quotation marks omitted.) *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 745, 873 A.2d 898 (2005).

[9] During the hearing before the commissioner, the plaintiff's attorney specifically sought clarification as to whether "there [was] any dispute [that the plaintiff] was an employee in 1999 or at the time which he filed his form 30C." The defendant's counsel responded: "No, no." The commissioner then stated: "All right. So, let's move on. So noted for the record. [The plaintiff] at the time of his claimed injury of September 8, 1999, and at the time of the filing of the 30C received by the [compensation] office on June 28, 2000, was an employee of the [defendant]. So stipulated."

[10] The plaintiff contends that the board essentially remanded the case to the commissioner for an articulation, which, it argues, was improper because no articulation is necessary. We conclude that the remand order is ambiguous, but that it appears to ask the commissioner to reconsider his findings and conclusions in light of the ambiguities in the evidence as set forth in the board's decision.

appeal is considered in AC 37304, *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 144 A.3d 530 (2016), issued today also.

On appeal, the plaintiff contends that the board went well beyond its authority and abused its discretion by attempting to weigh the credibility of the witnesses who testified before the commissioner and by attempting to retry the facts of the case. He argues that the obligation to weigh credibility and to decide contested issues of fact lies with the commissioner. He further argues that, provided there is evidence in the record to support the commissioner's findings, the board is without authority to remand the matter for the commissioner to reassess the evidence simply because the facts were disputed, and the board did not like the manner in which the commissioner weighed the evidence and made his findings.

We conclude that, although there were inconsistencies and conflicts in the evidence presented to the commission, the commissioner's findings were not inconsistent or contradictory; they were supported by the evidence. Accordingly, we further conclude that the board improperly reassessed the credibility of the witnesses and weighed the evidence, thereby usurping the authority of the commissioner.

We begin by setting forth the well established standard of review applicable to workers' compensation appeals. "The commissioner has the power and duty, as the trier of fact, to determine the facts . . . and [n]either the . . . board nor this court has the power to retry facts. . . . The conclusions drawn by [the commissioner] from the facts found [also] must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we

accord great weight to the construction given to the workers' compensation statutes by the commissioner and review board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Furthermore, [i]t is well established that, in resolving issues of statutory construction under the act, we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Citations omitted; internal quotation marks omitted.) *Hart* v. *Federal Express Corp.*, 321 Conn. 1, 18–19, 135 A.3d 38 (2016); see also Regs., Conn. State Agencies § 31-301-8.[11]

[11] Section 31-301-8 of the Regulations of Connecticut State Agencies provides: "Ordinarily, appeals are heard by the compensation review division upon the certified copy of the record filed by the commissioner. In such cases the division will not retry the facts or hear evidence. It considers no evidence other than that certified to it by the commissioner, and then for the limited purpose of determining whether the finding should be corrected, or whether there was any evidence to support in law the conclusion reached. It cannot review the conclusions of the commissioner when these depend upon the weight of the evidence and the credibility of witnesses. Its power in the corrections of the finding of the commissioner is analogous to, and

"Our scope of review of the actions of the board is similarly limited. . . . The role of this court is to determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, 145 Conn. App. 261, 268, 76 A.3d 657, cert. denied, 310 Conn. 935, 78 A.3d 859 (2013).

"In deciding a motion to preclude, the commissioner must engage [in] a two part inquiry. First, he must determine whether the employee's notice of claim is adequate on its face. See General Statutes § 31-294c (a). Second, he must decide whether the employer failed to comply with § 31-294c either by filing a notice to contest the claim or by commencing payment on that claim within twenty-eight days of the notice of claim. See General Statutes § 31-294c (b).[12] If the notice of

its method of correcting the finding similar to the power and method of the Supreme Court in correcting the findings of the trial court."

[12] General Statutes § 31-294c provides in relevant part: "(a) No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury . . . . Notice of a claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. . . .

"(b) Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he

claim is adequate but the employer fails to comply with

has received the written notice of claim, the employer shall commence payment of compensation for such injury . . . on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury . . . on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death.

"(c) Failure to provide a notice of claim under subsection (a) of this section shall not bar maintenance of the proceedings if there has been a hearing or a written request for a hearing or an assignment for a hearing within a one-year period from the date of the accident or within a three-year period from the first manifestation of a symptom of the occupational disease, as the case may be, or if a voluntary agreement has been submitted within the applicable period, or if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as provided in section 31-294d. No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice. Upon satisfactory showing of ignorance and prejudice, the employer shall receive allowance to the extent of the prejudice. . . ."

We note that although § 31-294c has been amended since the events at issue here, that amendment is not relevant to this appeal. For convenience, we refer to the current revision of § 31-294c.

the statute, then the motion to preclude must be granted." (Internal quotation marks omitted.) Id.

Here, the plaintiff contends that the board abused its discretion by ordering the commissioner to hold further proceedings because there were ambiguities in the evidence used by the commissioner in making his findings. The plaintiff argues that the commissioner's findings, which have support in the evidence, are binding on the board. The defendant argues that the board acted properly because "[t]he [plaintiff] has not met [his] burden of proof by a preponderance of evidence, as a matter of law, that the [plaintiff] properly served [the] notice of claim to [the defendant], thereby 'triggering' the preclusion statute."[13] Throughout its brief, the defendant argues about the lack of credibility in the plaintiff's evidence. We agree with the plaintiff.

"Whether a case should be remanded [to the commissioner], and the scope of that remand, presents questions to be determined by the compensation review board in the exercise of its sound discretion. . . . The actions of the board will not be disturbed unless the board has abused its broad discretion." (Citation omitted; internal quotation marks omitted.) *Fantasia* v. *Milford Fastening Systems*, 86 Conn. App. 270, 278, 860 A.2d 779 (2004), cert. denied, 272 Conn. 919, 866 A.2d 1286 (2005). "In workers' compensation cases, motions [for articulation] are granted when the basis of the commissioner's conclusion is unclear. . . . When a commissioner's findings are too ambiguous to serve as a basis for appellate review, it may be appropriate for the reviewing court to remand the case to the commissioner for further articulation."[14] (Citation omitted; internal quotation marks omitted.) Id., 280.

[13] The defendant also contends that the "motion to preclude must be denied as no medical documentation of a work-related injury" was presented. This issue is not before us, and we decline to address it.

[14] "Although the customary practice of the board is not a definitive indication of the boundaries of its statutory authority, it should be noted that the

In this case, the commissioner specifically found that the plaintiff properly had filed a timely notice of claim on June 28, 2000, for a September 8, 1999 injury, and that the defendant did not timely file a form 43 denial within twenty-eight days of receipt of the form 30C. Although we certainly agree with the board that there is conflicting evidence in the record, we conclude the record contains evidence to support the commissioner's findings. See *Hart* v. *Federal Express Corp.*, supra, 321 Conn. 18–19 ("commissioner has the power and duty . . . to determine the facts . . . and [n]either the . . . board nor this court has the power to retry facts" [internal quotation marks omitted]).

Specifically, the record contains evidence that the plaintiff worked for the defendant during the 1990s and was responsible for recruiting, training, safety training, and workers' compensation matters. He became the senior human resource person, and he had a "strong knowledge" of workers' compensation. His job duties included accepting and denying workers' compensation

board routinely has remanded cases to the commissioner for articulation when the commissioner's *findings* appeared to be inherently inconsistent. See *Ortiz* v. *Highland Sanitation*, No. 4439 CRB-4-01-9 (November 12, 2002) ('[w]e have held that, where the findings of a trial commissioner appear to be inherently inconsistent amongst themselves, or with the trier's conclusions, the correct approach is to remand the matter [to the commissioner] for clarification'); *Krajewski* v. *Atlantic Machine Tool Works, Inc.*, No. 4500, CRB-6-02-3 (March 7, 2003) (affirming in part and remanding one issue 'solely for an articulation of the basis of the [commissioner's] decision to dismiss [the] claim'); see also A. Sevarino, Connecticut Workers' Compensation After Reforms (3d Ed. 2002) § 10.85.2, p. 1453 ('where the facts found are inconsistent with the Workers' Compensation Commissioner's conclusions, the [board] will remand the matter back to the [commissioner]')." (Emphasis added.) *Fantasia* v. *Milford Fastening Systems*, supra, 86 Conn. App. 280 n.4.

One cannot conclude that a trial commissioner's *factual findings* are inherently flawed, however, merely because contradictory *evidence* has been presented. It is the duty of the trier of fact to weigh such evidence and come to a conclusion on the basis thereof. See *Hart* v. *Federal Express Corp.*, supra, 321 Conn. 18 ("commissioner has the power and duty . . . to determine the facts" [internal quotation marks omitted]).

claims that would be sent from the defendant's employees. The plaintiff testified that he was aware that form 30C had to be sent by certified mail.[15]

The record also reveals that, on September 8, 1999, the plaintiff injured his knees when he fell in the mail room at work, and that his injury was witnessed by a coworker, Frank Niceta. The plaintiff also testified that, while sitting in his office cubicle at the defendant's premises in June, 2000, he filled out and "certainly" mailed a copy of form 30C to both the defendant and the commissioner.[16] He believed that he sent them both via certified mail, but he no longer had the green certified mail cards as proof. He also testified that, because Niceta was aware of the injury and the form 30C, his filling out the form at his desk also qualified as notice to the defendant. The record also reveals that the commissioner received the plaintiff's form 30C on June 28, 2000, and marked it "Received Certified" on that date. On August 3, 2000, the commissioner also received by certified mail a form 43 from the defendant.

[15] We note that General Statutes § 31-321 also permits personal service of form 30C on a defendant: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. Notices on behalf of a minor shall be given by or to such minor's parent or guardian or, if there is no parent or guardian, then by or to such minor."

[16] Although the defendant contests whether the plaintiff, in fact, worked for it in June, 2000, when he filed his form 30C, during the hearing before the commissioner, the defendant stipulated that it was not disputing whether the plaintiff was an employee at the time he filed his form 30C. Specifically, the plaintiff's counsel had asked: "Is there any dispute [that the plaintiff] was an employee in 1999 or at the time which he filed his form 30C?" The defendant's counsel responded: "No, no." As set forth in footnote 9 of this opinion, the commissioner then stated: "All right. So, let's move on. So noted for the record. [The plaintiff] at the time of his claimed injury of September 8, 1999, and at the time of the filing of the 30C received by the [compensation] office on June 28, 2000, was an employee of the [defendant]. So stipulated."

The record also reveals that Christopher James Cornaglia II, a human resources consultant for the defendant, testified that the defendant had destroyed the plaintiff's records, which had been subpoenaed by the plaintiff's counsel. He explained that the records were destroyed because the defendant keeps files for only six years after an employee leaves his employment with the defendant. In response to that testimony, Cornaglia specifically was asked by the plaintiff's attorney: "Are you saying, your testimony is that [the defendant] shreds and throws out or rips up or disposes . . . in some manner all workers' compensation files that are claimed in a timely fashion within six years? Because they are making new law if they are doing that. Is that what your testimony is?" Cornaglia responded: "Files are kept for six years after employment."[17] The plaintiff's counsel then asked the commissioner to make "a negative inference . . . with regards to whether [the defendant] . . . actually [had] in [its] possession the green cards or the receipt certifications or stamped-in items with regards to the 30C that was filed [by the plaintiff]." The commissioner responded: "That is something I'll take up at the end."

On the basis of this evidence, which the commissioner appears to have credited and from which he drew reasonable inferences, the commissioner concluded that "[t]he [plaintiff] properly filed a timely notice of claim on [June 28, 2000] for a [September 8, 1999] injury" and that "[t]he [defendant] . . . did not file a form 43 denial within twenty-eight days of receipt of the form 30C." We conclude that there is evidence to support these findings and that the board abused its discretion in remanding the matter to the commissioner on the ground that it found ambiguity in the evidence.

[17] Cornaglia also explained that after the six years, a limited electronic file is maintained.

The decision of the Workers' Compensation Review Board is reversed and the case is remanded to the board with direction to affirm the commissioner's decision and to remand the case to the commissioner for further proceedings according to law.

In this opinion the other judges concurred.

JOHN M. WIBLYI, JR. *v.* MCDONALD'S CORPORATION ET AL.
(AC 37304)

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

Syllabus

The defendant M Co. appealed to this court from the decision of the Workers' Compensation Review Board concluding that the equitable doctrine of laches was not available to M Co. as a defense to a motion filed by the plaintiff employee to preclude M Co., pursuant to statute (§ 31-294c [b]), from contesting its liability for an injury he allegedly sustained while employed by M Co. The Workers' Compensation Commissioner had denied the motion to preclude on the basis of M Co.'s assertion of laches and ordered the matter to proceed on the merits. The commissioner found, inter alia, that the plaintiff timely filed a notice of claim that he was seeking compensation for the injury, but that the matter had been dormant for eleven years until the plaintiff filed the motion to preclude. The commissioner further found that M Co. had failed to timely notify the plaintiff of its intent to contest liability, as required by § 31-294c (b). The plaintiff thereafter appealed and M Co. cross appealed to the board. M Co. claimed that the commissioner improperly concluded that the plaintiff had timely filed the notice of claim. The plaintiff claimed that the commissioner erred as a matter of law by applying the equitable defense of laches in denying his motion to preclude. The board determined, inter alia, that because § 31-294c (b) set forth the remedy of claim preclusion and did not provide for a defense of laches, the commissioner was prohibited, as a matter of law, from denying the motion to preclude on the basis of the equitable doctrine of laches. The board further determined that ambiguities in the record did not support certain of the commissioner's findings and remanded the matter to the commissioner to reconsider his findings on the motion to preclude. M Co. thereafter appealed to this court, claiming that the board improperly concluded that laches was not applicable as a defense to the plaintiff's motion to preclude, and that the board therefore should have affirmed the commissioner's decision denying the motion to preclude. *Held* that

the board properly determined as a matter of law that the equitable doctrine of laches did not apply to the plaintiff's motion to preclude: the equitable defense of laches did not extend to the workers' compensation system, which is derived exclusively from statute and provides in § 31-294c (b) a waiver mechanism that bars an employer from contesting the compensability of its employee's claimed injury; moreover, in light of the statutory workers' compensation scheme promulgated by the legislature, this court declined to inject the doctrine of laches into that framework, which does not contain a time period during which a motion to preclude must be filed, as policy determinations as to what injuries are compensable and what jurisdictional limitations apply thereto are matters for the legislature.

Argued April 6—officially released September 6, 2016

Procedural History

Appeal and cross appeal from the decision of the Workers' Compensation Commissioner for the Eighth District denying the plaintiff's motion to preclude the defendants from contesting liability as to his claim for certain workers' compensation benefits, brought to the Workers' Compensation Review Board, which found error in the commissioner's decision and remanded the matter to the commissioner for further proceedings, and the defendants appealed to this court. *Affirmed*.

John B. Cantarella, for the appellants (defendants).

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant McDonald's Corporation[1] appeals from the decision of the Workers' Compensation Review Board (board) finding error in the decision of the Workers' Compensation Commissioner (commissioner). On appeal, the defendant claims that the board improperly concluded, as a matter of law, that the equitable doctrine of laches was not available

[1] Additional defendants on appeal are Bridgestone Firestone and Gallagher Bassett Services, the defendant's insurer. For simplicity, we refer to McDonald's Corporation as the defendant in this appeal.

as a defense to the motion to preclude filed by the plaintiff, John M. Wiblyi, Jr.[2] We disagree and, accordingly, affirm the decision of the board.

The following facts and procedural history are relevant to this appeal. The plaintiff filed a form 30C on June 28, 2000,[3] alleging that he had sustained an injury on September 8, 1999, while in the course of his employment.[4] Specifically, he claimed to have injured his knee after tripping over boxes on the floor. The defendant filed a form 43[5] on August 3, 2000, contesting liability for the injury. Specifically, the defendant stated "that [the] injury did not arise out of or in the course and

[2] General Statutes § 31-301b provides that "[a]ny party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263." This court, therefore, has jurisdiction to review this case.

We note that although § 31-301b has been amended since the events at issue here, that amendment is not relevant to this appeal. For convenience, we refer to the current revision of § 31-301b.

[3] A form 30C is the form "prescribed by the workers' compensation commission of Connecticut for use in filing a notice of claim under the [Workers' Compensation Act, General Statutes § 31-275 et seq.]." *Russell* v. *Mystic Seaport Museum, Inc.*, 252 Conn. 596, 619 n.11, 748 A.2d 278 (2000); see also *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 270, 44 A.3d 197 (well established that plaintiff has burden of proving that he is employee of employer from whom he seeks compensation and properly must initiate claim under General Statutes § 31-294c), cert. denied, 306 Conn. 905, 52 A.3d 731 (2012).

[4] General Statutes § 31-294c (a) provides in relevant part: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident . . . ."

We note that although § 31-294c has been amended since the events at issue here, that amendment is not relevant to this appeal. For convenience, we refer to the current revision of § 31-294c.

[5] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.2, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

scope of employment with [the defendant]. No medical documentation exists which supports causal relationship, disability and treatment recommendations. Delay in reporting incident. No medical treatment sought. Therefore, [defendant intends] to contest liability to pay compensation."[6]

After an extended time period, on February 25, 2010, the plaintiff filed a motion to preclude the defendant from contesting liability. Specifically, the plaintiff argued that the defendant had "failed to file notice contesting liability on or before the twenty-eighth day after it received written notice of claim." He further maintained that, as a result, the defendant conclusively was presumed to have accepted the compensability of his alleged injuries.

On October 11, 2012, the defendant filed an amended objection to the motion to preclude. It set forth the following reasons for its objection: (1) the notice of the claim was insufficient to trigger an investigation; (2) the notice of the claim was served improperly for the purposes of the motion to preclude; (3) there was no prima facie medical report that an injury had occurred; (4) waiver; (5) laches; (6) fraud; and (7) the defendant had filed a proper denial of benefits pursuant to General Statutes § 31-294c. In the attached memorandum of law,

[6] "A workers' compensation claimant must prove five elements to establish a prima facie case under the Workers' Compensation Act (act), General Statutes § 31-275 et seq.: (1) the workers' compensation commission has jurisdiction over the claim; (2) the claim has been timely brought by filing a claim of notice within the requisite time period or by coming within one of the exceptions thereto; (3) the claimant is a qualified claimant under the act; (4) the respondent is a covered employer under the act; and (5) *the claimant has suffered a personal injury as defined by the act arising out of and in the course of employment.* . . . A valid disclaimer contests one or more of the elements of the plaintiff's prima facie case." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Riveiro* v. *Fresh Start Bakeries*, 159 Conn. App. 180, 189, 123 A.3d 35, cert. denied, 319 Conn. 930, 125 A.3d 205 (2015).

the defendant argued that the plaintiff did not seek treatment to be paid by the defendant until approximately February, 2008. It further claimed that the treatment sought by the plaintiff included bilateral knee replacement. With respect to its laches defense, the defendant contended that the plaintiff's delay of nearly ten years before filing the motion to preclude constituted an inexcusable delay. It also claimed that there had been significant proceedings in the two years prior to the filing of the motion to preclude. Further, the defendant argued that it suffered prejudice from the delay because (1) witnesses were unavailable, (2) evidence was lost or destroyed and (3) it had expended significant resources throughout the course of the proceedings.

On August 21, 2013, the defendant filed a memorandum of law in opposition to the motion to preclude. It objected on the following bases: "(1) Improper Service of the Motion to Preclude; (2) a timely denial was filed under [§] 31-294c (b); and (3) Laches." The defendant iterated that there had been an inexcusable delay and that it had suffered prejudice as a result of said delay.

On September 19, 2013, the commissioner denied the plaintiff's motion to preclude. In his decision, the commissioner found that the plaintiff had filed a timely notice of claim on June 28, 2000, and that the defendant had not filed its form 43 within twenty-eight days of receipt of the notice of claim.[7] The commissioner also found that the claim had been dormant for many years and that many of the "original handlers of the claim . . . are no longer available and some documents no longer exist."

The commissioner denied the motion to preclude and ordered the case to proceed on the merits. Specifically,

[7] See *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 80, 144 A.3d 1075 (2016).

the commissioner stated: "Based on the totality of the circumstances, I hereby deny the motion to preclude. I am persuaded by the [defendant's] position on this issue, particularly as to the laches and prejudice claim, as this motion to preclude was filed eleven years after the filing of the [September 8, 1999] injury claim."[8]

The plaintiff appealed to the board from the denial of his motion to preclude. On October 3, 2014, the board issued a decision concluding that the commissioner had erred as a matter of law by applying the equitable doctrine of laches in the context of a motion to preclude, a creature of statute. The board reasoned that the Workers' Compensation Commission is limited by its enabling legislation and must act within its statutory authority. It then examined § 31-294c (b), which sets forth the framework for the filing of a motion to preclude. The board noted that the statute does not provide for a defense of laches. "Given that the remedy of claim preclusion, as set forth in the provisions of § 31-294c (b) . . . is clearly statutory in nature, we find that the [commissioner] was prohibited as a matter of law from denying the motion to preclude on the basis of the equitable doctrine of laches." After noting that statutory language must be given the intent as expressed in the words used by the legislature, the board remanded the matter for additional proceedings to determine whether the statutory requirements for granting a motion to preclude have been satisfied. This appeal followed.

On appeal, the defendant argues that the board improperly concluded the equitable doctrine of laches was not applicable as a defense to a motion to preclude filed pursuant to § 31-294c (b).[9] It further contends that

[8] We note that the finder of fact determines whether a party is guilty of laches. See, e.g., *TD Bank, N.A.* v. *Doran*, 162 Conn. App. 460, 466, 131 A.3d 288 (2016); *Florian* v. *Lenge*, 91 Conn. App. 268, 281, 880 A.2d 985 (2005).

[9] The plaintiff also appealed from the decision of the board. See *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 144 A.3d 1075 (2016). He claimed that the board improperly reconsidered the commissioner's findings that a "form 30C was filed upon the [defendant] . . . according to Connecticut

both elements of laches were satisfied in this case, and therefore the decision of the commissioner should have been affirmed. We conclude that the board properly determined, as a matter of law, that the defense of laches is inapplicable in this case. Therefore the defendant's appeal must fail.

As an initial matter, we set forth the general principles underlying the Workers' Compensation Act (act), General Statutes § 31-275 et seq. "The purpose of the [act] is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer . . . . [The act] compromise[s] an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation. . . . The act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Further, our Supreme Court has recognized that the state of Connecticut has an interest in compensating injured employees to the fullest extent possible . . . . The purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Citation omitted; internal quotation marks omitted.) *Gill* v. *Brescome Barton, Inc.*, 142 Conn. App. 279, 298–99, 68 A.3d 88 (2013), aff'd, 317 Conn. 33, 114 A.3d 1210 (2015); *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 831–32, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

law such that the 28 [day] rule to file a denial was triggered . . . ." (Internal quotation marks omitted.) Id., 81–82. In a separate decision released today, we concluded that the commissioner's findings were not inconsistent and were supported by the record, and that the board improperly reassessed the credibility of the witnesses and weighed the evidence. Id., 84. Accordingly, we reversed the decision of the board. Id., 92.

We next set forth our well established standard of review. "The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board." (Internal quotation marks omitted.) *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 205–206, 76 A.3d 168 (2013).

The issue of whether laches is available as a defense to a motion to preclude has not been decided by either our Supreme Court or this court. Additionally, the board did not indicate that it had relied on a time tested interpretation of § 31-294c (b). We need not defer, therefore, to the board's interpretation of the statute at issue in the present case. "A state agency is not entitled . . . to special deference when its determination of a question of law has not previously been subject to judicial scrutiny. . . . [W]hen . . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to review the administrative decision." (Internal quotation marks omitted.) *Kinsey* v. *World PAC*, 152 Conn. App. 116, 123, 98 A.3d 66 (2014); see also *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 398–99, 999 A.2d 682 (2010); *Perun* v. *Danbury*, 143 Conn. App. 313, 315–16, 67 A.3d 1018 (2013). Further, we are mindful that "[i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *McCullough* v. *Swan Engraving, Inc.*, 320 Conn. 299,

306, 130 A.3d 231 (2016); *Kinsey* v. *World PAC*, supra, 124.

Certain features of workers' compensation law regarding the timeliness of an employer's response to an employee's claim of compensation pursuant to the act underlie our resolution of the defendant's appeal. We first must examine the language of § 31-294c (b), which sets forth the obligations of an employer to preserve its right to contest the claim for workers' compensation benefits. We next consider the purpose behind and effect of an employee's motion to preclude filed in response to the employer's failure to comply with § 31-294c (b).

Section 31-294c (b) provides in relevant part: "Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested. . . . Notwithstanding the provisions of this subsection, *an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim* and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, *shall be conclusively presumed to have accepted the compensability of the alleged injury or death.*" (Emphasis added.) Plainly stated, an employer is required either to file a form 43 or to commence payment of the alleged injury to an employee within twenty-eight days of receiving written notice of the claim from the employee.[10] See, e.g., *Mehan* v. *Stamford*, 127 Conn.

[10] We previously recited our Supreme Court's explanation that "the portion of [§ 31-294c (b)] providing for a conclusive presumption of liability in the event of the employer's failure to provide timely notice was intended to correct some of the glaring inequities of the workers' compensation system, specifically, to remedy the disadvantaged position of the injured employee

App. 619, 626–27, 15 A.3d 1122 (§ 31-294c [b] dictates "strict standards" to employer that seeks to contest liability), cert. denied, 301 Conn. 911, 19 A.3d 180 (2011).

Next, we examine the purpose and effect of a motion to preclude. This motion is filed by an employee following an employer's failure to comply with § 31-294c (b), such as an untimely filed form 43. See id., 623 n.6. "The purpose of the preclusion statute is to ensure (1) that employers would bear the burden of investigating a claim promptly and (2) that employees would be timely apprised of the specific reasons for the denial of their claim. These effects would, in turn, diminish delays in the proceedings, discourage arbitrary refusal of bona fide claims and narrow the legal issues which were to be contested." (Internal quotation marks omitted.) *Chase* v. *State*, 45 Conn. App. 499, 503, 696 A.2d 1299 (1997). One treatise has observed that "[a] Motion to Preclude *acts as a statutorily created waiver mechanism* that requires the [commissioner] to forbid an employer/insurer from raising defenses to its liability for an ostensibly compensable injury if a Form 43 disclaimer is not submitted within 28 days of the filing of a suitable Form 30C." (Emphasis added.) 2 A. Sevarino, Connecticut Workers' Compensation After Reform (J. Passaretti, Jr., ed., 6th Ed. 2014) § 5.14, p. 688.

This court has noted that "[i]n deciding a motion to preclude, the commissioner must engage a two part inquiry. First, he must determine whether the employee's notice of claim is adequate on its face. See General Statutes § 31-294c (a). Second, he must decide whether the employer failed to comply with § 31-294c either by filing a notice to contest the claim or by commencing

. . . ." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, supra, 138 Conn. App. 840; see also *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 209 ("[o]ne reason for the existence of the act is the long recognized disparity in bargaining power that exists between an employee and his employer").

payment on that claim within twenty-eight days of the notice of claim. See General Statutes § 31-294c (b). If the notice of claim is adequate but the employer fails to comply with the statute, then the motion to preclude must be granted." *Callender* v. *Reflexite Corp.*, 137 Conn. App. 324, 338, 49 A.3d 211, cert. granted, 307 Conn. 915, 54 A.3d 179 (2012) (appeal withdrawn September 25, 2013). If the commissioner grants the motion to preclude, then "the employer is precluded from contesting either the compensability of its employee's claimed injury or the extent of the employee's resulting disability." Id., 334; see also *Mehan* v. *Stamford*, supra, 127 Conn. App. 630 (employer divested of right to contest liability for claim following granting of motion to preclude).[11]

We now return to the specifics of the present case. The commissioner found that the plaintiff timely filed notice of his claim of a compensable injury via the form 30C on June 28, 2000. See General Statutes § 31-294c (a). The defendant did not file its form 43, contesting its liability to pay compensation for the plaintiff's injury, until August 3, 2000. The defendant, therefore, failed

[11] Our Supreme Court has described this rule as a "harsh" penalty but one that results in a fair and just result. *Harpaz* v. *Laidlaw Transit, Inc.*, 286 Conn. 102, 130, 942 A.2d 396 (2008). It further recognized, however, that "[a]n employer readily can avoid the conclusive presumption by either filing a timely notice of contest or commencing timely payment of compensation with the right to repayment if the employer prevails. Should the employer's timely and reasonable investigation reveal that an issue regarding the extent of disability has not yet manifested, the employer still can preserve its right to contest that issue at some later point in time simply by paying the compensation due under the claim, even if all that is due is payment of medical bills." (Internal quotation marks omitted.) Id., 130–31.

Additionally, we have noted that an equally severe result will befall an employee who fails to file his or her claim for workers' compensation benefits within the statutorily mandated time period. "While preclusion has been described as a 'harsh remedy,' it is no less harsh than the strict statutory time period within which the employee must file his claim and notify his employer of the claim or otherwise relinquish it." *Callender* v. *Reflexite Corp.*, supra, 137 Conn. App. 334 n.14.

to comply with the mandate of § 31-294c (b) because its form 43 was not filed within twenty-eight days of receiving written notice of the claim.[12] See *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 91, 144 A.3d 1075 (2016).

The plaintiff did not file his motion to preclude until February 25, 2010, approximately nine and one-half years after the filing of the defendant's form 43. In its objection to the motion to preclude, the defendant argued, inter alia, that the plaintiff was barred by laches from proceeding with the motion to preclude. Specifically, it claimed that there had been an inexcusable delay of nearly ten years and that it was prejudiced as a result of that delay. The commissioner denied the motion to preclude on the basis of laches; the board disagreed and found that this equitable doctrine did not apply within the statutory framework of a motion to preclude. We agree with the board.

A brief explanation of laches will facilitate our analysis. In *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.*, 76 Conn. App. 599, 612–13, 821 A.2d 774, cert. denied, 264 Conn. 919, 828 A.2d 617 (2003), we explained that "[t]he defense of laches, if proven, bars a plaintiff from seeking equitable relief in a case in which there has been an inexcusable delay that has prejudiced the defendant. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant." (Internal quotation marks omitted.) We further noted that there must be unreasonable, inexcusable and prejudicial delay for the defense to apply. Id., 613. We also stated that "[a] laches defense is not . . . a substantive right that can be asserted in both legal and equitable proceedings. *Laches is purely an equitable doctrine*, is largely governed by the circumstances, and *is not to be imputed*

[12] There is nothing in the record to suggest that the defendant commenced payment within the twenty-eight day time period set forth in § 31-294c (b).

to one who has brought an action at law within the statutory period. . . . It is an equitable defense allowed at the discretion of the trial court *in cases brought in equity*." (Emphasis in original; internal quotation marks omitted.) Id.; see also *Fromm* v. *Fromm*, 108 Conn. App. 376, 385, 948 A.2d 328 (2008) (doctrine of laches functions in part as kind of flexible statute of limitations).

Our Supreme Court recently has observed that the defense of laches has only a limited applicability. *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 399, 119 A.3d 462 (2015). In that case, the court concluded that laches did not apply to actions at law brought within the statutory time period. Id., 400; see also *Florian* v. *Lenge*, 91 Conn. App. 268, 283, 880 A.2d 985 (2005) (laches not available in action at law and in absence of cause of action for equitable relief, trial court properly determined that laches not available as defense). Our Supreme Court reasoned that "[t]o import laches as a defense to actions at law would pit the legislative value judgment embodied in a statute of limitations . . . against the equitable determinations of individual judges. Judges could disallow claims that the legislature had already determined were timely brought. . . . Thus to import laches as a defense to actions of law would alter the balance of power between legislatures and courts regarding the timeliness of claims." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 401–402. On the basis of separation of powers and administrative concerns, our Supreme Court agreed that the distinction between legal and equitable claims was " 'sound' " and that laches did not apply to claims at law. Id., 402.

It is well recognized in our law that the workers' compensation system is derived exclusively from statute. *Discuillo* v. *Stone & Webster*, 242 Conn. 570, 576, 698 A.2d 873 (1997); see also *Kuehl* v. *Z-Loda Systems*

Engineering, Inc., 265 Conn. 525, 538, 829 A.2d 818 (2003); *Cantoni* v. *Xerox Corp.*, 251 Conn. 153, 159, 740 A.2d 796 (1999); *Fantasia* v. *Milford Fastening Systems*, 86 Conn. App. 270, 279, 860 A.2d 779 (2004), cert. denied, 272 Conn. 919, 866 A.2d 1286 (2005). We iterate that a motion to preclude, in the context of workers' compensation cases, is a statutorily created waiver mechanism that, following an employer's failure to comply with the requirement of § 31-294c (b), bars that employer from contesting the compensability of its employee's claimed injury or the extent of the employee's resulting disability. See 2 A. Sevarino, supra, § 5.14, p. 688; see also *Callender* v. *Reflexite Corp.*, supra, 137 Conn. App. 338; *Walter* v. *State*, 63 Conn. App. 1, 10–11, 774 A.2d 1052, cert. denied, 256 Conn. 930, 776 A.2d 1148 (2001). Mindful of our Supreme Court's analysis in *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 400–402, we agree with the board's conclusion that laches does not apply to a motion to preclude filed pursuant § 31-294c (b). The limited applicability of this equitable defense does not extend to a statutorily created mechanism found in a system derived exclusively from our statutes.

Although not directed specifically to the area of workers' compensation law, our Supreme Court also cautioned against pitting the equitable determinations of judges against the value judgment of the legislature. Id., 401. We recognize that our legislature has not established a time period within which a motion to preclude must be filed. Nevertheless, our courts consistently have recognized the prerogative of the legislature to set the parameters in this area of the law. As a result of the statutory nature of the workers' compensation laws, "policy determinations as to what injuries are compensable and what jurisdictional limitations apply thereto are for the legislature, not the judiciary or the board, to make." (Internal quotation marks omitted.)

Stickney v. *Sunlight Construction, Inc.*, 248 Conn. 754, 761, 730 A.2d 630 (1999); see also *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 217; *Matey* v. *Estate of Dember*, 256 Conn. 456, 481–82, 774 A.2d 113 (2001).

For example, we recently declined "to carve out another exception to the notice of claim requirements of § 31-294c (a) because we believe that the legislature, rather than this court, is the proper forum through which to create any additional exceptions . . . ." *Izikson* v. *Protein Science Corp.*, 156 Conn. App. 700, 713, 115 A.3d 55 (2015); see also *Dowling* v. *Slotnik*, 244 Conn. 781, 811, 712 A.2d 396 (Supreme Court consistently has eschewed recognizing exception to act because it represents complex and comprehensive statutory scheme balancing rights and claims of employer and employee arising out of work-related personal injuries; therefore, responsibility for exceptions to act belongs to legislature and not courts), cert. denied sub nom. *Slotnik* v. *Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998); see generally *Discuillo* v. *Stone & Webster*, supra, 242 Conn. 577 (although Supreme Court did not disagree with employee's analysis of equities, it was not free to transcend jurisdictional limits of act). Consistent with these principles, we will not inject the equitable doctrine of laches into the framework that has been established by our legislature and does not contain a time period in which a motion to preclude must be filed.

We also are guided by our Supreme Court's recent decision in *McCullough* v. *Swan Engraving, Inc.*, supra, 320 Conn. 299. In that case, the issue was whether the widow of an employee (dependent) was required to file a separate timely notice of claim for survivor's benefits under the act when the employee previously had filed a timely claim for disability benefits. Id., 301. The claim for survivor's benefits was filed fifty-five weeks after the death of the employee. Id., 302. The board concluded

that the act required the dependent to file a separate claim for survivor's benefit and that her claim was not filed timely. Id., 303–304.

Our Supreme Court noted that there was no statutory language "creating a statute of limitations for a claim for survivor's benefits or language requiring that a dependent file a separate claim for survivor's benefits if the employee filed a timely claim for benefits during his or her lifetime. If the legislature had intended to require such a filing and to provide a statute of limitations period, it could have done so. In the face of a legislative omission, it is not our role to engraft language onto the statute to require a dependent to file a claim for survivor's benefits in such a situation." Id., 310. Finally, it reasoned that if it recognized this limitation not set forth by the legislature, the court risked "denying the beneficent purposes of the act." Id., 311.

Likewise, we will not recognize, in the absence of legislative action, a time limitation within which an employee, such as the plaintiff, must file a motion to preclude. In light of the precedent set forth previously, and the intricate and comprehensive statutory scheme promulgated by the legislature, this court declines to insert a time limitation to an employee's ability to file a motion to preclude.

Finally, we briefly address the defendant's argument regarding the equitable nature of workers' compensation. General Statutes § 31-298 provides in relevant part: "In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated

to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. . . ."

This statute, however, does not engraft equitable doctrines, such as a laches, onto all aspects of the act. Our Supreme Court has interpreted § 31-298 "to cover only the manner in which hearings are conducted." *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 218; see also *O'Neil* v. *Honeywell, Inc.*, 66 Conn. App. 332, 340, 784 A.2d 428 (2001), cert. denied, 259 Conn. 914, 792 A.2d 852 (2002). Accordingly, we reject the defendant's claim that the equitable nature of the act requires the application of laches. We conclude that the board properly determined, as a matter of law, that the equitable doctrine of laches did not apply to the plaintiff's motion to preclude. Any such time limitation must originate with our legislature, not the courts.

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

In this opinion the other judges concurred.

TRENDEL TUTSON *v.* COMMISSIONER OF CORRECTION (AC 37939)

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

Syllabus

The petitioner, who had been convicted of attempt to commit murder and assault in the first degree, sought a second writ of habeas corpus, claiming that his prior habeas trial counsel, B, and his prior habeas appellate counsel, B and P, had rendered ineffective assistance. The petitioner claimed in his first habeas action that B was ineffective for having failed to present testimony from an alibi witness, R, that the petitioner was visiting with a friend, T, at the time of the shooting at issue. B had failed to file an appropriate notice of alibi defense in order to present R's testimony. The shooting occurred while the petitioner was driving a vehicle from which gunshots were fired at another vehicle in which the victim was riding. At trial, T's mother testified that the

petitioner was visiting with T at their home and had left close to the time the shooting occurred. B then sought to present alibi testimony that R and the petitioner had left T's home at about the time of the shooting. B later informed the court, however, that she learned that R was not with the petitioner at the time of the shooting and, thus, did not want to offer R as an alibi witness. R thereafter testified as a regular witness that she had driven the petitioner to T's home near the time of the shooting. After the court noted the conflict between R's testimony and the testimony of T's mother, B did not inquire further as to R's activities after she had dropped the petitioner off at T's home. Two other witnesses identified the petitioner as the driver of the car from which the gunshots came, and testimony from a police detective contradicted R's testimony that she had dropped off the petitioner at T's home on the day of the shooting. The first habeas court denied the petition for a writ of habeas corpus, concluding that the petitioner was not prejudiced by B's failure to file the notice of alibi defense. The court then denied the petition for certification to appeal, which did not explicitly challenge the habeas court's ruling as to whether the petitioner was prejudiced by B's alleged mishandling of the alibi defense, and the petitioner appealed to this court. The petitioner argued that the first habeas court erred in concluding that he was not prejudiced by B's alleged mishandling of the alibi defense. This court, however, declined to review the prejudice claim because it had not been raised in the petition for certification to appeal, and thereafter dismissed the petitioner's appeal. In this second habeas action, the petitioner claimed that the result of the first habeas proceeding, as well as the result of his criminal trial or direct appeal from the judgment of conviction, or both, would have been more favorable, but for B's deficient performance in handling the alibi defense. He also claimed that B and P had rendered deficient performance as his prior habeas appellate counsel, and that the court should presume that he was prejudiced by their representation. The second habeas court determined that the petitioner was not prejudiced by B's performance and rendered judgment denying the petition for a writ of habeas corpus, from which the petitioner, on the granting of certification, appealed to this court. He claimed that the second habeas court erred in concluding that he did not demonstrate that he was prejudiced by B's failure to challenge the first habeas court's prejudice determination. He claimed that because there was no reasonable probability that had the prejudice ruling been raised in the petition for certification to appeal, thereby allowing this court to review the claim, the result of the first habeas appeal would have been different. He further contended that the second habeas court erred by not presuming that he was prejudiced by B's failure to raise, in the petition for certification to appeal, the issue of the first habeas court's improper prejudice determination. *Held* that the second habeas court properly denied the petition for a writ of habeas corpus and determined that the petitioner failed to

establish that he was prejudiced by the alleged deficient performance of B and P: even if R had testified as an alibi witness in the petitioner's criminal trial, it was not reasonably probable that her testimony would have created a reasonable doubt as to the petitioner's guilt, as the jury heard testimony from two other witnesses who identified the petitioner as the driver of the vehicle at issue, testimony from an expert witness about gunshot residue from which it reasonably could have inferred that the petitioner was the driver of that vehicle, and testimony from a police detective who contradicted R's testimony that she had dropped the petitioner off at T's home on the day of the shooting; moreover, contrary to the petitioner's claim that this court should remand the case to the first habeas court to consider the merits of his petition for certification to appeal, with the inclusion of the issue of prejudice, a remand was not necessary here because the petitioner did not establish that there was a reasonable probability that he would have prevailed in his appeal from the first habeas judgment had B included the prejudice finding in the first habeas petition for certification to appeal.

Argued April 4—officially released September 6, 2016

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

Michael D. Day, with whom, on the brief, was *John J. Duguay*, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David M. Carlucci*, assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Trendel Tutson, appeals from the judgment of the second habeas court, *Oliver*, *J.*, denying his second amended petition for a writ of habeas corpus. The petitioner claims that the second habeas court erred by (1) concluding that there was no reasonable probability that the result of the

habeas appeal from the first habeas court's denial of his petition for certification to appeal would have been different and (2) declining to presume that the petitioner was prejudiced by his prior habeas appellate counsel's failures to raise an issue on his petition for certification to appeal from the first habeas court's ruling. We affirm the judgment of the second habeas court.

The petitioner was charged with attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a, and assault in the first degree in violation of General Statutes § 53a-59 (a) (5), for his role in a shooting that took place between 1 and 1:30 p.m. on March 26, 2001, in Hartford. In order to resolve the issues in this appeal, we revisit relevant facts concerning the petitioner's alibi witnesses who testified at his trial as set forth in *State* v. *Tutson*, 278 Conn. 715, 899 A.2d 598 (2006). Approximately eight months before the petitioner's trial commenced, "[o]n August 6, 2001, the [petitioner's trial counsel] sent a letter to the state . . . identifying Julia Thomas (Julia) as the only alibi witness. The letter contained no information, however, regarding the [petitioner's] whereabouts at the time the crime was committed. The [petitioner's trial counsel] also provided the state with a three page investigative report dated April 19, 2001. The report was based on a personal interview with Julia and a telephone interview with her son, Terrell Thomas (Terrell). Although the report referred to the [petitioner's] 'girlfriend' and listed the name of Rooty [Thomas (Rooty)] as a subject to be interviewed, it did not name Rooty as a prospective witness and did not identify her as the [petitioner's] girlfriend.

"The trial commenced on March 11, 2002. The state alleged that the [petitioner] was guilty as a principal or an accessory of criminal attempt to commit murder and assault in the first degree. In the bill of particulars . . . the state specifically alleged that, '[o]n [March 26, 2001],

at approximately 1:30 p.m., the [petitioner] was the operator of a 1997 white Dodge Neon proceeding east on Bond Street' and that '[Philip] Washington was his front seat passenger in the . . . Neon.' The state further alleged that the [petitioner] had engaged in a car chase with [Ernesto] Molina, who was driving a red Volkswagen Jetta carrying two other passengers, [Jorge Pagan and one other individual], and had fired a shot at the Jetta, or had assisted Washington in shooting at the Jetta, thereby causing physical injury to Molina.[1] The [petitioner], relying on theories of misidentification and alibi, attempted to convince the jury that the two eyewitnesses to the shooting [Molina and Pagan] incorrectly had identified him as the perpetrator because, at the relevant time, he was in another location and thus could not have committed the alleged offenses.

"As the state was nearing the end of its case-in-chief, [the petitioner's trial counsel] represented to the court, outside the presence of the jury, that she had given the state the names of Julia and her sons, Terrell and Tyrone Thomas (Tyrone), as alibi witnesses. An extended discussion followed as to whether the [petitioner] had provided the state with adequate notice to admit the proposed alibi testimony . . . .

"During this discussion, [the petitioner's trial counsel] declared that the [petitioner's] 'strongest' alibi witness was Rooty. When the state protested that it had not been given notice that Rooty would testify as an alibi witness, [the petitioner's trial counsel] replied that she had included Rooty on the defense witness list, although counsel was having difficulty locating her. Upon further inquiry by the court, [the petitioner's trial counsel] stated that if Rooty could be located and was

[1] A detailed recitation of the facts of the petitioner's underlying offenses, as reasonably found by the jury, can be found in *State* v. *Tutson*, 84 Conn. App. 610, 612–15, 854 A.2d 794 (2004), rev'd, 278 Conn. 715, 899 A.2d 598 (2006).

allowed to appear as an alibi witness, she would testify that she and the [petitioner] went to New Haven following his visit with Terrell to pick up her child or drop off her nephew. . . .

"That same day, prior to the testimony of the state's final witness, the [petitioner's trial counsel] filed the following notice of alibi with the court: '[O]n the date of [March 26, 2001] at approximately [1] and 1:20 [p.m.], the [petitioner] . . . was at the home of . . . Julia . . . and Tyrone . . . located at 827 Wethersfield Avenue, Hartford . . . .

" '[O]n [March 26, 2001] at approximately 1:20 until [3 or 4 p.m.], the [petitioner] . . . was in the company of Terrell . . . and Rooty . . . (who are not related to each other) [en] route to and from Meriden and New Haven . . . where Rooty . . . had to pick up her . . . child from school.'

"After the state concluded its case-in-chief, [the petitioner's trial counsel] reiterated to the court, outside the presence of the jury, that if Rooty was located and permitted to appear as an alibi witness, she would testify that the [petitioner] left Julia's residence at approximately 1:20 p.m. on the day of the shooting and accompanied her to Meriden and New Haven to pick up her child. . . .

"The following day, [the petitioner's trial counsel] informed the court that she finally had located Rooty, who would be available to testify later that day. The court replied that, because [the petitioner's trial counsel] had failed to comply with the applicable rules of practice, it would allow Rooty to testify as an alibi witness only if the state was given an opportunity to interview her first. [The petitioner's trial counsel] initially agreed to this proposal but then informed the court that she no longer wanted to offer Rooty as an alibi witness because she had learned that Rooty was

not with the [petitioner] at the time of the shooting. The court responded that, in those circumstances, the [petitioner's trial counsel] had 'an absolute right' to call Rooty as a regular witness.

"Thereafter, Julia testified in a manner generally consistent with the investigative report, stating that the [petitioner] was visiting her sons, Terrell and Tyrone, when she returned home from grocery shopping between 12:30 and 1 p.m. on the day of the shooting and that he left at approximately 1:10 to 1:15 p.m. She further testified that the [petitioner] had stated upon leaving that his girlfriend was waiting outside in her car. Julia described the vehicle, which she had seen when returning to her residence a short time earlier, as a small white car with a child inside.

"Rooty subsequently testified that she drove the [petitioner] to Julia's residence to visit his friend Terrell between 12:30 and 1 p.m. on the day of the shooting. Before she could testify further, however, the state objected, outside the presence of the jury, to further questioning of Rooty because it appeared that she was about to give alibi testimony. [The petitioner's trial counsel] responded that Rooty was going to testify that, after she dropped the [petitioner] off at Julia's residence, she left the area and returned to pick him up around 2 p.m.[2] When the court noted the conflict between the proffered testimony and Julia's testimony that the [petitioner] had left her residence shortly after 1 p.m., the [petitioner's trial counsel] responded that

[2] Specifically, the petitioner's trial counsel had learned that, according to Rooty, the petitioner was dropped off at approximately 1 p.m. at Wethersfield Avenue, and Rooty drove the Neon, with her child inside, to a friend's residence in the north end of Hartford, where she briefly stayed to watch soap operas. Rooty told the petitioner's trial counsel that she returned for the petitioner at about 2 p.m. This more detailed version of events was not provided to the court until May 20, 2002, at the petitioner's sentencing hearing in support of a motion for a new trial.

Rooty was not an alibi witness because she would not be testifying as to what the [petitioner] did between the time she dropped him off and the time she picked him up.

* * *

"After Rooty returned to the stand, [the petitioner's trial counsel] did not inquire further regarding her activities after she dropped the [petitioner] off at Julia's residence.

"In the proceedings that followed, the state elicited rebuttal testimony from Detective Andrew Weaver of the Hartford police department that Rooty had stated in an interview that was conducted shortly after the crime was committed that the [petitioner] had asked her if he could use her Neon on the morning of March 26, 2001, that she had assented to his request and that she was unaware of the location of the vehicle until Weaver had contacted her after the shooting. . . . In accordance with [a request from the petitioner's trial counsel], the court thereafter gave an alibi instruction that the [petitioner] claimed he was elsewhere at the time of the alleged offenses.

"At the conclusion of the trial, the jury found the [petitioner] guilty of attempt to commit murder and assault in the first degree. The court rendered judgment in accordance with the jury verdict and sentenced the [petitioner] to twenty years incarceration." (Citation omitted; footnotes altered.) Id., 721–30.

On direct appeal, this court reversed the judgment of the trial court and remanded the case for a new trial because it concluded that the trial court had violated the petitioner's right to present a defense. *State* v. *Tutson*, 84 Conn. App. 610, 627–28, 854 A.2d 794 (2004). Our Supreme Court reversed the judgment of this court with direction to consider additional claims that this

court did not resolve. *State* v. *Tutson*, supra, 278 Conn. 751. Following that remand, this court affirmed the judgment of conviction. *State* v. *Tutson*, 99 Conn. App. 655, 656, 915 A.2d 344 (2007).

Thereafter, the petitioner filed his first petition for a writ of habeas corpus and was represented by Attorney Rebecca I. Bodner. Count one of his amended petition dated February 23, 2010, alleged ineffective assistance of counsel. The petitioner contended that his trial counsel failed, inter alia, "to pursue an adequate alibi defense . . . to file a formal notice of alibi . . . [and] to recognize the testimony of Rooty . . . as alibi testimony . . . ."

On May 20, 2010, Rooty testified before the first habeas court, *Fuger*, *J*. On direct examination, Rooty testified that at approximately 12 p.m. on the day of the shooting, her sister called, requesting her to pick up Rooty's nephew in New Haven. According to Rooty, she received this call when she and the petitioner were visiting friends in Hartford. Because Rooty felt ill, the petitioner drove the vehicle to New Haven. Rooty also testified that the petitioner's friend, "Rel," accompanied them. After picking up her nephew in New Haven, Rooty testified that they all returned to Meriden. Rooty also testified that, prior to testifying at the petitioner's criminal trial, she spoke with his trial counsel:

"[The Petitioner's Habeas Counsel]: So, did you meet with [the petitioner's trial counsel] prior to testifying?

"[Rooty]: Briefly because I was late. . . .

"[The Petitioner's Habeas Counsel]: For how long did this meeting last?

"[Rooty]: I'd say about ten minutes.

"[The Petitioner's Habeas Counsel]: Okay. What did you talk about?

"[Rooty]: She basically briefed me on the trial, let me know that he would be present, and she gave me what his charges were, and that's really about it. She asked me if I [could] recollect anything about that day, and I told her that I really just didn't know besides telling her that we spent a lot of time together, so, as far as the exact date of everything that happened, that so much had happened in my life, I couldn't really recall that."

Furthermore, Bodner sought to clarify whether Rooty had "ever [told the petitioner's trial counsel] that [the petitioner] was not driving with [her] on that day." Rooty responded, "I don't remember telling [the petitioner's trial counsel] that," but agreed with Bodner that she had told the petitioner's trial counsel "basically what [she] testified to" at the habeas trial.

On cross-examination, counsel for the respondent, the Commissioner of Correction, pressed Rooty on her recollection of the time line of March 26, 2001. After testifying that she had picked up her nephew at "approximately one something," Rooty was asked whether she and the petitioner left Hartford en route to New Haven at approximately 12:30 p.m. Rooty responded, "Approximately." The following colloquy ensued:

"[The Respondent's Counsel]: Okay. And what time did your sister call you?

"[Rooty]: No, not to leave them at 12:30 p.m. I received a phone call around that time, and yeah, that's when we left, around one to get down there.

"[The Respondent's Counsel]: Okay. You left around one to get to New Haven, correct?

"[Rooty]: I'd say. I mean not to—I don't want to perjure myself, but when it comes to when I received the call, as soon as I received the call, I left. So, when my sister called me, as I testified before, it was about two

hours before my nephew was even supposed to get out of school, and he's supposed to get out of school between, around 2:30 p.m.

"[The Respondent's Counsel]: So, you would have gotten a call around 12:30 p.m., correct?

"[Rooty]: Yes, ma'am.

"[The Respondent's Counsel]: And you immediately left with [the petitioner] and drove to New Haven, correct?

"[Rooty]: I'd say give or take ten to fifteen minutes because we were waiting on his friend to come downstairs. He was handling some business with his mother. His mother had called him upstairs as he was leaving. We went upstairs, and we waited for him, and then we took off.

"[The Respondent's Counsel]: Okay. Now, after [the petitioner] changed his clothes in Windsor, you went immediately to his friend's house?

"[Rooty]: I believe so.

"[The Respondent]: Okay. Well, didn't you testify in 2002 that you then went to the doctor's office for forty-five minutes?[3]

"[Rooty]: Well, as the—as I testified, the dates that were being thrown at me, and things that had happened had gotten my days misconstrued. So, I told that to [the petitioner's habeas counsel] and everyone else that

[3] At the petitioner's criminal trial, Rooty testified that on March 26, 2001, at approximately 10:30 a.m., the petitioner accompanied her to a doctor appointment in Meriden. The appointment lasted approximately forty-five minutes. After dropping off a prescription, Rooty then drove the petitioner to his residence in Windsor. Rooty testified that the petitioner spent approximately twenty minutes in his residence because "he had taken a shower . . . ." After leaving Windsor, the petitioner, according to Rooty, asked her to take him to see his friend, "Rel . . . in the south end of Hartford."

questioned me and asked me about these events." (Footnote added.)

In an oral ruling, later memorialized pursuant to Practice Book § 64-1 (a), the first habeas court rejected the petitioner's claim of ineffective assistance of trial counsel without explicitly finding deficient performance by the petitioner's trial counsel. Specifically, the habeas court found that although it "appear[ed] that [the petitioner's trial counsel] may have been guilty of . . . deficient performance in not filing an appropriate notice of alibi defense, it's crystal clear that such failure did not operate to the prejudice of the petitioner."

After the first habeas court denied the petition for certification to appeal, the petitioner appealed to this court, claiming that (1) the habeas court abused its discretion when it denied the petition for certification to appeal and (2) the habeas court improperly, inter alia, "concluded that he was not prejudiced by his trial counsel's mishandling of his alibi defense . . . ." *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 204, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013). Bodner continued to represent the petitioner but was unable to attend oral argument before this court. Attorney Temmy Ann Pieszak represented the petitioner for purposes of oral argument. In dismissing the petitioner's appeal, this court did not reach the merits of his claim on the ground that the petitioner, in his petition for certification to appeal, had not raised a claim related to the habeas court's determination that his trial counsel's failure to present Rooty's alibi testimony was not prejudicial. Id., 221.

Thereafter, the petitioner initiated the second habeas action that is the subject of this appeal. His second amended petition for a writ of habeas corpus, filed October 20, 2014, contained two counts alleging that (1) the performance of his habeas trial counsel, Bodner,

was deficient,[4] and (2) the performance of his habeas appellate counsel, Bodner and Pieszak, was deficient.[5] As to count one, the petitioner argued that but for Bodner's deficient performance, the result in the prior habeas corpus proceeding and "criminal trial and/or appeal would have been different and more favorable . . . ." As to the second count, the petitioner claimed that both Bodner and Pieszak had rendered deficient performance as his habeas appellate counsel. The petitioner also argued that prejudice should be presumed as to both counts pursuant to *Iovieno* v. *Commissioner of Correction*, 242 Conn. 689, 699 A.2d 1003 (1997).

At the second habeas trial, which was held on November 5, 2014, Bodner, Attorney Sheila S. Iverson, the

[4] Regarding his claim against his habeas trial counsel, Bodner, the petitioner alleged that she (1) "conceded the petitioner's claim of ineffective assistance of trial counsel through her inaccurate representation to the court concerning the performance of Attorney Sheila [S.] Iverson [the petitioner's other trial counsel] at the petitioner's trial, and through her failure to present any evidence regarding the scope of . . . Iverson's involvement in the trial"; (2) "failed to adequately present the petitioner's claim of ineffective assistance of trial counsel pertaining to the mishandling of the petitioner's alibi defense at his criminal trial"; and (3) "[f]ollowing the judgment of dismissal rendered by the habeas trial court, she failed to raise and/or clarify, in the petition for certification to appeal or through appropriate postjudgment motions, the improper conclusion of [the] habeas trial court . . . that the petitioner was not prejudiced by his trial counsel's mishandling of his alibi defense."

[5] In claiming that both his habeas appellate counsel's performances were deficient, the petitioner alleged that Bodner and Pieszak (1) "failed to properly or adequately raise, in the petition for certification to appeal, the improper conclusion of [the] habeas trial court . . . that trial counsel's handling of the petitioner's alibi did not constitute ineffective assistance of counsel"; (2) "failed to properly or adequately address the determination by habeas trial court . . . that trial counsel's errors regarding the presentation of the petitioner's alibi did not prejudice the petitioner"; (3) "failed to file any motions for articulation, or further articulation, in order to clarify the court's ruling and ensure appellate review of the habeas trial court's ruling on the alibi issue"; and (4) "failed to obtain appellate review of the . . . habeas trial court's dismissal of the petitioner's claim of ineffective assistance of trial counsel for trial counsel's mishandling of the petitioner's alibi defense."

petitioner's trial counsel, and Pieszak testified. On April 2, 2015, the habeas court issued its memorandum of decision. As set forth in the court's memorandum of decision, "Bodner testified that there was no strategic reason for her failing to include the 'prejudice issue' in the petition for certification to appeal." Pieszak "testified that she did not recall the content of the petition for certification to appeal, nor did she refer to it in preparation for oral argument before the Appellate Court." She also testified that, as a general matter, "there can be no strategic reason for habeas appellate counsel not raising a challenge to a habeas court's prejudice finding." Ultimately, the second habeas court determined that "the petitioner ha[d] failed to demonstrate prejudice in that, upon a review of the entire record, there [was] not a reasonable probability that the habeas appeal [from the first habeas court's ruling] would have been different. . . . It is clear to this court, upon a review of the entire record, that the [first] habeas trial court's assessment of [Rooty's] credibility and the substance of her testimony . . . at the [first] habeas trial that she was not certain that the events she related to [the first habeas court] were actually related to the day of the shooting, that the prior habeas court's findings would not have been reversed on appeal." Accordingly, the second habeas court denied the petition for a writ of habeas corpus, and thereafter granted the petition for certification to appeal. Additional facts will be set forth as necessary.

On appeal, the petitioner presents two claims. First, the petitioner argues that the second habeas court erred in concluding that he did not demonstrate that he was prejudiced by Bodner's failure to challenge the first habeas court's prejudice determination because there was no "reasonable probability that had [the first habeas court's] prejudice ruling been raised in the petition for certification to appeal," thereby allowing this

court to review his claim, "the result of the prior habeas appeal would have been different." Second, the petitioner contends that the second habeas court erred by not presuming that he was prejudiced by Bodner's failure "to raise the issue of [the first habeas court's] improper prejudice determination in the petition for certification to appeal from the prior habeas decision." We disagree with both claims.

We begin by setting forth the appropriate standard of review for a challenge to a denial of a petition for a writ of habeas corpus. The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. *Correia* v. *Rowland*, 263 Conn. 453, 462, 820 A.2d 1009 (2003). The conclusions reached by the habeas court in its decision to deny a habeas petition are matters of law, subject to plenary review. *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008).

We are guided by the following relevant legal principles. To succeed on an ineffective assistance of appellate counsel claim, the petitioner must satisfy both the performance prong and the prejudice prong of *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 728, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "In *Strickland* . . . the United States Supreme Court enunciated the two requirements that must be met before a petitioner is entitled to reversal of a conviction due to ineffective assistance of counsel. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable."

(Internal quotation marks omitted.) *Bowens* v. *Commissioner of Correction*, 104 Conn. App. 738, 740–41, 936 A.2d 653 (2007), cert. denied, 286 Conn. 905, 944 A.2d 978 (2008). "A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 91, 52 A.3d 655 (2012).

"The first part of the *Strickland* analysis requires the petitioner to establish that appellate counsel's representation fell below an objective standard of reasonableness considering all of the circumstances." (Internal quotation marks omitted.) *Vivo* v. *Commissioner of Correction*, 90 Conn. App. 167, 171, 876 A.2d 1216, cert. denied, 275 Conn. 925, 883 A.2d 1253 (2005). To satisfy the prejudice prong, the petitioner must demonstrate that "there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial." *Small* v. *Commissioner of Correction*, supra, 286 Conn. 722. Thus, "to determine whether a habeas petitioner had a reasonable probability of prevailing on appeal, a reviewing court necessarily analyzes the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." Id.

Therefore, had the first habeas court's prejudice ruling been challenged in the petition for certification to appeal and had the first habeas court denied the petition, this court, on appeal, would have applied a well settled standard of review. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). 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. Id., 616. If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. Id., 612." *Joseph* v. *Commissioner of Correction*, 153 Conn. App. 570, 574–75, 102 A.3d 714 (2014), cert. denied, 315 Conn. 911, 106 A.3d 304 (2015).

"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 . . . [and verify] the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Morquecho* v. *Commissioner of Correction*, 164 Conn. App. 676, 682, 138 A.3d 424 (2016).

We bear in mind that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . [T]he question is whether there is a reasonable probability that, absent the [alleged] errors, the [fact finder] would have had a reasonable doubt respecting guilt." (Internal quotation marks omitted.) *Crespo* v. *Commissioner of Correction*, 149 Conn. App. 9, 18–19, 87 A.3d 608, cert. denied, 311 Conn. 953, 97 A.3d 984 (2014); see also *Cullen* v. *Pinholster*, 563 U.S. 170, 189, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . That

requires a substantial, not just conceivable, likelihood of a different result." [Citation omitted; internal quotation marks omitted.]).

"In making this determination, *a court hearing an ineffectiveness claim must consider the totality of the evidence before . . . the jury.* . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . We note, however, that the [*Strickland*] principles . . . do not establish mechanical rules. . . . [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case [we] should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." (Citation omitted; emphasis added; internal quotation marks omitted.) *Crespo* v. *Commissioner of Correction*, supra, 149 Conn. App. 19. "We emphasize that the task before us . . . is to determine, under *Strickland*, whether there is a *reasonable probability* that the petitioner would have prevailed on appeal." (Emphasis in original.) *Small* v. *Commissioner of Correction*, supra, 286 Conn. 731.

We first clarify the issue before us. The first habeas court denied the petition for a writ of habeas corpus because it concluded that the petitioner had failed to establish his ineffective assistance of counsel claim. Specifically, the first habeas court, having heard and evaluated Rooty's testimony, found that the petitioner was not prejudiced by his trial counsel's failure to file an appropriate notice of alibi defense to present Rooty

as an alibi witness. Thereafter, the habeas court denied the petition for certification to appeal, which had not explicitly challenged the habeas court's ruling on prejudice. On appeal, however, the petitioner briefed and argued that the first habeas court erred in concluding that the petitioner was not prejudiced. This court declined to review this claim because it had not been raised in the petition for certification to appeal. See *Tutson* v. *Commissioner of Correction*, supra, 144 Conn. App. 221. Thus, in order for the petitioner to succeed in this case, we must conclude that, had Bodner challenged the first habeas court's prejudice finding in the petition for certification to appeal and had the first habeas court subsequently denied his petition, the petitioner would have prevailed in his prior appeal to this court. In other words, the petitioner bears a heavy burden of persuading us that the denial of the petition for certification to appeal on this issue would have been an abuse of discretion and that the first habeas decision would have been reversed on its merits. Our analysis does not yield such a result.

Our review of the record leads us to conclude that the petitioner has failed to establish that there is a reasonable probability that, but for Bodner's failure to challenge the first habeas court's prejudice ruling on the petition for certification to appeal, the petitioner would have prevailed in his appeal from the prior habeas court's judgment. We first examine Rooty's testimony. At the criminal trial, she clearly testified to having dropped off the petitioner at Julia's residence.[6] At the habeas trial, during direct examination, Rooty presented a different version of events, namely, that she

[6] At trial, Rooty was precluded from testifying further. The petitioner's trial counsel, however, represented to the court that Rooty's proposed testimony would have been that she "drove her Neon to the north end of Hartford after she dropped the [petitioner] off at Julia's residence between 12:30 p.m. and 1 p.m., and that she picked him up at 2 p.m." *State* v. *Tutson*, supra, 278 Conn. 736.

was with the petitioner at the time of the commission of the crime because they, along with "Rel," were driving from Hartford to New Haven at about the time of the shooting. In recalling a conversation with the petitioner's trial counsel, who was inquiring whether Rooty could "recollect anything about that day," Rooty testified that she replied to this inquiry that she "really just didn't know besides [stating to the petitioner's trial counsel] that [she and the petitioner] spent a lot of time together, so, as far as the exact date of everything that happened, that so much had happened in [her] life, [she] couldn't really recall that." On cross-examination, when pressed on her recollection of the time line of events, she acknowledged that "the dates that were being thrown at me, and things that had happened had gotten my days misconstrued." It is axiomatic that we do not assess the credibility of witnesses; see *Veal* v. *Commissioner of Correction*, 54 Conn. App. 384, 386, 735 A.2d 833, cert. denied, 251 Conn. 907, 738 A.2d 1094 (1999); thus, we refrain from doing so here.[7] We do note that both versions of Rooty's testimony are inconsistent with Weaver's rebuttal testimony. Weaver testified that Rooty was interviewed shortly after the crime, and that

[7] The respondent, in his appellate brief, argues that the petitioner could not prevail on his first claim because, inter alia, "the record reveals that Rooty's credibility was highly questionable." In his reply brief, the petitioner counters that "the [first] habeas court . . . did credit the testimony of Rooty . . . ." He argues for the first time that "the lack of credibility of Rooty's testimony was determined largely because of the multiple versions of Rooty's *proffered* testimony, not Rooty's own testimony." (Emphasis in original; internal quotation marks omitted.) The petitioner urges us to remand this case for a new trial if we conclude that no trier of fact has made a credibility determination of Rooty's testimony. We decline such invitation. "The appellate courts of this state have often held that an appellant may not raise an issue for the first time in a reply brief. . . . An appellant's claim must be framed in the original brief so that it can be responded to by the appellee in its brief, and so that we can have the full benefit of that written argument." (Citations omitted; internal quotation marks omitted.) *Niblack* v. *Commissioner of Correction*, 80 Conn. App. 292, 298, 834 A.2d 779 (2003), cert. denied, 267 Conn. 916, 841 A.2d 219 (2004).

she had stated that the petitioner borrowed her automobile on the morning of the shooting and that "she was unaware of the location of the vehicle until Weaver had contacted her after the shooting." *State* v. *Tutson*, supra, 278 Conn. 729. As opined by our Supreme Court, "[t]he serial submission of various alibis before and during the trial strongly suggests fabrication. The [petitioner], who was arrested within hours of the alleged crime, in all likelihood knew where he was in the preceding hours and knew who, if anyone, would be able to verify his alibi. Thus, the submission to the court of conflicting alibis indicates that Rooty's testimony would not have been truthful." Id., 744 n.12.

In light of all the evidence before the jury, even if Rooty had testified, it is not reasonably probable that her testimony would have created a reasonable doubt as to the petitioner's guilt, which leads us to conclude that the petitioner would not have prevailed on his appeal from the first habeas court's judgment. First, the jury heard testimony from Molina and Pagan identifying the petitioner as the driver of the Neon. See *State* v. *Tutson*, supra, 84 Conn. App. 615–16. Second, the jury heard the testimony of Fung Kwok, a criminalist at the state forensic laboratory concerning the results of the gunshot residue tests. Id., 617. Kwok testified that the gunshot residue test performed on Washington was "100 percent conclusive that the residue found on Washington was from a gunshot." Id. Kwok's testimony provided evidence by which the jury reasonably could infer that the petitioner was the driver of the Neon. Third and last, the state recalled Weaver as a rebuttal witness to impeach Rooty's credibility. See id., 619. The jury heard Weaver's testimony that entirely contradicted Rooty's testimony that she had dropped off the petitioner at Julia's residence on the day of the shooting. See id. Accordingly, we conclude that the second habeas court properly determined that the petitioner

failed to establish that he was prejudiced by the alleged deficient performance by his prior habeas appellate counsel. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 522, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

We briefly address the petitioner's second claim. He contends that the second habeas court erred by not presuming prejudice as a result of Bodner's failure to challenge the first habeas court's prejudice ruling in his petition for certification to appeal. He relies on *Iovieno* v. *Commissioner of Correction*, supra, 242 Conn. 706, for this proposition and seeks, sub silentio, a remand of the case to the first habeas court to consider the merits of his petition for certification to appeal with the inclusion of the issue of prejudice. See id., 708. We conclude that a remand is not necessary because we have addressed the claim of error as to prejudice in this appeal. We determined that the petitioner did not establish that there was a reasonable probability that, but for Bodner's failure to include the prejudice finding in the first habeas petition for certification, the petitioner would have prevailed in his appeal from the first habeas judgment. Thus, even with a presumption of prejudice, the petitioner could not prevail in either habeas case.

The judgment is affirmed.

In this opinion the other judges concurred.

NYRON DUMAS *v.* COMMISSIONER OF CORRECTION (AC 36974)

Beach, Sheldon and Prescott, Js.

Syllabus

The petitioner, who was convicted of manslaughter in the first degree with a firearm and was fifteen years old at the time of his sentencing, sought a writ of habeas corpus. He claimed, inter alia, that the habeas court erred in denying the count of his petition in which he asserted that his sentence of thirty years imprisonment violated the eighth amendment, as enunciated by the United States Supreme Court in *Miller* v. *Alabama* (567 U.S. 460), which held that sentences for certain juveniles violate the eighth amendment when they are the functional equivalent of life imprisonment without the possibility of parole. The habeas court determined that the count of the petition at issue potentially could have constituted a claim under the eighth amendment. The court denied that count on the ground that the petitioner had not presented any evidence to establish his claim. The court thereafter rendered judgment dismissing in part and denying in part the habeas petition. The court then denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly denied the petition for certification to appeal, this court having determined, on a different ground, that the habeas court would have been obligated to deny the petitioner relief regardless of whether he had met his burden of going forward with evidence because his sentence was not the functional equivalent of a life sentence; furthermore, the legislature, subsequent to the petitioner's sentence, amended parole procedures for a juvenile offender sentenced to a term of thirty years such that the petitioner is now eligible for parole pursuant to statute ([Supp. 2016] § 54-125a [f]).

Argued January 19—officially released September 6, 2016

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment dismissing in part and denying in part the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Cobb*, *J.*, issued an articulation of its decision. *Appeal dismissed.*

Heather Clark, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BEACH, J. The petitioner, Nyron Dumas, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing in part and denying in part his petition for a writ of habeas corpus. He claims that the habeas court abused its discretion in denying his petition for certification to appeal and, as to the merits, improperly denied a count of his habeas petition for failure of proof. We disagree with the petitioner and agree with the result reached by the habeas court, but on an alternative ground.

The following facts and procedural history are relevant to the petitioner's appeal. In February, 1999, the then fourteen year old petitioner was at an apartment visiting another person. While there, he and the victim exchanged words that led to a heated argument. When he was asked to leave the apartment, the petitioner did so. He went outside, below the apartment's balcony, and yelled at the victim to come outside. The victim went onto the balcony and the petitioner fatally shot the victim in the abdomen. In October, 1999, when the petitioner was fifteen years old, he pleaded guilty to manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55 (a). That charge carried a maximum penalty of forty years imprisonment and a minimum of five years imprisonment. General Statutes §§ 53a-55a and 53a-35a (5). At the time of the guilty plea, the state noted that the agreement called for thirty years incarceration with a right to argue for less. The

state indicated that, because of the petitioner's age, the recommendation was for ten years less than the maximum sentence permitted by statute. At sentencing, the defendant's attorney stated, "Obviously, I'm going to argue to the court to consider his age; and I think it is a very critical component in this particular sentencing." The court concluded, "This incident, with all the circumstances I've heard, he took the life of the victim here. There has not been any showing of any just cause. The state has given consideration in reducing the charge and the plea agreement both to the factors I have cited, having no prior record and his age. . . . The unfortunate circumstance of the age or the loss of loved ones around him is that he did not understand the value of human life and the blessing he . . . did have, despite all the trials that he had been given as well. . . . The only way that the court can impress upon him the value of a human life, particularly at his age, is by the impact my sentence will have on his own." The court then sentenced the petitioner to thirty years incarceration.

In October, 2008, the self-represented[1] petitioner filed an eighteen count petition for a writ of habeas corpus. In count eleven, which is the only count implicated in this appeal, the petitioner alleged that "the sentence imposed was inappropriate and disproportionate in light of the nature of the offense, the character of the offender, the protection of public interest and the deterrent, rehabilitative, isolative and denunciatory purposes for which the sentence was intended . . . . [T]he sentence imposed was unduly excessive in light of the petitioner's youth and diminished capacity at the time of the crime." (Citation omitted.) The petitioner attached to his petition a number of documents, including transcripts from the underlying criminal proceedings and several scholarly articles.

[1] The petitioner filed a motion for appointment of habeas counsel, which the court granted. Habeas counsel later filed a motion for permission to withdraw, which the court also granted.

On May 1, 2014, the day the habeas trial was set to begin, the following colloquy occurred:

"The Court: Okay. All right. So, Mr. Dumas, are you ready to proceed to trial today?

"[The Petitioner]: No.

"The Court: Okay. Well, today's your trial day, so we're going forward.

"[The Petitioner]: Yeah, but I don't understand habeas law, so that's why I didn't file nothing.

"The Court: So, you didn't file anything?

"[The Petitioner]: No.

"The Court: . . . Eleven is an eighth amendment claim, as I read it in the most liberal sense, as I'm required to do . . . . Today is your trial day, so what happens at trial is that you're supposed to go forward and present evidence on those claims. . . . So, what evidence do you have to support your remaining claims . . . .[2] Are you prepared to present witnesses today?

"[The Petitioner]: No. The only thing I have, whatever is in that petition. That's it. . . .

"The Court: . . . Well, that's not evidence. Evidence is presented through witnesses and/or exhibits. So, you are telling me you have no witnesses that you wish to present on your claims?

"[The Petitioner]: Right now, no.

"The Court: Well, I'm reading count eleven in the broadest sense possible since he's pro se, and I think that could potentially be an eighth amendment claim,

[2] The court dismissed counts one through ten, twelve, thirteen and fifteen because of procedural default, and determined that counts seventeen and eighteen did not raise separate claims. The court questioned the petitioner as to what evidence he had to support the remaining claims—counts eleven, fourteen and sixteen.

so I'm not dismissing that outright. However, I am going to deny the petition and dismiss it because the petitioner has not come forward with any evidence today, the day of his trial, to establish [count eleven]. The court has no choice but to deny the petition."[3] (Footnote added.)

The judgment file stated that count eleven was dismissed for failure to prosecute. Thereafter, the court denied the petition for certification to appeal, and this appeal followed.

In May, 2015, the respondent, the Commissioner of Correction, filed a late motion for rectification of the judgment file and a motion for permission to file the late motion for rectification, arguing that the judgment file should be corrected to reflect a denial of the petition as to count eleven on the merits. This court denied the respondent's motion for permission to file a late motion for rectification. This court sua sponte ordered the habeas court to articulate whether it had intended to dismiss or deny count eleven. The habeas court articulated that "count 11 of the petition . . . was denied for lack of any proof."

On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal and that the court erred in denying count eleven for lack of proof. He contends that, although the eleventh count of his habeas petition largely relied on *Roper* v. *Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), his pleading, read broadly and realistically, included a claim invoking *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Graham* v. *Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), which had not been decided by the United States Supreme Court when the petition was

[3] The court also dismissed counts fourteen and sixteen for failure to prosecute. There is no claim on appeal regarding those counts.

filed in 2008.[4] He argues that the eighth amendment claim presents a question of law properly reviewed under a plenary standard; thus, the habeas court erred when it denied the claim for lack of proof. He further argues that the documents attached to his habeas petition could properly have been reviewed as part of the expanded record pursuant to Practice Book § 23-36.

The respondent argues that the court properly denied count eleven and the petition for certification to appeal because the petitioner failed to present any evidence to support his claim, and the documents attached to the petition did not become part of an expanded record pursuant to Practice Book § 23-36.

We need not address the petitioner's claim that his rights secured by the eighth amendment were violated in the manner urged by the petitioner or his related procedural claims. Rather, we decide the case on an alternative ground, necessitated by the rapid advance of case law regarding juvenile sentencing procedure.

The constitutional law regarding the sentencing of juvenile offenders has been developing rapidly in recent years; thus, a brief overview may be helpful. The eighth amendment prohibits governmental imposition of "cruel and unusual punishments . . . ." U.S. Const., amend. VIII. "The eighth amendment's prohibition against cruel and unusual punishment is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution." *State* v. *Carrasquillo*, 290 Conn. 209, 211 n.7, 962 A.2d 772 (2009). "[T]he United States Supreme Court has indicated that at least three types of punishment may be deemed unconstitutionally cruel: (1) inherently

[4] *Miller* applies retroactively to cases on collateral review. *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 61–72, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

barbaric punishments; (2) excessive and disproportionate punishments; and (3) arbitrary or discriminatory punishments." *State* v. *Santiago*, 318 Conn. 1, 19, 122 A.3d 1 (2015). With respect to the second, the "United States Supreme Court has recognized that the eighth amendment contains a proportionality principle, that is, that punishment for crime should be graduated and proportioned to both the offender and the offense." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 58–59, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016). "[T]he United States Supreme Court decided a trilogy of cases that fundamentally altered the legal landscape for the sentencing of juvenile offenders. . . . In *Roper* v. *Simmons*, supra, 543 U.S. 578, the court held that the eighth and fourteenth amendments prohibit the imposition of the death penalty on juvenile offenders. In *Graham* v. *Florida*, supra, 560 U.S. 82, the court held that the eighth amendment prohibits the sentence of life without the possibility of parole for juvenile nonhomicide offenders. Most recently, in *Miller* v. *Alabama*, supra, 567 U.S. 479–80, the court held that the eighth amendment prohibits mandatory sentencing schemes that mandate life in prison without the possibility of parole for juvenile homicide offenders, although a sentence of life imprisonment without the possibility of parole may be deemed appropriate following consideration of the child's age related characteristics and the circumstances of the crime. These federal cases recognized that [t]he concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to [the] offense." (Footnote omitted; internal quotation marks omitted.) *State* v. *Logan*, 160 Conn. App. 282, 288–89, 125 A.3d 581 (2015), cert. denied, 321 Conn. 906, 135 A.3d 279 (2016).

The respondent posits that claims made under *Graham* v. *Florida*, supra, 560 U.S. 48 (life sentence without possibility of parole for juveniles convicted of nonhomicide offense violates eighth amendment), are now moot because the October 1, 2015 enactment of Public Acts 2015, No. 15-84, § 1 (f) (1), amended parole procedures such that all juvenile offenders are now eligible for parole within certain time periods.[5] We agree and thus consider count eleven only to the extent that it makes a claim under *Miller*.

This court summarized Connecticut's recent history in the field of juvenile sentencing procedures in *Logan*: "In *State* v. *Taylor G.*, 315 Conn. 734, 738, 741, 110 A.3d 338 (2015), the defendant was fourteen and fifteen years old when he committed nonhomicide offenses for which the trial court imposed a total effective sentence of ten years imprisonment followed by three years of special parole. Our Supreme Court concluded that the ten and five year mandatory minimum sentences [that the defendant would serve concurrently], under which the defendant is likely to be released before he reaches the age of thirty, do not *approach* what the [United States Supreme Court] described in *Roper*, *Graham* and *Miller* as the two harshest penalties. . . . The court reasoned that [a]lthough the deprivation of liberty for any amount of time, including a single year, is not insignificant, *Roper*, *Graham* and *Miller* cannot be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude, and that the defendant will be able to work toward his rehabilitation and look forward to release at a relatively young age. . . .

[5] A juvenile offender sentenced to a term of thirty years imprisonment is now eligible for a parole hearing after serving 60 percent of the sentence, or eighteen years. See Public Acts 2015, No. 15-84, § 1 (f) (1), which is now codified as General Statutes (Supp. 2016) § 54-125a (f).

"[I]n *Casiano* v. *Commissioner of Correction*, [supra, 317 Conn. 55], the petitioner was sixteen years old when he committed homicide and nonhomicide offenses for which the trial court imposed a total effective sentence of fifty years imprisonment without the possibility of parole pursuant to a plea agreement. Our Supreme Court determined that *Miller* applies retroactively to cases arising on collateral review, and that a fifty year sentence without the possibility of parole was the functional equivalent of life imprisonment without the possibility of parole and, therefore, subject to the sentencing procedures set forth in *Miller*. . . . The court observed that because the petitioner would be released from prison at the age of sixty-six and the average life expectancy of a male in the United States is seventy-six years, he would only have approximately ten more years to live outside of prison after his release. . . . The court explained that [a] juvenile is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects of his quality of life for the few years he has left. . . . The court concluded that a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Logan*, supra, 160 Conn. App. 291–93.

Logan was decided more than one year after the habeas court's decision in this case. In *Logan*, a panel of this court held that a thirty-one year sentence for

murder and conspiracy to commit murder, imposed on a defendant who was seventeen years old at the time of the offenses, was not the equivalent of a life sentence because "even if he is not paroled, [he] will be able to work toward rehabilitation, and can look forward to release at an age when he will still have the opportunity to live a meaningful life outside of prison and to become a productive member of society. Although the deprivation of liberty for any amount of time, including a single year, is not insignificant . . . *Miller* cannot be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude." (Footnote omitted; internal quotation marks omitted.) Id., 293–94. The court concluded that thirty-one years was not the equivalent of a life sentence; relief pursuant to *Miller*, then, was unavailable to the defendant in *Logan*.

The legal landscape changed, then, after this case was decided in the habeas court. Most relevant to the disposition of this case, *Logan* was decided while this appeal was pending. *Logan* held that, as a matter of law, the imposition of a thirty-one year sentence did not trigger relief pursuant to *Miller*.

The petitioner in the present case was fourteen years old at the time of the offense and he received a thirty year sentence. Similar to the seventeen year old defendant in *Logan* who received a thirty-one year sentence, the petitioner in this case will be released before he is fifty years old even if he is not paroled.[6]

On June 27, 2016, we requested that the parties submit supplemental briefs on the question of "whether this court should consider the merits of this appeal if the habeas court could not afford practical relief in light of [*Logan*]." The gravamen of the respondent's brief was that the subject area is now controlled by *Montgomery* v. *Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193

[6] See footnote 5 of this opinion.

L. Ed. 2d 599 (2016), and General Statutes (Supp. 2016) § 54-125a (f), and that this case accordingly should be either dismissed or affirmed on the ground that the petitioner now has a constitutionally adequate remedy: he may demonstrate maturity in the context of a parole hearing.[7] The petitioner urged that circumstances in this case may be different from those in *Logan*, and argued that, in any event, *Logan* was wrongly decided.

We affirm on a different, but closely related, ground,[8] which is that the habeas court would now be obligated to deny relief pursuant to *Logan* regardless of whether the petitioner had met his burden of going forward with the presentation of evidence because his sentence was not functionally equivalent to a life sentence. We need not repeat the criteria set forth in *Logan* and cases cited therein; suffice it to say that if a thirty-one year

[7] The petitioner subsequently moved this court either to strike the respondent's brief, because it advanced arguments well beyond the scope of the question presented, or to grant him the opportunity to respond. Because we decide the case on another ground, we take no action on the petitioner's motion.

We note, however, that a panel of this court was asked to address the *Montgomery* issue in *State* v. *Williams-Bey*, 167 Conn. App. 744, 144 A.3d 467 (2016), and *State* v. *McClean*, 167 Conn. App. 781, 164 A.3d 32 (2016).

[8] We see no injustice in affirming the judgment on an alternative ground rather than dismissing the appeal on the ground that we can afford no practical relief, where the parties had the opportunity to address the *Logan* issue. See, e.g., *State* v. *Brown*, 242 Conn. 389, 401, 699 A.2d 943 (1997) (court may reformulate certified question); see also *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 159–64, 84 A.3d 840 (2014) (when appellant entitled to directed judgment upon prevailing on appeal, "the reviewing court may review an unpreserved, alternative ground for affirmance, or raise the issue sua sponte, only if the claim merits review under the plain error doctrine or [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)], or under exceptional circumstances" such as intervening case law); *State* v. *Martin M.*, 143 Conn. App. 140, 151, 70 A.3d 135 ("[t]his court is not precluded, however, from reviewing an alternate ground that was not raised in accordance with Practice Book § 63-4 [a] [1] [A] so long as the appellant will not be prejudiced by consideration of that ground for affirmance" [internal quotation marks omitted]), cert. denied, 309 Conn. 919, 70 A.3d 41 (2013).

sentence imposed on a juvenile offender does not violate the eighth amendment, then surely a thirty year sentence does not. The habeas court properly denied the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

NELSON PENA *v.* LAURA GLADSTONE
(AC 37479)

Keller, Mullins and Lavery, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for attorney's fees pursuant to certain dissolution statutes (§§ 46b-62 and 46b-82), in connection with postdissolution proceedings concerning custody and visitation of the parties' minor child. The defendant claimed that the trial court improperly applied the law in awarding attorney's fees to the plaintiff, and that the trial court's award of attorney's fees improperly included fees for past legal services rendered that did not relate to the prosecution of the plaintiff's pending motion for modification of custody. *Held*:

1. The trial court did not abuse its discretion in granting the plaintiff's motion for attorney's fees in connection with his motion for modification of the custody order, as a trial court in marital dissolution proceedings may order either spouse to pay the reasonable attorney's fees of the other in accordance with the parties' respective financial abilities pursuant § 46b-62 after considering the criteria set forth in § 46b-82 and in light of its inherent equitable powers in family matters in order to make the financially disadvantaged party whole for pursuing a legitimate legal claim: furthermore, after properly considering the criteria in § 46b-82, the trial court here determined that giving more weight to the plaintiff's earning capacity was inappropriate considering all the circumstances, and the court did not abuse its discretion in considering the exigencies of the child's best interests or whether the plaintiff would be deprived of his rights regarding custody and visitation due to his present lack of funds; moreover, the trial court was not required to determine whether the defendant had liquid funds sufficient to pay the attorney's fees award because the proper inquiry was whether the plaintiff had ample liquid assets to pay his own fees or whether the failure to award attorney's fees would undermine the court's other orders, and the trial court here

reasonably could have concluded from the defendant's substantial income and assets that she in fact had the financial ability to comply with the court's order and sustain her basic welfare.

2. The trial court abused its discretion in awarding attorney's fees to the plaintiff that constituted payment of fees for past legal work unrelated to his pending motion for modification and, accordingly, the case was remanded to the trial court to conduct further proceedings to reduce the award by the amount of past legal fees awarded that were not directly related to the prosecution of the motion for modification; the trial court did not abuse its discretion in awarding the plaintiff a sizeable retainer for future attorney's fees, as the court permissibly relied on its knowledge of what had occurred previously in the high conflict proceedings between the parties and reasonably could have inferred that the pending motion for modification most likely would require a considerable amount of future legal effort to achieve a resolution.

Argued May 18—officially released September 13, 2016

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Heller, J.*, granted the plaintiff's motion for counsel fees, and the defendant appealed to this court; subsequently, the court, *Heller, J.*, issued an articulation of its decision. *Reversed in part; further proceedings.*

Samuel V. Schoonmaker IV, with whom, on the brief, was *Wendy Dunne DiChristina*, for the appellant (defendant).

John H. Van Lenten, for the appellee (plaintiff).

Opinion

KELLER, J. This appeal, and a related appeal, *Pena* v. *Gladstone*, 168 Conn. App. 175, 146 A.3d 51 (2016), which we also officially release today, involve successive motions for attorney's fees considered by two different judges pertaining to the same postdissolution

custody proceeding in a contentious family case. The defendant in this appeal, Laura Gladstone, appeals from a $75,000 postjudgment award of attorney's fees to the plaintiff, Nelson Pena, by the trial court, *Heller*, *J.*, for past and future legal services rendered in connection with custody and visitation issues involving the parties' minor child.[1] The defendant claims that the court (1) improperly applied the law and (2) abused its discretion when it ordered the defendant to pay the plaintiff's counsel fees. We agree with the defendant that the court's award of legal fees to the plaintiff improperly included fees for past legal services rendered that did not relate to the prosecution of the plaintiff's pending motion for modification of custody and, therefore, we reverse, in part, the judgment of the court.

The following facts and procedural history are relevant to this appeal. The parties were divorced on August 17, 2010. The defendant was awarded sole legal and physical custody of the parties' minor child in accordance with Article II of a separation agreement executed by the parties. That lengthy and complex section of the agreement, regarding custody and visitation, as well as other parenting considerations, provided the plaintiff with liberal parenting time with the child. Litigation between the parties continued, however, after the entry of the dissolution judgment, and each party filed numerous motions relative to parenting issues. The situation deteriorated to the point where on July 28, 2014, the parties agreed to engage the services of Visitation Solutions to evaluate and facilitate the minor child's visitation with the plaintiff. A $3500 retainer was required for the use of this service; the plaintiff was ordered to pay 18 percent of the costs, and the defendant was to be responsible for the remaining 82 percent

[1] This court denied the parties' motions to consolidate the two appeals. The related appeal, *Pena* v. *Gladstone*, 168 Conn. App. 175, 146 A.3d 51 (2016), involves the plaintiff's appeal from the denial by the court, *Tindill*, *J.*, of his motion for additional attorney's fees to defend the present appeal.

of the costs. On May 6, 2014, the plaintiff, alleging the defendant's consistent interference with his relationship with the minor child, filed a motion for modification of legal custody, seeking joint legal custody, along with a motion for attorney's fees that sought "attorney's fees in an amount sufficient to prosecute the underlying motion for modification" and a further order that the defendant pay the cost of the child's guardian ad litem.[2] He further alleged that he previously had "earnings of less than $150,000 per year" and was unemployed as of May 2, 2014.

The court heard the plaintiff's motion for attorney's fees on July 28, 2014, and issued its memorandum of decision on November 19, 2014. The court noted that the "parties were before the court on the plaintiff's motion for attorney's fees . . . in which the plaintiff seeks an award of attorney's fees for counsel to represent him in the parties' continuing dispute over custody and visitation, particularly in prosecuting the plaintiff's motion for modification for joint legal custody."

The court then found the following facts. "The plaintiff testified that he had been unemployed since May, 2014. He was residing with his parents at the time of the hearing. According to his financial affidavit, the plaintiff has net weekly income of $15, representing residuals for his prior work in television and film. The plaintiff's financial affidavit reflects a total of $2785 in his checking and savings accounts and liabilities totaling $58,139.

"According to the affidavit of counsel fees submitted by the plaintiff's counsel, the plaintiff had paid $22,339 and owed $41,261 as of the hearing date. The plaintiff testified that he had not asked his parents for financial

[2] A guardian ad litem was appointed by the court on October 9, 2012. The issue of payment of the fees of a guardian ad litem is not addressed in the court's memorandum of decision and is not the subject of this appeal.

assistance to pay his legal bills. There was no evidence that the plaintiff's parents were willing or able to do so.[3]

"The defendant is a managing director of Gladstone Management Corporation, a family company.[4] According to her financial affidavit, her net weekly income from employment is $5569. She had $7742 in her checking account and retirement assets totaling $429,075 as of the hearing date. The defendant reported liabilities of $288,354 on her financial affidavit, $266,450 of which was a loan from the defendant's father for her legal fees in this action. The balance due to the defendant's father had increased by approximately $166,000 since January, 2014. . . .

[3] On September 25, 2015, the court filed a corrected memorandum of decision to replace the word "defendant's" with the word "plaintiff's" in the following sentence on page 2, line 4 of its decision: "There was no evidence that the *plaintiff's* parents were willing or able to [pay the plaintiff's legal fees]." (Emphasis added).

[4] Although not raised as an issue on appeal, the defendant disputes this finding as inaccurate, claiming that there was no evidence to support the finding that Gladstone Management Corporation is a closely held family business entity, rather than a corporation. The plaintiff counters that the court had heard testimony and/or argument concerning previous matters in this case that disclosed that the defendant's father, David Gladstone, was the founder and chief executive officer of this corporation. During argument on the motion for attorney's fees, the defendant also referred the court to a recent motion that the plaintiff had filed seeking to depose her father. In her reply brief, the defendant does not dispute the plaintiff's assertion that the corporation is connected to the Gladstone family of which she is a member. Even if the court took judicial notice of prior information it had acquired related to the corporation, and failed to notify the parties of such notice, we conclude that the defendant's familial connection to her employer was not central to the issues at hand. Although the fact of the defendant's ability to borrow funds from her father for legal fees was discussed during the hearing, the sources from which her father may have acquired the funds to lend to her was not an issue that was discussed. "Notice to the parties is not always required when a court takes judicial notice. Our own cases have attempted to draw a line between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard . . . and matters of established fact, the accuracy of which cannot be questioned, such as court files, which may be judicially noticed without affording a hearing." (Citations omitted.) *Moore* v. *Moore*, 173 Conn. 120, 121–22, 376 A.2d 1085 (1977).

"There is a significant disparity between the financial resources of the plaintiff and those available to the defendant.[5] In addition to her own earnings and assets, the defendant has a loan facility with her father to fund her legal fees as necessary. The plaintiff does not have a similar line of credit arrangement with his family.

"If the plaintiff cannot afford an attorney to represent him in postjudgment custody and visitation matters, he may be unable to protect his interests and the best interests of the parties' child. . . . Where, as here, a minor child is involved, an award of counsel fees may be even more essential to insure that all of the issues are fully and fairly presented to the court. . . .

"The court finds that the attorney's fees and costs sought by the plaintiff are reasonable under the circumstances.[6] An award that includes a retainer for future professional services is also appropriate here in view of the issues relating to the parties' child that are pending before the court." (Citations omitted; footnotes altered.)

The court granted the plaintiff's motion and ordered that the defendant pay $75,000 toward the plaintiff's attorney's fees, which payment "includes a retainer for services to be rendered in the future, to counsel for the plaintiff on or before December 15, 2014." This appeal followed.

The defendant filed a motion for articulation with this court on June 30, 2015. The trial court filed its

[5] Here, the court, in a footnote, indicated that "[t]he parties' July 28, 2014 stipulation, in which they allocate 18 percent of the fees of Visitation Solutions to the plaintiff and 82 percent of the fees to the defendant, reflects this disparity." At the beginning of the hearing, the defendant agreed, in response to the court's question, that this stipulation to the allocation was fair and equitable.

[6] The reference to "costs" appears to be a minor error on the court's part. The plaintiff did not seek costs, or present any evidence regarding costs, and the defendant has not argued that any costs were improperly awarded. The issue on appeal is the award of attorney's fees.

articulation on September 25, 2015. The defendant requested that the court articulate (a) the legal and factual basis for the trial court's finding that the defendant had a "loan facility with her father to fund her legal fees as necessary"; (b) whether the trial court determined that the defendant has a line of credit arrangement with her father to fund her own future legal expenses, and, if so, the legal and factual basis for that determination; (c) whether the trial court determined that the defendant would use a "loan facility with her father" to pay all or any part of the court's $75,000 counsel fee award; and (d) the factual basis for the trial court's determination that the plaintiff does not have a line of credit arrangement with his family. The court articulated: "'[T]he court's finding that the defendant had a 'loan facility with her father to fund her legal fees as necessary' was based on the defendant's testimony at the hearing . . . . The court made no findings as to whether the defendant has a line of credit arrangement with her father to fund her own future legal expenses. The court made no findings as to whether the defendant would use a 'loan facility with her father' to pay all or any part of the $75,000 counsel fee award to the plaintiff. The court's finding that the plaintiff does not have a line of credit arrangement with his family was based on the plaintiff's testimony at the . . . hearing."

The defendant also requested that the court articulate the legal and factual basis for (a) the portion of the $75,000 attorney's fee award that was for services already rendered by the plaintiff's counsel, and (b) the portion of the $75,000 award that was for services to be rendered in the future. The court articulated that it "did not allocate the award of attorney's fees between payment for services that had already been provided by the plaintiff's counsel and a retainer for future services. Counsel for the plaintiff provided an affidavit of attorney's fees and represented to the court at the . . . hearing that his firm was owed $41,261.12. He also requested

a retainer of $50,000." No motion for review of the articulation was filed.

The court granted the plaintiff's motion for a termination of the stay of its $75,000 counsel fee award on September 22, 2015. The defendant filed a motion for review of that order. On November 18, 2015, this court granted that motion and granted the relief requested by vacating the trial court's order terminating the stay.

Additional facts will be set forth as necessary.

I

We first address the defendant's claim that the court improperly applied the law when it ordered the defendant to pay the plaintiff's attorney's fees.

We begin by noting our standard of review, which is well established. In dissolution proceedings, the court may order either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in General Statutes § 46b-82;[7] see also General Statutes § 46b-62.[8] This includes postdissolution proceedings affecting the custody of minor children. See *Krasnow* v. *Krasnow*, 140 Conn. 254, 262, 99 A.2d 104 (1953) (jurisdiction of

[7] General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the . . . age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

[8] General Statutes § 46b-62 provides in relevant part: "(a) In any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse or, if such proceeding concerns the custody, care, education, visitation or support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. . . ."

court to modify decree in matter of custody is continuing one, so court has power, whether inherent or statutory, to make allowance for counsel fees when custody matter again in issue after final decree).[9] "Whether to allow counsel fees, and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citations omitted; internal quotation marks omitted.) *Unkelbach* v. *McNary*, 244 Conn. 350, 373–74, 710 A.2d 717 (1998). The court's "function in reviewing such discretionary decisions is to determine whether the decision of the trial court was clearly erroneous in view of the evidence and pleadings in the whole record. . . . [J]udicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In making those determinations, [this court] allow[s] every reasonable presumption . . . in favor of the correctness of [the trial court's] action." (Citations omitted; internal quotation marks omitted.) *Bornemann* v. *Bornemann*, 245 Conn. 508, 531, 752 A.2d 978 (1998). We also note that "the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . It is axiomatic that we defer to the trial court's assessment of the credibility of witnesses and the weight to afford their testimony." (Citation omitted; internal

[9] In light of our Supreme Court's ruling in *Krasnow*, we decline the defendant's invitation to adopt a different method for determining whether to award counsel fees in postdissolution proceedings to avoid unauthorized property redistributions. The statute, § 46b-62, is not limited to fees incurred during a dissolution action, as it refers to "any proceedings seeking relief under the provisions of this chapter," which would include a proceeding seeking to modify custody pursuant to General Statutes § 46b-56. It also specifically refers to an award of fees to a spouse or a parent in a proceeding concerning the custody of a minor child.

quotation marks omitted.) *Malave* v. *Ortiz*, 114 Conn. App. 414, 425, 970 A.2d 743 (2009). "An appeal is not a retrial and it is well established that this court does not make findings of fact." *Clougherty* v. *Clougherty*, 162 Conn. App. 857, 865–66 n.3, 133 A.3d 886, cert. denied, 320 Conn. 932, 134 A.3d 621 (2016).

The defendant contends that the trial court could not order her to pay the plaintiff's attorney's fees unless the evidence showed that she had ample liquid assets with which to pay the award, and that the plaintiff's only liquid asset at the time of the hearing on the plaintiff's motion was a bank account with a balance of $7742. She argues that had the court done a proper analysis of whether an award of counsel fees was appropriate, it would have concluded that neither party had ample liquid assets to support an award of attorney's fees. Instead, she claims, the court looked past her limited liquid funds and considered the parties' total financial resources and, in doing so, took an unbalanced view of them. She further claims that the court improperly accepted as true the plaintiff's allegations that she had violated their parenting agreement and considered the defendant's past ability to borrow funds from her father to pay her past legal fees. The defendant also asserts that if neither party has ample liquid funds to pay attorney's fees, there has to be a required finding of contempt, misconduct, or bad faith litigation in order to justify an award.

The plaintiff asserts that the court, after first determining that the plaintiff, the party seeking counsel fees, did not have ample liquid assets with which to pay attorney's fees, properly applied the law and considered the parties' overall financial abilities and considered the required statutory criteria in determining whether to award attorney's fees. He claims that the defendant is faulting the trial court for not specifying how it considered and weighed each statutory criterion despite

the fact that the trial court is not obligated to make express findings on each of the criteria. Finally, the plaintiff argues that the court emphasized that in issues involving a minor child's custody, an award of counsel fees may be even more essential to protect the child's best interests. We agree with the plaintiff that the court's determination that the defendant should pay an award of counsel fees to the plaintiff was not in derogation of the law. We disagree with the plaintiff, however, as to the reasonableness of the fees that were awarded to the plaintiff, which will be discussed in part II of this opinion.

General Statutes § 46b-62 governs the award of attorney's fees in dissolution proceedings except in certain contempt matters.[10] Section 46b-62 provides in relevant part that "the court may order either spouse . . . to pay the reasonable attorneys' fees of the other in accordance with their respective financial abilities and the criteria set forth in § 46b-82." These criteria include, inter alia, the parties' "age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs . . . ." General Statutes § 46b-82 (a). "[T]he focus of § 46b-62 is on compensation. Section 46b-62 empowers a trial court to award attorney's fees to make a financially disadvantaged party whole for pursuing a legitimate legal claim. The court may not exercise this compensatory power without first ascertaining that the prospective recipient lacks funds sufficient to cover the cost of his or her legal expenses." *Dobozy* v. *Dobozy*, 241 Conn. 490, 499, 697 A.2d 1117 (1997). "It is the circumstances of the parties at the time of trial which control." *Arrigoni* v. *Arrigoni*, 184 Conn. 513, 519, 440 A.2d 206 (1981).

[10] General Statutes § 46b-87 governs the award of attorney's fees upon a finding of contempt in contempt proceedings in domestic relations cases.

In making an award of attorney's fees pursuant to these statutes, "[t]he court is not obligated to make express findings on each of these statutory criteria." (Internal quotation marks omitted.) *Grimm* v. *Grimm*, 276 Conn. 377, 397, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

In *Koizim* v. *Koizim*, 181 Conn. 492, 435 A.2d 1030 (1980), our Supreme Court stated: "Counsel fees are not to be awarded merely because the obligor has demonstrated an ability to pay. Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . In making its determination regarding attorney's fees, the court is directed by . . . § 46b-62 to consider the respective financial abilities of the parties. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. Because the defendant had ample liquid funds as a result of the other orders in this case, there was no justification for an allowance of counsel fees." (Citations omitted; internal quotation marks omitted.) Id., 500–501.

Subsequently, in *Maguire* v. *Maguire*, 222 Conn. 32, 608 A.2d 79 (1992), our Supreme Court noted that "the matters to be considered in awarding a party counsel fees are essentially the same as those involved in making alimony awards . . . . [R]easonable attorney's fees [may] be awarded in accordance with [the parties'] respective financial abilities and the criteria set forth in [§ 46b-82, which lists numerous] criteria to be considered by the court in awarding alimony." (Citations omitted; internal quotation marks omitted.) Id., 43–44. In analyzing the statutory language and the relevant case law interpreting § 46b-62, the court stated, "ample liquid funds were not an absolute litmus test for an award of counsel fees. . . . [T]o award counsel fees to a spouse who had sufficient liquid assets would be justified, if

the failure to do so would substantially undermine the other financial awards." (Citation omitted; internal quotation marks omitted.) Id., 44.

"It is also well established that the court has inherent equitable powers in resolving actions stemming from a marital dispute, and the court may consider factors other than those enumerated in the statutes if such factors are appropriate for a just and equitable resolution of the marital dispute . . . ." (Internal quotation marks omitted.) *Clougherty* v. *Clougherty*, supra, 162 Conn. App. 876; id., 877 (in addition to considering parties' overall financial situations in accordance with § 46b-82 criteria, as required by § 46b-62, court could consider one party's additional expenses incurred in fulfilling parental duties under child support and visitation orders); see also *Benavides* v. *Benavides*, 11 Conn. App. 150, 156, 526 A.2d 536 (1987).[11]

In the present case, the court heard brief testimony from both parties and also had for its review the parties' financial affidavits, the defendant's 2013 tax return and her form W-2 for 2012. The defendant's wages and other compensation exceeded one million dollars per year. Her assets, including a one-half interest in a home in Greenwich valued at $722,129,[12] restricted stock valued at $73,713, upon which the defendant had been able

[11] The inherent equitable powers of the family court also should permit the denial of an award of counsel fees despite the poor financial situation of the moving party if the legal claim being pursued is without merit or frivolous. See *Dobozy* v. *Dobozy*, supra, 241 Conn. 499 (§ 46b-62 empowers trial court to award attorney's fees to make financially disadvantaged party whole for pursuing legitimate legal claim).

[12] In footnote 2 of the defendant's brief, she claims that the amount attested to by her on her financial affidavit as to the amount of equity she possessed in the home, $722,129.69, was a "mistake"; however, she never moved to reargue or moved to open the judgment and correct the record. "In deciding a case, this court cannot resort to matters extraneous to the formal record, to facts which have not been found and which are not admitted in the pleadings, or to documents or exhibits which are not part of the record." *State* v. *Evans*, 9 Conn. App. 349, 354, 519 A.2d 73 (1986). The trial court is entitled to rely on the sworn financial affidavits of the parties filed in

to borrow, and retirement assets valued at $429,075. The plaintiff was unemployed and had a weekly net income of $15. He was living with his parents and the net value of his assets was $29,983.89. Although the defendant testified, she never asserted during the hearing that she could not generate additional funds by liquidating or borrowing on her considerable assets. The court found that she had incurred attorney's fees in the amount of $166,000 between January and July, 2014.

In granting the plaintiff an award of counsel fees in this case, the court noted that if the potential obligee has ample liquid funds, an allowance of counsel fees would not be justified. Therefore, the court obviously concluded, after noting that the plaintiff was unemployed with a net weekly income of $15 and liabilities totaling $58,139 and that he was residing with his parents, that he did not possess ample liquid funds. As a result, the court expressly indicated, without specificity, that it had considered the total financial resources of the parties, employing the criteria set forth in § 46b-82 as required by § 46b-62, the statute that permits the court to award attorney's fees in dissolution proceedings.

The defendant devotes a considerable portion of her brief to arguing that the court specifically neglected to consider certain criteria or that it impermissibly considered others.

The defendant asserts that the court abused its discretion by failing to consider the plaintiff's employability or earning capacity, but the court heard the plaintiff testify that he was currently unemployed and what amounts he had earned at several of his prior places of employment. The defendant's counsel made no further inquiry in this area. The defendant also claims that the

family matters. See, e.g., *Voloshin* v. *Voloshin*, 12 Conn. App. 626, 628, 533 A.2d 573 (1987).

court failed to consider her expenses as the custodial parent, which were reflected on her financial affidavit. In marshaling the evidence during a brief closing argument, however, the defendant's counsel did not present any argument to the court regarding the plaintiff's employability or earning capacity, or the defendant's custodial expenses, or how they should be taken into consideration when ruling on the plaintiff's motion.

The defendant also claims that the court failed to consider the fact that her earning level is commensurate with her expense level,[13] and, therefore, she cannot possibly comply with an order to pay the plaintiff's counsel fees.

Despite the defendant's assertions that the court did not consider the plaintiff's employability, or the defendant's custodial and other expenses, nothing in the court's memorandum of decision supports that conclusion. Rather, the trial court concluded, after reviewing and considering the evidence of the parties' financial circumstances, that there was "a significant disparity between the financial resources of the plaintiff and those available to the defendant." The court, given the circumstances of this case, reasonably deemed giving considerable weight to the plaintiff's earning capacity to be inappropriate. The visitation situation in this case had progressed to a point where, for whatever reason, the minor child, who was seven years old at the time of the hearing, was not seeing the plaintiff as often as was contemplated by the separation agreement, visits were supervised, and a visitation evaluation had become necessary. Thus, it was not unreasonable for

[13] The defendant's claimed monthly expenses are $26,474.90, which translates into $6109.64 weekly. The affidavit reflects numerous expenses only those with income well above average might consider essential, such as private school, camps, piano lessons, four athletic programs for the minor child, domestic help, yard maintenance, entertainment, travel and vacations, Pilates classes, and a club membership.

the court to conclude that time was of the essence and that waiting for the plaintiff to find employment commensurate with his earning capacity would not be in the minor child's best interests.

Taking further aim at the court's consideration of the best interests of the minor child, the defendant argues that it was improper for the trial court to consider the basis underlying the plaintiff's motion for modification in ruling on his motion for counsel fees. The defendant suggests that the court accepted as true the plaintiff's allegations of parental alienation on her part and, therefore, issued a punitive award. We do not agree. Although the court indicated as part of its consideration that "[i]f the plaintiff cannot afford an attorney to represent him in postjudgment custody and visitation matters, he may be unable to protect his interests and the best interests of the parties' child," and that "where, as here, a minor child is involved, an award of counsel fees may be even more essential to insure that all of the issues are fully and fairly presented to the court," the court did not specifically find that there was truth to the plaintiff's allegations of parental alienation on the part of the defendant.[14] Our Supreme Court has indicated that a paramount consideration in the determination of whether to award a party counsel fees is that the party "may not be deprived of [his or] her rights because of lack of funds." (Internal quotation marks omitted.) *Koizim* v. *Koizim*, supra, 181 Conn. 501. As previously noted in this opinion, a trial court, in reviewing an award of attorney's fees, "has inherent equitable powers in resolving actions stemming from marital disputes that allow it to consider factors beyond those enumerated in the statutes." *Clougherty* v. *Clougherty*, supra,

[14] In fact, during the hearing, the court sustained the defendant's objection and only allowed limited testimony by the plaintiff about the defendant's alleged noncompliance with the visitation order, indicating it did not want "to get into the substance of other issues."

162 Conn. App. 877. Thus, once it determined that the statutory factors justifying an award had been met, it was not an abuse of discretion for the court to additionally consider the exigencies of the circumstances with regard to visitation and custody, and to determine that waiting for the plaintiff to realize, at some future point, sufficient liquid assets with which to pay counsel fees was not in the minor child's best interests.

The defendant also argues that the court improperly considered her nonliquid assets in awarding the plaintiff counsel fees. She claims the court should have considered only the $7742 in her checking account in determining her ability to pay an award of attorney's fees. In the alternative, the defendant claims that even if the trial court was correct in examining her "total financial resources," it should have denied the plaintiff's motion because she does not possess adequate financial resources to pay the plaintiff's counsel fees.

Contrary to the argument set forth by the defendant, case law does not require the trial court to first determine whether the party *opposing* the request for an award of counsel fees has ample liquid assets sufficient to pay such an award. Hence, the defendant's view of the trial court's discretionary authority to award attorney's fees is too restrictive and would render the reference to § 46b-82 in § 46b-62 a nullity. It also would permit a recalcitrant party to insulate other sources of income from the court's consideration in weighing the criteria set forth in § 46b-82 merely by avoiding the accumulation of immediately accessible sums of money.

In *Dobozy* v. *Dobozy*, supra, 241 Conn. 490, our Supreme Court determined that the compensatory power under § 46b-62 may not be exercised unless the trial court first determines that "the *prospective* recipient lacks funds sufficient to cover the cost of his or her legal expenses." (Emphasis added.) Id., 499.

Although the court in *Bornemann* v. *Bornemann*, supra, 245 Conn. 508, noted that the plaintiff who was awarded counsel fees lacked sufficient liquid assets with which to pay her own attorney's fees, it also indicated that assets that would have been easily convertible to liquid form may be considered when reviewing each party's total financial resources; however, in that case, the only asset that the plaintiff possessed was shares of stock which, if sold, would not have generated an amount sufficient to pay her counsel fees. Id., 544–45. In *Arrigoni* v. *Arrigoni*, supra, 184 Conn. 519, the court stated that it did not mean to imply in *Koizim* v. *Koizim*, supra, 181 Conn. 501, that no allowance should be made if a party has sufficient cash to meet the attorney's bill, and in *Arrigoni*, it upheld a $5000 award of fees when the trial court did not regard the defendant's other financial resources as adequate for her future needs, even when supplemented by the financial orders contained in the judgment and the receipt of a $97,000 personal injury award, particularly because of her permanent disability and the continuing cost of her medical care. *Arrigoni* v. *Arrigoni*, supra, 517–20.

The use of the term "ample liquid funds" first appears in *Koizim*, with reference to counsel fees pursuant to § 46b-62 being improperly awarded because the proposed recipient of the award possessed ample liquid assets. *Koizim* v. *Koizim*, supra, 181 Conn. 501. Contrary to the defendant's position, the consideration of ample liquid assets pertains to the party requesting fees, and not to the party opposing the award. The plaintiff correctly argues that the test for an award of attorney's fees pursuant to § 46b-62 is not whether the nonmoving party has adequate liquid assets, but whether the *moving* party has ample liquid assets to pay his or her own attorney's fees. See *Dobozy* v. *Dobozy*, supra, 241 Conn. 499. If the moving party, the prospective recipient of the fee award, does not possess such assets, then the

trial court must look to and examine the total financial resources of the respective parties and the criteria set forth in § 46b-82 to determine whether it would be equitable to award the movant attorney's fees under the circumstances.

The so-called "*Maguire* rule"; *Maguire* v. *Maguire*, supra, 222 Conn. 44; was not expressed as such until our Supreme Court decided *Ramin* v. *Ramin*, 281 Conn. 324, 915 A.2d 790 (2007). In interpreting *Maguire*, the court in *Ramin* indicated that "the general rule under *Maguire* is that an award of attorney's fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; or (2) the failure to award attorney's fees will undermine the court's other financial orders." Id., 352.

This court, in *Wood* v. *Wood*, 160 Conn. App. 708, 125 A.3d 1040 (2015), recently addressed a claim similar to the defendant's claim that her lack of liquid assets prohibited an award of attorney's fees. In *Wood*, the plaintiff argued that his assets essentially were immune from the trial court's consideration because there was no finding that he could access the equity in his assets by selling, mortgaging, or collecting on them. Id., 725–26. We rejected the plaintiff's arguments that his assets were somehow immune from the court's consideration in determining whether he was capable of paying, inter alia, the defendant's counsel fees. This court concluded that, as long as the plaintiff had adequate financial assets to comply, the trial court did not abuse its discretion in ordering him to make certain payments to the defendant, including the payment of attorney's fees.[15] Id., 726. This court further noted that "[t]he trial court

[15] This court noted that the equity in the plaintiff's Greenwich property alone was sufficient to permit him to make the payments in a timely manner. *Wood* v. *Wood*, supra, 160 Conn. App. 726 n.5.

is not required to establish a plan for [a party] that details the steps [he or she] must take in order to comply with the court's financial orders." Id.

In the present case, like the plaintiff in *Wood*, the defendant possessed adequate financial resources, including a substantial income and assets valued at more than $1,230,000, from which the court reasonably could conclude she had the financial ability to comply with the court's order and sustain her basic welfare. The court did not abuse its discretion as it could have determined the defendant had sufficient assets to comply with its award, which assets were not shown to be incapable of liquidation.

The defendant portrays this case as one of first impression because she claims that where neither party has adequate financial resources and there has been no finding of contempt, misconduct or bad faith litigation, attorney's fees may not be awarded. Because we have concluded that the court, after considering the § 46b-82 criteria, reasonably could have found that the defendant *had* sufficient financial resources to pay the award, this argument requires scant attention. The plaintiff, in countering the defendant's argument, cites our Supreme Court's decision in *Mays* v. *Mays*, 193 Conn. 261, 476 A.2d 562 (1984), which presented a situation where both parties had little income or assets and the defendant challenged the trial court's order that he pay $1000 toward the plaintiff's counsel fees in defending an appeal. Id., 268. In concluding that the trial court abused its discretion in awarding counsel fees to the plaintiff, the court stated, "[t]here is nothing in the record to indicate that [the defendant] had any resources which could be applied to the payment of [the plaintiff's] expenses in defending the appeal." Id., 270. Contrary to the defendant's position in the present case, the court looked to the total financial resources of each party, and not merely to their liquid assets, in

determining whether it would be equitable to award the movant attorney's fees under the circumstances. Unlike the defendant in *Mays*, whose income was $59.75 per week and whose assets consisted of a ten year old car, furniture, and $500 worth of camera equipment; id., 269; the defendant in the present case possessed more than adequate financial resources to pay the award.

Furthermore, her view ignores the broad equitable powers of family courts. "The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. Without this wide discretion and broad equitable power, the courts in some cases might be unable fairly to resolve the parties' dispute . . . . These powers, although not expressly given to the court by statute, have been held to be inherent powers of the trial court in actions for divorce or dissolution of marriage." (Citations omitted.) *Pasquariello* v. *Pasquariello*, 168 Conn. 579, 585–86, 362 A.2d 835 (1975).[16]

The final aspect of the defendant's claim is that the court abused its discretion by considering the defendant's past ability to borrow considerable sums from

[16] A trial court's ability to employ broad discretionary powers in determining whether to award counsel fees to a party in a domestic case was further addressed in *Ramin* v. *Ramin*, supra, 281 Conn. 324, in which our Supreme Court expanded the *Maguire* rule by permitting the trial court to award counsel fees in the case of egregious litigation misconduct that has required the other party to expend significant sums for attorney's fees, even if the innocent party possesses ample liquid funds and regardless of whether the court's other financial orders would be undermined, provided that the trial court determines that the misconduct has not been adequately addressed by other orders of the court. Id., 357; but see *Berzins* v. *Berzins*, 306 Conn. 651, 658, 51 A.3d 941 (2012) (refusing to expand scope of *Ramin*'s expansion of *Maguire* beyond discovery misconduct that occurs prior to entry of final judgment of dissolution). We do not, however, interpret *Berzins* as prohibiting a trial court from considering other equitable factors to justify an award of attorney's fees if the court first ascertains that one of the two requirements in the *Maguire* rule has been met. See *Clougherty* v.

her father to pay her own legal fees. On her financial affidavit, the defendant represented that she owed her father $266,450 in loans for legal fees, which she was repaying at the rate of $2664.50 per month.[17] Specifically, she points to a portion of the court's memorandum of decision that notes "the defendant has a loan facility with her father to fund her legal fees as necessary." The defendant asserts that this runs afoul of our Supreme Court's holding in *Mallory* v. *Mallory*, 207 Conn. 48, 539 A.2d 995 (1988), where the court held that family assistance in paying the defendant's attorney's fees did not reasonably support a conclusion that the family also would help the defendant pay the plaintiff's attorney's fees for an appeal. Id., 56. This claim, however, is refuted by the trial court's subsequent articulation, in response to the defendant's request, regarding the defendant's borrowing sums from her father.[18] In its articulation, the court unambiguously stated: "The court made no finding as to whether the defendant has a line of credit arrangement with her father to fund her own future legal expenses. The court made no finding as to whether the defendant would use a 'loan facility with her father' to pay all or any part of the $75,000 counsel fee award to the plaintiff." The court thus impliedly rejected the defendant's claim that it considered the defendant's ability to borrow from her father as the sole or primary means available to her to pay either the plaintiff's or her own fees going forward.

On the basis of our review of the record and our interpretation of existing case law, we conclude that the court did not abuse its discretion in granting the plaintiff's motion for attorney's fees to prosecute his

Clougherty, supra, 162 Conn. App. 876; see also *Benavides* v. *Benavides*, supra, 11 Conn. App. 156.

[17] The defendant testified, however, that her payment on the loan from her father was made annually.

[18] Neither party sought review of the court's articulation. See Practice Book § 66-7.

motion for a modification of the custody order. The court correctly considered and employed the *Maguire* test under §§ 46b-62 and 46b-82. Its decision was not phrased in such a manner that it suggested the court was sanctioning the defendant; rather, the court, after considering the correct criteria, also employed its inherent equitable powers in resolving actions stemming from marital disputes and properly considered another factor beyond those enumerated in the statutes. *Benavides* v. *Benavides*, supra, 11 Conn. App. 156. The court considered the "significant disparity between the financial resources of the plaintiff and those available to the defendant," and the need to fairly and fully resolve the parties' continuing, four year old dispute over custody and visitation of their seven year old child, as well as the need to ensure that the plaintiff not be deprived of his rights because of a lack of funds.

II

We next address the defendant's claim that the amount of the attorney's fees awarded reflected an abuse of the court's discretion.

The defendant objects to the payment of fees that, she argues, were outside the scope of the motion, not supported by evidence and completely speculative. She argues that the court improperly awarded both counsel fees for past legal work unrelated to the custody proceeding before it when the plaintiff's motion for counsel fees sought an award only "in connection with the prosecution of the plaintiff's motion for modification of joint legal custody" and not in connection with past litigation. In addition, the defendant claims that the court improperly failed to determine how much of the $75,000 was a retainer for future legal services and how much was for legal services already rendered.[19] Finally, the defendant objects to the court's decision to award fees in an

[19] The defendant concedes that an award of up to $9206.25 for prior legal services related to the plaintiff's motion for modification of custody was supported by the record by total billings that appear in the fee affidavit by

indeterminate amount for future work of undetermined description when the plaintiff offered no testimony, expert or otherwise, to support the representation of counsel that he needed a $50,000 retainer for future work.

The plaintiff counters that the defendant failed to preserve this claim when she failed to object to the submission of the affidavit by the plaintiff's counsel regarding fees or challenge the reasonableness of his requested attorney's fees during the hearing, even after the court addressed the defendant's counsel and asked if she wanted to be heard further on the request. See *Dobozy* v. *Dobozy*, supra, 241 Conn. 501 (trial court must allow obligor spouse right to challenge reasonableness of fees by cross-examination of witnesses or by presentation of evidence). The plaintiff claims that by failing to object or inquire further, the defendant effectively acquiesced in his request. Additionally, the plaintiff claims that his motion for attorney's fees expressly stated that he had existing fees due to his attorney in excess of $30,000.

Although we agree that under the circumstances of this case, which plainly reflect a history of litigiousness between the parties, the court acted within its wide discretion in awarding a sizeable retainer,[20] we agree

the plaintiff's counsel from May 5 to July 27, 2014. Therefore, the court's unspecified award for past services rendered relevant to the plaintiff's motion for modification of custody and the retainer for related, future services could have been as high as $65,793.75, which the defendant claims was an unreasonable amount to litigate a motion to modify legal custody. She argues that such an award lacked a sufficient evidentiary foundation, created a perverse incentive to litigate, rather than settle the custody issue, and did not provide for potentially necessary transfers if the plaintiff replaces his current attorney or a refund if the custody issue were to be resolved before the expenditure of the full retainer.

[20] The court awarded the plaintiff $75,000 in attorney's fees. The plaintiff requested a $50,000 retainer for future services and $41,261.12 for past services rendered that the plaintiff had not paid. Even if we assume that the court awarded the plaintiff the full amount of his request for past services, the amount of the retainer awarded would have been a sizeable amount, $33,738.88.

with the defendant that the court abused its discretion in setting the award of fees at $75,000 because the unspecified portion of the award that constituted payment of past fees for legal work unrelated to the plaintiff's pending custody issue was improper.

The following additional facts are relevant to the issue of the impropriety of the amount of fees awarded. During the hearing on the plaintiff's motion for attorney's fees, after the parties had testified, the plaintiff's counsel submitted a fee affidavit that contained entries spanning a period from March, 2012, to July 28, 2014. The fee affidavit indicated an amount billed over the past twenty-eight months of $63,600, and an amount due of $41,261.12 for past services rendered. The plaintiff's counsel represented that he sought an additional $50,000 retainer for possible future work on the plaintiff's motion for modification of custody. The defendant's counsel did not dispute the reasonableness, as to amount, of fees incurred for past work performed, but the defendant did object to the granting of *any* award. Furthermore, the defendant's counsel did specifically dispute the assertion of the plaintiff's counsel that a retainer in the amount of $50,000 was necessary for future work related to the pending custody proceeding.

The court's decision indicates that its award was for a combination of past and future legal services. On May 6, 2014, the plaintiff filed his motion to modify custody on his own behalf, yet counsel's signature is not affixed to it. In reviewing the fee affidavit from the plaintiff's counsel, even if we attribute all of the reflected billing descriptions between May 5, 2014, to July 28, 2014, as relating to the prosecution of his motion for modification of custody, the total is $9206.25.[21] In its articulation, the court refused to allocate the award of attorney's

[21] See footnote 19 of this opinion.

fees between payment for past services that already had been provided by the plaintiff's counsel and a retainer for future services, but it did indicate that it found that the plaintiff's counsel was owed $41,261.12, and that he requested a retainer of $50,000 before issuing its $75,000 award.

Preliminarily, we address the issue of whether the defendant waived her right to object to the amount of the past fees or the sizeable retainer awarded. We conclude that the defendant sufficiently alerted the court to her positions that no fees should be awarded and that the inclusion, in any award, of a $50,000 retainer would be unreasonably premature. We agree with the plaintiff, however, that the defendant did not object at the hearing to the amount of the claimed allowance on the ground of the lack of any evidentiary support. As the defendant indicated in her brief, this was not a case involving an objection to the truthfulness of counsel's fee affidavit or the quality of counsel's work; rather, the defendant objected to payment of any fees, and specifically, future fees for a retainer that she claimed encompassed a hearing in Middletown that might never occur.

A

First, we discuss our conclusion that the court erred in including, as part of its award, attorney's fees related to past services. In *Dobozy* v. *Dobozy*, supra, 241 Conn. 501 n.8, our Supreme Court noted: "We interpret [§ 46b-62] to imply that a trial court may award attorney's fees incurred only in connection with the proceeding immediately before the court and not in connection with a legal action resolved in an antecedent proceeding. . . . Having already acted on the plaintiff's first two contempt motions without awarding attorney's fees thereon, the trial court did not have the authority, under

§ 46b-62, to award fees for those proceedings on a retroactive basis. On remand, the trial court should ensure that whatever reasonable attorney's fees are properly owing to the plaintiff, those fees reflect only legal expenses arising in connection with the contempt proceeding at issue in this case . . . ."[22] (Citation omitted.)

Furthermore, in this regard, "we note that [p]leadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . It is fundamental in our law that the right of a [party] to recover is limited to the allegations in his [pleading]. . . . Facts found but not averred cannot be made the basis for a recovery. . . . Thus, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings. . . . A judgment in the absence of written pleadings defining the issues would not merely be erroneous, it would be void." (Citation omitted; internal quotation marks omitted.) *Breiter* v. *Breiter*, 80 Conn. App. 332, 335–36, 835 A.2d 111 (2003). Although the plaintiff's motion made a reference to fees in excess of $30,000 already due and owing to his attorneys, his request at the conclusion of his motion, which set forth the nature of the award that he was seeking, only referred to as an award "in connection with the prosecution of the plaintiff's motion for modification of joint legal custody." In reaching its conclusion that the plaintiff was entitled to an award of $75,000, we conclude that the court abused its discretion and improperly awarded fees for past legal work unrelated to the proceeding immediately before it.

[22] See also *Mallory* v. *Mallory*, supra, 207 Conn. 58 (where party is found in contempt, §§ 46b-87 and 46b-62 permit trial court to award attorney's fees incurred during "that" contempt proceeding); *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 185, 138 A.3d 1069 (2016) (fees awarded should be restricted to time expended in relation to pending contempt action).

B

Next, we address whether the court abused its discretion in awarding the plaintiff a retainer for future attorney's fees. The defendant claims that the trial court abused its discretion in awarding an unspecified retainer for attorney's fees in connection with the prosecution of the plaintiff's motion for modification of custody because his request lacked a sufficient evidentiary foundation and was an unreasonably high amount. The defendant also claims that the award of the retainer was impermissibly vague, failing to provide for the contingency of the motion being resolved before the full amount of the retainer fee awarded was exhausted by the rendition of future services. The plaintiff claims that the defendant waived her right to object to the reasonableness of the retainer sought by the plaintiff, and even if it was properly objected to, there was a sufficient evidentiary foundation justifying the award of fees to secure future work on the motion for modification of custody.[23] We conclude that the court's award of an unspecified retainer for future legal services was not an abuse of discretion.

The following additional facts are relevant to this issue. Upon the submission of an affidavit of counsel fees prepared by the plaintiff's attorney, the court inquired into what fees he was seeking to have paid, and the plaintiff's counsel indicated that the plaintiff was requesting $41,261.12 in unpaid counsel fees for past work, as well as a further retainer of $50,000 for future legal services because "going forward . . . this looks like we're going to have a hearing and it may be in Middletown."[24] The court then addressed the defendant's counsel and asked if she wanted to be heard

[23] The plaintiff also argues that the defendant has not adequately briefed her vagueness claim. We do not agree with that position.

[24] In this instance, the plaintiff's counsel evidently was referring to the Regional Custody Docket located in the judicial district of Middlesex at Middletown, which accepts complex custody disputes referred to it by family courts around the state.

further on the request. In response, the defendant's counsel stated: "The only thing that I would say, Your Honor, I don't dispute the fees that Attorney Piazza is owed or the time or anything of that nature. I would say [I] do dispute . . . the likelihood that this would be a hearing in Middletown that will require $50,000 going forward. [M]y hope is that . . . this is the first time that we're getting a professional involved that both sides have selected who we all know and trust and respect . . . . So my hope is that there will be no hearing." Later, the defendant's counsel suggested that the court consider deferring a determination on a fee award to a later point in the progression of the custody dispute, when it would be certain that a contested hearing in Middletown would have to be scheduled.

An allowance for future counsel fees where one spouse is without ability to pay has long been recognized because a party who lacks funds would otherwise be deprived of their rights. "While ordinarily it is the better course for the court to defer such an award until after the services have been rendered, under some circumstances an allowance for future services may be necessary to safeguard a [party's] rights properly." *England* v. *England*, 138 Conn. 410, 417, 85 A.2d 483 (1951). Nevertheless, even though our Supreme Court has recognized that it is preferable to award counsel fees after they have been incurred; see *Arrigoni* v. *Arrigoni*, supra, 184 Conn. 518; in some cases, such as the case here, where the plaintiff is claiming that he has been unfairly deprived of his right to a relationship with his child, to wait until the conclusion of the proceeding would not serve to protect the rights of the party requiring the award of fees or the child's best interests.[25]

[25] During oral argument before this court, the plaintiff's attorney admitted in response to a question from the panel that the custody dispute has made no progress since the commencement of this appeal in December, 2014.

"[T]o support an award of attorney's fees, there must be a clearly stated and described factual predicate for the fees sought, apart from the trial court's general knowledge of what constitutes a reasonable fee." *Smith* v. *Snyder*, 267 Conn. 456, 477, 839 A.2d 589 (2004). To avoid the "undesirable burden imposed upon the courts when a party seeks an award of attorney's fees predicated solely upon a bare request for such fees," a party "must supply the court with a description of the nature and extent of the fees sought, to which the court may apply its knowledge and experience in determining the reasonableness of the fees requested." Id., 480. In applying its general knowledge and experience to a request for an award of future fees, the usual assumption that "[c]ourts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorneys' fees [because the] . . . court [is] in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues"; (internal quotation marks omitted) *Miller* v. *Kirshner*, 225 Conn. 185, 201, 621 A.2d 1326 (1993); is not wholly applicable because the award is being sought at the commencement of the subject litigation and not, as is more typical, at the conclusion. Because courts are required to base an award of counsel fees on descriptive evidence and their observation of the progress of the case, some courts that have awarded retainers for fees to be expended in the future have proceeded cautiously and awarded a small sum with a provision for review and possible augmentation of the award at a later time, thereby allowing the court to return to the preferred method of awarding fees after it has observed the nature and skillfulness of the legal work performed.[26]

[26] See, e.g., *Temple* v. *Brooks*, Superior Court, judicial district of Fairfield, Docket No. FA-85-0230050-S (March 27, 1990) (1 Conn. L. Rptr. 411) (motion for attorney's fees granted without prejudice to further consideration of matter at time of final hearing; defendant ordered to advance plaintiff fees of $3500 within thirty days); *Kiernan* v. *Kiernan*, Superior Court, judicial

In the case of a custody modification proceeding, we are aware that many such motions are resolved by agreement after negotiation, or a referral to family relations or mediation, which eliminates the need for a contested hearing. The award of a large retainer may be unwarranted in many such cases where it is impossible to predict how the motion will proceed to a resolution, especially where the court makes no provision for future review of its award. A large retainer award also may create an incentive to litigate rather than settle the custody issue, and it may encourage the erosion of a large retainer award by needless expenditures of the attorney's time.[27]

In this case, however, the court began its decision by indicating that it had taken judicial notice of the pleadings, motion and orders in the court file, and it determined that the parties had been continually litigating since the date of their divorce. It found that between September, 2010, the month after the judgment of dissolution entered, and November, 2014, each party had filed at least thirty postjudgment motions related in some way to the parties' minor child.[28] It further noted

district of Hartford, Docket No. FA-00-0723876-S (May 25, 2000) ($7500 pendente lite attorney's fee retainer awarded to plaintiff without prejudice to her right to return to court during pendente lite period if that sum proved to be inadequate).

[27] We do recognize, however, that an award of a large retainer also may discourage an overly litigious obligor from addressing the issue in a reasonable fashion, particularly if there is provision for a review, at the conclusion of the matter, to see how much of the retainer has been expended by the legal work performed.

[28] Our review of the record reflects that since the date of the filing of the plaintiff's motion for modification of custody on May 6, 2014, in addition to the plaintiff's motion for attorney's fees, he had filed three motions pertaining to alleged violations of the visitation schedule, including a motion for contempt, and a motion for a commission to depose David Gladstone, a resident of Virginia. The defendant had filed a motion for an updated psychological and custody evaluation, a motion for therapeutic visitation and a motion for a protective order regarding the scheduling of her deposition. The guardian ad litem had filed a request for a status conference to address compliance with court orders affecting the minor child.

that the defendant had accumulated legal fees in the amount of $166,000 since January, 2014. The court also had before it evidence that the plaintiff had accumulated expenses for fees related to the prosecution of his motion for modification in the amount of nearly $10,000 in the two months subsequent to the date on which the motion was filed. The court reasonably could have inferred, after reviewing these fees and the history of litigation in the case file, that this case would not be resolved easily. As a result, the court indicated that the plaintiff's request for fees was "reasonable under the circumstances."

In *Rostad* v. *Hirsch*, 128 Conn. App. 119, 15 A.3d 1176 (2011), this court disagreed with the defendant's contention that an award of attorney's fees, pendente lite, to the plaintiff in a paternity case, in the amount of $180,489.03, was an abuse of discretion because, due to the defendant's litigiousness, the plaintiff needed excellent, time-consuming representation in order to deal with the defenses employed by the defendant. Id., 126–27.

Although the precise amount of the retainer awarded in the present case is unclear, as previously noted, even if the court awarded the full $50,000, we find no abuse of discretion here, having reviewed the record, including the parties' past filings and the evidence of both parties' past legal expenses. First, although given the opportunity to respond to the retainer request, the defendant made no inquiry of the plaintiff or his counsel as to the basis for such a retainer, and never objected to the $50,000 retainer claim on the ground of the lack of an evidentiary foundation. See *Dobozy* v. *Dobozy*, supra, 241 Conn. 501; *England* v. *England*, supra, 138 Conn. 417. The court justifiably could have taken into account the fairness of and need for comparable skill levels in both plaintiff's and defendant's legal representation, the testimony of both parties as to the history

and current status of their custody and visitation arrangements,[29] its general knowledge and experience

[29] The record reflects that the visits were to be supervised and evaluated by an expert, the minor child was seeing a therapist, and the exchange of the child for visits was occurring at the Greenwich public library. The court heard evidence that an arrest had occurred at the time of an exchange of the child for a visit with the plaintiff. It appears that the suggestion by the defendant's counsel of the possibility of a resolution without the need for protracted litigation was overly optimistic in light of the number of filings in this case since May 6, 2014. The following testimony of the defendant when being questioned by the plaintiff's counsel during the hearing further illustrates the contentiousness with which the parties approach matters related to visitation:

"Q. [Y]our former husband is to see his son on weekends?

"A. Yes.

"Q. The last time he saw your son was for Father's Day for an hour?

"A. No.

"Q. When was the last time he saw your son?

"A. It was the end of June in the Greenwich library. I can't remember the date.

"Q. Okay. Is that the date he got arrested?

"A. Yes.

"Q. And that was during an exchange for visitation, right?

"A. Yes.

"Q. May 16, he was supposed to see your son, and you said your son was sick and you wouldn't take him, right?

"A. I don't remember.

"Q. Same for May 30?

"A. I don't remember.

"Q. Your husband asked to enforce his one week of visitation in the summer, he gave the week and you left with your son for Paris, right?

"A. No.

"Q. Were you in Paris with your son?

"A. Yes.

"Q. When was that?

"A. June 18 and I can't remember when we got back, maybe the 28th.

"Q. And you're saying your former husband did not ask for those dates to be with his son pursuant to the separation agreement?

"A. No.

"Q. On June 13, you said your son was sick and you wouldn't take him, correct, to visitation?

"A. I don't remember.

"Q. June 11 or July 11 the same thing, you said he was sick and you wouldn't take him?

"A. I don't remember.

"Q. And I subpoenaed the medical records for your son, correct?

"A. Yes.

"Q. And you don't have records of taking him to the doctor on those different dates, do you?

with these types of family cases, as well as its knowledge of past proceedings from its review of the file. The court acquainted itself with the history of the case, which, sadly, reflected the level to which the parties' ability to effectuate their original parenting agreement had deteriorated. Given the nature of the filings since the plaintiff had sought a modification of custody, the dispute seemed likely to continue for a considerable period of time. The court also had evidence of the parties' ability to accumulate significant attorney's fees in relatively brief periods of time. Under the unique circumstances of this high conflict case, a substantial retainer award was not an abuse of discretion, as it was not mere speculation to conclude that the matter before the court would most likely require a considerable amount of future legal effort to achieve a resolution.[30] In addition, any portion of the award for past fees rendered in prosecuting the plaintiff's motion for modification of custody since he had retained the assistance of legal counsel in May, 2014, also was appropriate and not an abuse of discretion.

Consideration of the foregoing and the general factual background disclosed by the record makes clear that the court was fully warranted in awarding the allowance that it did for a retainer and past fees rendered that were related to the recently initiated prosecution of the plaintiff's motion for modification of custody. Although ordinarily it is the better course for the court to defer an award of attorney's fees until after the services have been rendered, in certain circumstances, an allowance

"A. I do have records, but they're not all there, and some of them—

"Q. They're not here though?

"A. No, not all there."

[30] Given the family court's inherent power to act equitably, should the custody dispute achieve a swift resolution, the defendant would be able to file a subsequent motion for an accounting of attorney's fees expended on behalf of the plaintiff in pursuing his motion and request a refund, if one is justified.

for future services may be necessary to properly safeguard a party's rights. The court was justified in treating this as such a case.

The judgment is reversed only as to the award of attorney's fees for past legal services rendered that were unrelated to the plaintiff's May 6, 2014 motion for modification of custody, and the case is remanded for further proceedings on the plaintiff's motion for attorney's fees, consistent with this opinion, to reduce the amount of the award by the amount of past legal fees awarded to the plaintiff that were not directly related to the prosecution of his motion for modification of custody. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

NELSON PENA *v.* LAURA GLADSTONE
(AC 37750)

Keller, Mullins and Lavery, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying his motion for appellate attorney's fees. Previously, the trial court had awarded attorney's fees to the plaintiff related to past and future legal services rendered in connection with postjudgment custody and visitation issues involving the parties' minor child, from which the defendant appealed to this court. The plaintiff then sought additional attorney's fees to defend against that appeal. After a hearing, the trial court found that the plaintiff's testimony regarding his present net weekly income was not credible, and that he had an annual earning capacity of $200,000 given his age, level and amount of work experience, job history, and educational attainment. The trial court concluded that the plaintiff had or could garner the resources to pay his appellate counsel and denied the motion for appellate attorney's fees. On appeal to this court, the plaintiff claimed that the trial court improperly determined his earning capacity and that the court was mandated by certain dissolution statutes (§§ 46b-62 and 46-82) to award him appellate attorney's fees because he did not have ample liquid assets to pay them. He further claimed that by failing to award such attorney's fees, the trial

court had undermined the prior award of attorney's fees that were needed to prosecute his motion for modification of custody. *Held* that the trial court did not abuse its discretion in denying the plaintiff's motion for appellate attorney's fees: although there was no support in the record for the trial court's finding that the plaintiff realistically could be expected to earn $200,000 annually, any such error was harmless, as there was evidence in the record that supported the court's conclusion that the plaintiff had or could garner the resources to pay his appellate counsel, especially in light of the court's determination that the plaintiff was less than forthcoming about his available financial resources, and it was clear from the record that the trial court did not rely solely on its determination of the plaintiff's earning capacity in denying his motion; furthermore, the trial court expressly referenced the relevant criteria set forth in § 46b-82 and was free to weigh those criteria without having to detail what importance it had assigned to each of them when deciding whether to award attorney's fees pursuant to § 46b-62, which permitted but did not require the trial court to award attorney's fees under all of the circumstances of this case.

Argued May 18—officially released September 13, 2016

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' agreement; thereafter, the court, *Heller*, *J.*, granted the plaintiff's motion for attorney's fees, and the defendant appealed to this court; subsequently, the court, *Tindill*, *J.*, denied the plaintiff's motion for attorney's fees to defend the appeal, and the plaintiff appealed to this court; thereafter, the court, *Tindill*, *J.*, issued an articulation of its decision. *Affirmed.*

John H. Van Lenten, for the appellant (plaintiff).

Samuel V. Schoonmaker IV, with whom, on the brief, was *Wendy Dunne DiChristina*, for the appellee (defendant).

KELLER, J. This appeal, and a related appeal, *Pena* v. *Gladstone*, 168 Conn. App. 141, 144 A.3d 1085 (2016), an opinion we also are officially releasing today, involve successive motions for attorney's fees, considered by two different judges, and pertaining to a postdissolution custody proceeding in a contentious family case. The plaintiff, Nelson Pena, appeals from the trial court's, *Tindill*, *J.*, denial of his motion for attorney's fees to defend the related appeal brought by the defendant, Laura Gladstone. In that related appeal, the defendant has appealed from the order of the trial court, *Heller*, *J.*, which requires her to pay $75,000 to the plaintiff for attorney's fees related to past and future legal services rendered in connection with custody and visitation issues involving the parties' minor child.[1] In the present appeal, the plaintiff claims that the court (1) improperly determined that he had an earning capacity of $200,000 per year, and (2) abused its discretion in denying his motion for appellate attorney's fees. We affirm the judgment of the trial court.

The following facts and procedural history, portions of which are set forth in our opinion in the related appeal,[2] are relevant to this appeal. "The parties were divorced on August 17, 2010. The defendant was awarded sole legal and physical custody of the parties' minor child in accordance with Article II of a separation agreement executed by the parties. That lengthy and complex section of the agreement, regarding custody and visitation, as well as other parenting considerations, provided the plaintiff with liberal parenting time with

[1] This court denied the parties' motions to consolidate the two appeals. The related appeal, *Pena* v. *Gladstone*, 168 Conn. App. 141, 144 A.3d 1085 (2016), involves the defendant's appeal from the court's granting of the plaintiff's motion for attorney's fees to prosecute his motion for modification of custody.

[2] *Pena* v. *Gladstone*, supra, 168 Conn. App. 141.

the child. Litigation between the parties continued, however, after the entry of the dissolution judgment, and each party filed numerous motions relative to parenting issues. The situation deteriorated to the point where on July 28, 2014, the parties agreed to engage the services of Visitation Solutions to evaluate and facilitate the minor child's visitation with his father. A $3500 retainer was required for the use of this service; the plaintiff was ordered to pay 18 percent of the costs and the defendant was to be responsible for the remaining 82 percent. On May 6, 2014, the plaintiff, alleging the defendant's consistent interference with his relationship with the minor child, filed a motion for modification of legal custody, seeking joint legal custody, along with a motion for attorney's fees [postjudgment] that sought attorney's fees in an 'amount sufficient to prosecute the underlying motion for modification' . . . . He further alleged that he previously had 'earnings of less than $150,000 per year' and was unemployed as of May 2, 2014.

"The court heard the plaintiff's motion for attorney's fees on July 28, 2014, and issued its memorandum of decision on November 19, 2014. The court noted that the 'parties were before the court on the plaintiff's motion for attorney's fees, postjudgment . . . in which the plaintiff seeks an award of attorney's fees for counsel to represent him in the parties' continuing dispute over custody and visitation, particularly in prosecuting the plaintiff's motion for modification for joint legal custody.'

"The court then found the following facts. 'The plaintiff testified that he had been unemployed since May, 2014. He was residing with his parents at the time of the hearing. According to his financial affidavit, the plaintiff has net weekly income of $15, representing residuals for his prior work in television and film. The plaintiff's financial affidavit reflects a total of $2785 in

his checking and savings accounts and liabilities totaling $58,139.

" 'According to the affidavit of counsel fees submitted by the plaintiff's counsel, the plaintiff had paid $22,339 and owed $41,261 as of the hearing date. The plaintiff testified that he had not asked his parents for financial assistance to pay his legal bills. There was no evidence that the plaintiff's parents were willing or able to do so.

" 'The defendant is a managing director of Gladstone Management Corporation, a family company. According to her financial affidavit, her net weekly income from employment is $5569. She had $7742 in her checking account and retirement assets totaling $429,075 as of the hearing date. The defendant reported liabilities of $288,354 on her financial affidavit, $266,450 of which was a loan from the defendant's father for her legal fees in this action. The balance due to the defendant's father had increased by approximately $166,000 since January, 2014. . . .

" 'There is a significant disparity between the financial resources of the plaintiff and those available to the defendant. In addition to her own earnings and assets, the defendant has a loan facility with her father to fund her legal fees as necessary. The plaintiff does not have a similar line of credit arrangement with his family.

" 'If the plaintiff cannot afford an attorney to represent him in postjudgment custody and visitation matters, he may be unable to protect his interests and the best interests of the parties' child. . . . Where, as here, a minor child is involved, an award of counsel fees may be even more essential to insure that all of the issues are fully and fairly presented to the court. . . .

" 'The court finds that the attorney's fees and costs sought by the plaintiff are reasonable under the circumstances. An award that includes a retainer for future

professional services is also appropriate here in view of the issues relating to the parties' child that are pending before the court.' . . .

"The court granted the plaintiff's motion and ordered that the defendant pay $75,000 toward the plaintiff's attorney's fees, which payment 'includes a retainer for services to be rendered in the future, to counsel for the plaintiff on or before December 15, 2014.'' (Footnotes omitted.) *Pena* v. *Gladstone*, supra, 168 Conn. App. 143–46. The defendant appealed the court's award of $75,000 in attorney's fees.[3]

On December 19, 2014, the plaintiff filed a motion for attorney's fees to defend the appeal. In his motion, the plaintiff represented that he was unemployed and was not earning income, that he had substantial visitation expenses that he was unable to pay, and that he did not have any assets to enable him to pay counsel fees, transcript fees, and other costs to defend the appeal. On February 23, 2015, the court, *Tindill*, *J.*, held a hearing. At that hearing, the plaintiff and the defendant testified and filed their respective, updated financial affidavits. The plaintiff's financial affidavit was dated January 12, 2015, and the defendant's financial affidavit was dated February 23, 2015.

The plaintiff's testimony, which included extensive cross-examination, established that he was continuing to search for employment but had not received any job offers.[4] The plaintiff acknowledged that his mother

[3] In our opinion released today regarding the related appeal, we reversed, in part, the judgment of the trial court with respect to the portion of the $75,000 award that pertained to proceedings that are unrelated to the plaintiff's motion for modification of custody. *Pena* v. *Gladstone*, supra, 168 Conn. App. 175.

[4] The plaintiff was reluctant to provide the names of the companies where he had sought employment or had been interviewed, alleging that, in the past, the defendant and her father had contacted his potential employers to discourage his hiring. The plaintiff only disclosed the names after the court ordered the defendant and her family members not to contact any of the potential employers that the plaintiff had mentioned during the hearing.

allowed him to live with her rent free. He also indicated to the court, however, that he hoped soon to find employment, and the court concluded that he expected to secure employment soon. He told the court that he would accept a salary as low as $45,000 if he was offered a job to get his foot in the door, but he testified that a potential salary or other compensation was never disclosed or discussed during any of his recent job interviews. When asked about his past work in film and television, which was the source of a small amount of residual income in the amount of $15.05 per week, the plaintiff stated that he had acted in small parts on television shows, including Law and Order, and in commercials for McDonald's, Sprite, Eurovision, and Levi's, which had been shown on Spanish television. He did not indicate during his testimony that he was no longer able to obtain work in the entertainment field. Furthermore, he testified that he started receiving unemployment compensation in June or July, 2014, but then he contradicted his earlier testimony by saying that it commenced in September, 2014. He said that he did not know if he had received any retroactive payment for unemployment compensation in September, 2014, although he had lost his job in May, 2014. He advised the court that he previously had earned $90,000 working for major league baseball. The plaintiff also indicated that he was able to charge some of his weekly expenses of $130.25 on his credit card. He testified that his attorney was owed $53,219 and that he did not know if he had paid his attorney in the past two years, but he subsequently admitted that he had used his credit card to pay some of his attorney's fees in the spring or summer of 2014. He testified that he was not paying child support, or any part of the child's medical or child care expenses. He further stated that he had paid 18 percent of the cost of visitation supervision by Visitation Solutions until the end of December, 2014, but none of the

guardian ad litem's fees since the date of the dissolution judgment, although the guardian ad litem was still working on the case. The plaintiff defended his lack of financial support for the child by stating the following: "My child is well taken care of. My ex made a million dollars roughly last year in salary and had a bonus that was from her last financial affidavit of roughly $420,000."

On his financial affidavit, the plaintiff claimed a net weekly income of $15.05, a total of $580 in his checking and savings accounts, liabilities totaling $67,815.30, and assets of $24,698.74, which were contained in two IRAs. At the conclusion of the hearing, the plaintiff's attorney requested a $25,000 award of attorney's fees to defend the appeal.

The defendant, when called as a witness by the plaintiff, testified only briefly. She indicated that her salary as managing director of Gladstone Management Corporation was $22,333.34 per month, and that she had received a bonus of $422,222 in September, 2014. The defendant also stated that she had dividend and interest income. She was asked no further questions about her financial affidavit.[5] She indicated that she had paid her appellate attorney a full retainer of $10,000 to appeal Judge Heller's decision to award the plaintiff attorney's fees.

[5] On appeal, the plaintiff extensively compares the financial affidavit that the defendant filed at the time of the hearing before Judge Heller, on July 28, 2014, with the financial affidavit that she filed at the time of the hearing before Judge Tindill on February 23, 2015. In this regard, the plaintiff claims that the defendant attempted to render herself "judgment proof" subsequent to Judge Heller's attorney's fee award. These differences, however, were neither explored during the defendant's testimony nor argued to Judge Tindill on February 23, 2015, and there is no indication that the court considered the alleged disparities or took judicial notice of the defendant's earlier financial affidavit. See *Torres* v. *Waterbury*, 249 Conn. 110, 133, 733 A.2d 817 (1999) ("[i]t is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level" [internal quotation marks omitted]).

The defendant's financial affidavit reflected a net weekly income of $6143. Her weekly expenses were $5619.20 and her liabilities were $1,509,553, including an amount of $109,539 owed for her own counsel fees. Her assets were $484,132.74.

The court rendered judgment and issued its memorandum of decision, which it delivered orally from the bench, on the same date as the hearing.[6] The court, prior to issuing its decision, indicated that it had reviewed the transcript of the proceedings before Judge Heller, Judge Heller's decision, and the financial affidavits submitted by the parties dated January 12, 2015, which was the plaintiff's, and February 23, 2015, which was the defendant's. The court further indicated that it had exercised its discretion and inherent power to award an allowance of fees, and it considered the parties' respective financial abilities as well as the criteria set forth in General Statutes § 46b-82, as required by General Statutes § 46b-62. The court found that the income and earning disparity that Judge Heller had noted continued to exist between the parties. The court noted that the plaintiff was still unemployed and residing with his parents and had a net weekly income of $15.05. It also found that the defendant had a net monthly income of $26,618.86. The court then indicated that it found the plaintiff's testimony, regarding his expenses and available financial resources, not to be credible. It determined that the plaintiff could earn a minimum of $90,000 per year in the field in which he was actively looking for work, and that, given his age, experience, and education level, he had an earning capacity of at least $200,000 per year.

On the basis of its foregoing findings, the court found that the plaintiff "has the resources or can garner the

[6] This court ordered the trial court to comply with Practice Book § 64-1 by signing the February 23, 2015 transcript of its oral decision.

resources to defend the appeal and will not be deprived of his rights if the court declines to grant [his] motion." The court then denied the plaintiff's motion for attorney's fees to defend the appeal. This appeal followed.

After appealing, the plaintiff filed a motion for articulation, which the trial court denied. Then he filed a motion for review with this court, which motion was granted, but the relief requested was denied. In the same order, however, this court ordered the trial court, sua sponte, to "articulate the basis for [its] finding that the plaintiff has an earning capacity of $200,000 annually."

In response to this court's order, the trial court articulated the basis for its finding that the plaintiff's annual earning capacity is $200,000. In its articulation, the court provided the following additional bases for its decision not to award the plaintiff attorney's fees to defend the appeal. The court found that the plaintiff's testimony regarding his current earnings, monetary and other contributions from his mother, current rent, payments to his attorney, unemployment compensation, and American Express credit card was neither forthcoming nor honest; the information on the plaintiff's sworn financial affidavit regarding his current earnings and expenses was not truthful; and his claimed expenses and financial resources were not credible. The court noted that prior to residing with his mother, the plaintiff had rented a New York City apartment for $2500 per month and had earned an annual salary of $90,000 at his prior job as recently as September, 2014,[7] doing sales and marketing for major league baseball. The court further found that the plaintiff has a bachelor's

[7] The reference to September, 2014, appears to be a scrivener's error as the court acknowledged, during the hearing on February 23, 2014, that the plaintiff had last worked in May, 2014. September, 2014, is one time period during which the plaintiff testified that he had started receiving unemployment compensation.

degree in finance and a master's degree in business administration. It noted that his testimony as to his salary requirements, compensation discussions, or offers from the companies where he had sought employment was dishonest and that he concealed the amount of potential compensation for such jobs, which constituted a violation of his duty to provide a full and frank disclosure to the court. The court also articulated that the plaintiff has income from past television and film work and continues to be able to do such work. The court found that the plaintiff is in his forties and appears to be in excellent health, and that given the plaintiff's age, level and amount of work experience, job history, educational attainment, and the depth, breadth, and intensity of his job search and networking efforts, he has an annual earning capacity of $200,000.

Additional facts will be set forth as necessary.

We address only the plaintiff's second claim because we conclude that our determination of it is dispositive of this appeal. See, e.g., *Valentine* v. *Valentine*, 149 Conn. App. 799, 800, 90 A.3d 300 (2014).

The plaintiff claims that the court abused its discretion in denying his motion for appellate attorney's fees. The defendant argues that there was no abuse of discretion because the plaintiff failed to provide credible evidence to convince the court by a fair preponderance of the evidence that he was unable to pay appellate attorney's fees. We agree with the defendant.

We begin with our standard of review, which we set forth in the opinion we released today in the related appeal of *Pena* v. *Gladstone*, supra, 168 Conn. App. 141. "In dissolution proceedings, the court may order either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities

and the criteria set forth in General Statutes § 46b-82;[8] see also General Statutes § 46b-62.[9] This includes postdissolution proceedings affecting the custody of minor children. See *Krasnow* v. *Krasnow*, 140 Conn. 254, 262, 99 A.2d 104 (1953) (jurisdiction of court to modify decree in matter of custody is continuing one, so court has power, whether inherent or statutory, to make allowance for counsel fees when custody matter again in issue after final decree). Whether to allow counsel fees, and if so, in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did. . . . *Unkelbach* v. *McNary*, 244 Conn. 350, 373–74, 710 A.2d 717 (1998). The court's function in reviewing such discretionary decisions is to determine whether the decision of the trial court was clearly erroneous in view of the evidence and pleadings in the whole record. . . . [J]udicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In making those determinations, [this court] allow[s] every

[8] "General Statutes § 46b-82 (a) provides in relevant part: 'In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the . . . age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment.' " *Pena* v. *Gladstone*, supra, 168 Conn. App. 148 n.7.

[9] "General Statutes § 46b-62 provides in relevant part: '(a) In any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse or, if such proceeding concerns the custody, care, education, visitation or support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82.' " *Pena* v. *Gladstone*, supra, 168 Conn. App. 148 n.8.

reasonable presumption . . . in favor of the correctness of [the trial court's] action. . . . *Bornemann* v. *Bornemann*, 245 Conn. 508, 531, 543, 752 A.2d 978 (1998). We also note that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . It is axiomatic that we defer to the trial court's assessment of the credibility of witnesses and the weight to afford their testimony. . . . *Malave* v. *Ortiz*, 114 Conn. App. 414, 425, 970 A.2d 743 (2009). An appeal is not a retrial and it is well established that this court does not make findings of fact. *Clougherty* v. *Clougherty*, 162 Conn. App. 857, 865–66 n.3, 133 A.3d 886, cert. denied, 320 Conn. 932, 134 A.3d 621 (2016)." (Footnotes in original; internal quotation marks omitted.) *Pena* v. *Gladstone*, supra, 148–50. "Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Kiniry* v. *Kiniry*, 299 Conn. 308, 329, 9 A.3d 708 (2010).[10]

The plaintiff argues that the court was mandated to award him fees since there was nothing in the record to support the conclusion that he had ample liquid assets to pay them. That a court must award fees if it determines that the moving party lacks ample liquid assets is an erroneous statement of the law. The test for an award of attorney's fees pursuant to § 46b-62 is

[10] We note that the trial court is not limited to awarding attorney's fees for proceedings at the trial level. Connecticut courts have permitted post-judgment awards of attorney's fees to defend an appeal. See *Friedlander* v. *Friedlander*, 191 Conn. 81, 87–88, 463 A.2d 587 (1983) (affirming award of attorney's fees to defend appeal); *Greene* v. *Greene*, 13 Conn. App. 512, 517, 537 A.2d 537 (same), cert. denied, 207 Conn. 809, 541 A.2d 1238 (1988).

not based only on a consideration of whether the moving party has ample liquid assets. If the moving party, the prospective recipient of the fee award, does not possess such assets, then § 46b-62 requires that the trial court look to and examine the total financial resources of the respective parties and the other criteria set forth in § 46b-82 to determine whether it would be equitable to award the movant attorney's fees under the circumstances. The language of § 46b-62 "*permits*, *without requiring*, a trial court to award attorney's fees after considering the respective financial abilities of the parties and the criteria set forth in section 46b-82." (Emphasis added; internal quotation marks omitted.) *Fitzgerald* v. *Fitzgerald*, 190 Conn. 26, 33, 459 A.2d 498 (1983); accord *Marcus* v. *Cassara*, 142 Conn. App. 352, 359, 66 A.3d 894 (2013).

Although the court found that the plaintiff was currently unemployed and being supported in part by his parents, the court also found that the plaintiff's testimony as to his expenses and financial resources was not credible. The plaintiff had the burden to prove what he alleged in his motion: that he was unemployed and not earning income, that he had substantial visitation expenses that he was unable to pay, and that he did not have any assets or other financial resources to enable him to pay attorney's fees.

We presume the court correctly analyzed the law and the facts in rendering its judgment. See *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 129–31, 981 A.2d 1068 (2009). Contrary to the plaintiff's contention, the court did not determine that the plaintiff had ample liquid assets with which to pay his fees, but rather, in accordance with § 46b-62, it considered the respective financial resources and abilities of the parties in accordance with the criteria contained in § 46b-82.

The plaintiff argues that the court's finding that his earning capacity was $200,000 was the sole basis for

the denial of an attorney's fee award, but the court's decision and its articulation list numerous other reasons for its denial of the plaintiff's motion, including his health; his vocational abilities; his level of education; the intensity of his job search efforts; his lack of credibility, including testimony the court deemed evasive as to his job-related inquiries; the level of financial contributions he was getting from his mother; his unemployment compensation; his credit card payments; and his past payments to his attorney. Furthermore, the court does not have to specify each and every criterion it considers in assessing the parties' total financial resources under § 46b-82. In making an award of attorney's fees pursuant to these sections, "[t]he court is not obligated to make express findings on each of these statutory criteria." (Internal quotation marks omitted.) *Grimm* v. *Grimm*, 276 Conn. 377, 397, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

The trial court's oral decision expressly references that it considered the statutory criteria set forth in § 46b-82, as required by § 46b-62. That general reference by the court to those criteria is all that is required. See *Jewett* v. *Jewett*, 265 Conn. 669, 693, 830 A.2d 193 (2003) (court is not obligated to make express findings on each of statutory criteria in making award of attorney's fees under § 46b-62). The court, although it must consider all of these criteria, "need not . . . make explicit reference to the statutory criteria that it considered in making its decision or make express finding[s] as to each statutory factor. A ritualistic rendition of each and every statutory element would serve no useful purpose. . . . [T]he trial court is free to weigh the relevant statutory criteria without having to detail what importance it has assigned to the various statutory factors." (Internal quotation marks omitted.) *Greco* v. *Greco*, 70 Conn. App. 735, 739–40, 799 A.2d 331 (2002). "The trial court

is not required to give equal weight to each of the specified criteria it considers in determining its award, nor is any single criterion preferred over the others. . . . Where . . . it is apparent that the trial court considered all mandatory factors in fashioning its orders, we are not permitted to vary the weight that the trial court placed upon the statutory criteria in reaching its decision." (Internal quotation marks omitted.) *Langley* v. *Langley*, 137 Conn. App. 588, 596–97, 49 A.3d 272 (2012). Although "[t]he trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards on the earning capacity of the parties rather than on actual earned income"; (internal quotation marks omitted) id., 600; the court is not compelled to assign any particular weight to earning capacity vis-à-vis other criteria under § 46b-82. Although we agree with the plaintiff that there was no support in the record for the court's finding that the plaintiff realistically could be expected to earn $200,000 annually,[11] it was harmless error in light of the fact that it was not the only factor that the court expressly considered or may have considered in determining that he had the resources, or could garner the resources, to pay $25,000 in appellate attorney's fees.

Among other factors reflected in the record that the court might reasonably have considered was the fact that although the plaintiff claimed that he owed his attorney $53,219, his attorney continued to represent him, and the defendant already had been ordered by Judge Heller to pay an unspecified $75,000 award of attorney's fees to the plaintiff, which the plaintiff's counsel suggested had a "90 percent" chance of being affirmed on appeal. The plaintiff's financial affidavit also revealed nearly $25,000 in two retirement savings

[11] See *Schmidt* v. *Schmidt*, 180 Conn. 184, 190–91, 429 A.2d 470 (1980); *Bleuer* v. *Bleuer*, 59 Conn. App. 167, 170, 755 A.2d 946 (2000).

accounts, which he testified he had not considered liquidating to pay his attorney's fees because "[t]hat's all my money." He did not testify that these accounts could not be liquidated or borrowed upon. The plaintiff also testified, and the court found, that he had past earnings of $90,000.[12] The court also might reasonably have assumed that the plaintiff—given the optimism he expressed concerning his job search, his flexibility as to salary requirements, and the strength of his efforts in seeking employment—would soon find gainful employment in either the sports marketing or the entertainment field. The court also heard considerable evidence that the plaintiff was contributing nothing to the support of the child and that that burden had become the defendant's exclusively. The defendant also had been voluntarily paying 100 percent of the cost of the visitation evaluator, Visitation Solutions. The defendant's appellate attorney had requested a retainer of $10,000, not $25,000, to take her appeal. The court also might have considered the considerable expenses and liabilities reflected in the defendant's financial affidavit.[13]

The plaintiff further argues that even if the court concluded that he had sufficient financial assets to pay appellate attorney's fees, the court could not properly

[12] If the court had determined the plaintiff had an earning capacity of $90,000 annually, it would not necessarily have changed the end result on the plaintiff's motion. Evidence of past earnings may establish an earning capacity. *Schmidt* v. *Schmidt*, 180 Conn. 184, 191, 429 A.2d 470 (1980).

[13] "It is also well established that the court has inherent equitable powers in resolving actions stemming from a marital dispute, and the court may consider factors other than those enumerated in the statutes if such factors are appropriate for a just and equitable resolution of the marital dispute . . . ." (Internal quotation marks omitted.) *Clougherty* v. *Clougherty*, supra, 162 Conn. App. 876; id., 877 (in addition to considering parties' overall financial situations in accordance with § 46b-82 criteria, as required by § 46b-62, court could consider one party's additional expenses incurred in fulfilling parental duties under child support and visitation orders); see also *Benavides* v. *Benavides*, 11 Conn. App. 150, 156, 526 A.2d 536 (1987).

have concluded that its failure to award him attorney's fees to defend the appeal would not undermine Judge Heller's prior financial order granting him $75,000 in fees. See *Maguire* v. *Maguire*, 222 Conn. 32, 44, 608 A.2d 79 (1992) (to award counsel fees to spouse who had sufficient assets would be justified if failure to do so would substantially undermine other financial awards). He notes that but for the appellate stay, the only resource that could be applied to pay for the expense of defending the appeal would be to take some portion of the court's prior $75,000 award, and that shifting a portion of the court's prior award to defend the appeal would impair and diminish the plaintiff's ability to prosecute his motion for modification.[14]

This argument is similar to one that was raised in *Clougherty* v. *Clougherty*, supra, 162 Conn. App. 857, where the trial court awarded attorney's fees to a mother defending a motion for modification of custody, and later, a different judge denied her subsequent motion for attorney's fees when she had exhausted her initial award. The mother appealed, arguing that she lacked ample liquid funds, and that the court had improperly considered the father's substantial child support burden in deciding not to award her additional fees. This court upheld the denial of attorney's fees, concluding that there was no reason why the court could not equitably consider factors other than those enumerated in § 46b-82 if such factors are appropriate for a just and equitable resolution of the dispute. Id., 876. In *Clougherty*, this court further emphasized that the court was not obligated to make any finding as to whether the failure to award additional fees would undermine the court's existing financial orders. "Furthermore, the court was not obligated to award the plaintiff additional attorney's fees merely because she

[14] As the plaintiff notes in his brief, "[t]he court, [*Heller*, *J.*] giveth and the court, [*Tindill*, *J.*] taketh away."

exhausted [the court's] initial award . . . to defend the defendant's motion to modify custody." Id., 878. We iterate that the language of § 46b-62 permits, but does not require, the awarding of attorney's fees. See *Marcus* v. *Cassara*, supra, 142 Conn. App. 358–59.[15]

Given the notable differences in the parties' presentations during the two hearings, Judge Tindill, upon finding the plaintiff not to be credible, reasonably could have concluded, seven months after the hearing before Judge Heller and after almost a year of unemployment, that the plaintiff's claims of impecuniosity appeared less genuine and more contrived. It is clear from the record that the court thought the plaintiff was less than forthcoming about his financial resources. The manner in which he testified, particularly on cross-examination, reasonably could have left the court with the impression

[15] There are obvious inconsistencies in the two judgments with respect to an award of attorney's fees that we have considered on appeal and decided today. These inconsistencies are the result of factual, and significantly, credibility determinations of separate fact finders as to different, albeit similar, motions in which financial abilities were considered seven months apart and determined in light of separate and distinctive factual presentations by the parties. As a result, we cannot say that the apparent inconsistencies in the two decisions render either outcome illogical or unreasonable. In *McCarthy* v. *McCarthy*, 55 Conn. App. 326, 752 A.2d 1093 (1999), cert. denied, 252 Conn. 923, 752 A.2d 1081 (2000), the plaintiff's first motion for appellate attorney's fees was denied. Id., 328. Later, her second motion for appellate attorney's fees was granted by a different judge, who had not been informed of the prior judge's earlier denial. When informed of the earlier denial in a motion for rehearing, the second judge vacated his decision granting counsel fees, ruling that the first judge's decision should be adhered to as the law of the case. Id., 329–31. This court disagreed and held that the doctrine of the law of the case did not apply because the issue of appellate counsel fees was not an issue requiring a legal ruling, but rather a motion for the exercise of the trial court's discretion, which confers a wide degree of freedom when the same question is presented to different judges of a single district court, particularly when new or overriding circumstances exist. Id., 333–34; see also *State* v. *Knight*, 266 Conn. 658, 673, 835 A.2d 47 (2003) (logically inconsistent verdicts by separate fact finders are permissible); *State* v. *Arroyo*, 292 Conn. 558, 579–80, 973 A.2d 1254 (2009) (same), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010).

that he was concealing or conveniently forgetting financial information. Ultimately, therefore, in light of the court's conclusion that the plaintiff did not provide the court with full and frank disclosure as to his financial situation, he did not meet his burden of proving that it was fair and equitable, in light of all the circumstances, to order the defendant to pay him additional attorney's fees pursuant to § 46b-62 to defend the defendant's appeal.

On the basis of our review of the full record, we conclude that the court did not abuse its discretion in denying the plaintiff appellate attorney's fees. The court specifically stated that it considered all of the statutory criteria set forth in the applicable statute, as well as the parties' testimony and financial affidavits. Affording the court every reasonable presumption in favor of the correctness of its decision, we assume that the court relied on evidence relevant to each statutory criterion as it applied to both parties, and not solely on its finding as to the plaintiff's earning capacity. In light of the credible evidence and the court's findings, we conclude that the court properly exercised its wide discretion in denying the plaintiff's motion.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GUILLERMO BALBUENA
(AC 37208)

Sheldon, Prescott and Mihalakos, Js.

Syllabus

Convicted of the crime of conspiracy to commit murder, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he and five other persons, armed with guns and knives, pursued the victim, told him that they were going to kill him, and fired

multiple gunshots in the direction of the victim, one of which struck the victim and severely injured him. The defendant claimed that the trial court improperly denied his motion for a judgment of acquittal because the evidence was insufficient to show that he had entered into an agreement with his cohorts to kill the victim. *Held* that the trial court properly denied the defendant's motion for a judgment of acquittal, there having been sufficient evidence from which the jury could have found beyond a reasonable doubt that the defendant conspired to kill the victim: in light of the evidence showing that the defendant and his cohorts had arrived together outside the home of the victim's aunt and began vandalizing a car owned by the victim's brother, that upon seeing the victim, the group, armed with guns and knives, began to advance on and pursue the victim, taunting him that they were going to kill him, and that the group had fired multiple gunshots in the direction of the victim as they pursued him, the jury reasonably could have found that the defendant and his cohorts had agreed to kill the victim, and the jury reasonably could have inferred that the defendant was aware that some of his cohorts were armed and intended to use their weapons, which was strong circumstantial evidence of the defendant's agreement with others to engage in the pursuit with the purpose of killing the victim; moreover, the words yelled by the group that they were going to kill the victim, coupled with the group's concerted activities, were sufficient evidence from which the defendant's intent to kill the victim could be inferred; furthermore, the defendant's acquittal on the substantive charges did not undermine his conviction for conspiracy to commit murder, as the jury reasonably could have found that the defendant agreed to and held the requisite specific intent to kill the victim based on his active participation in a group that collectively made threatening comments to the victim, brandished weapons, and pursued and shot at the victim, whereas proof of the substantive crimes required the jury to find the existence of factors that were not elements of the crime of conspiracy.

Argued April 18—officially released September 13, 2016

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit murder, conspiracy to commit murder, assault in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Alander*, *J.*; verdict of guilty of conspiracy to commit murder; thereafter, the court denied

the defendant's motion for a judgment of acquittal and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Lisa A. Vanderhoof, assigned counsel, for the appellant (defendant).

Jean E. Silverio, certified legal intern, with whom were *Harry Weller*, senior assistant state's attorney, and, on the brief, *Brian Preleski*, state's attorney, and *Brett J. Salafia*, senior assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Guillermo Balbuena, appeals from the judgment of conviction, rendered after a jury trial, of conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a. On appeal, the defendant claims that the court erred in denying his motion for a judgment of acquittal. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On January 8, 2011, the victim, Erick Cruz, was at his aunt's home in New Britain for a Three Kings Day celebration. While the victim and his family were celebrating, the defendant, his brothers Yair Balbuena and Mario Balbuena, and three other individuals arrived at the scene in two vehicles. Upon their arrival, the defendant's group began to vandalize a car belonging to the victim's brother, Mario Cruz, who was also at the Three Kings Day celebration. After receiving a call from Cruz, the victim and his cousin, Marcelino Bermejo, ran downstairs and emerged from the building, whereupon they encountered the defendant's group.

The defendant and his five cohorts advanced on the victim. In response to the group's advance, the victim began to back away toward a garage located behind

the building and urged Bermejo to call the police. Bermejo ran back into his aunt's home to make the telephone call. The defendant's group brandished weapons, which included two guns and three knives, and said to the victim that they were going to kill him, and asked him, "how does it feel to have a pistol in your face?" The group pursued the victim around a car, around the garage, and back into the street.[1] Members of the group then shot at the victim multiple times, and one of the shots struck the victim in the neck, exiting through his jaw.

Santa Bermejo, a cousin of the victim and sister of Marcelino Bermejo, was in a building across the street when she heard a gunshot. In response to the noise, she stepped onto the second floor porch and lay on her stomach where she could look through a gap between the floor and the solid railing. From her location on the porch, Santa Bermejo was able to observe and identify the defendant and his two brothers. She also saw the defendant shoot at the victim. Once the defendant and his cohorts fled, she went onto the street. Shortly thereafter, Marcelino Bermejo and Santa Bermejo found the victim lying on the ground, bleeding from his wounds. The police and ambulance arrived, and the victim was taken to Saint Francis Hospital and Medical Center in Hartford, where he was treated for his injuries.

The victim gave two statements to the police following the incident, one at the hospital on January 13, 2011, and one at the New Britain Police Department on May

[1] The victim's testimony and his police statement vary slightly on this point. In his police statement on May 18, 2011, the victim stated that some of the men yelled, "how does it feel to have a pistol in your face?" The group then started to chase the victim while yelling, and subsequently shot the victim. In his testimony, the victim stated that he started to back away as the group came toward him. When the group moved in front of the victim, the victim walked around the garage, and at this point the group made their statements. The group continued to pursue the victim and then shot him.

18, 2011. On both occasions, the victim stated that the defendant was one of the six individuals who had pursued him, that two of the individuals had guns, and that the defendant's brother, Mario Balbuena, was the individual who had shot him. The victim was unclear as to the defendant's exact role in the pursuit; on January 13, 2011, the victim identified the defendant as the other individual with a gun, while on May 18, 2011, the victim was uncertain if the defendant had a gun.

The defendant was arrested on October 3, 2012, and charged with attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, conspiracy to commit murder in violation of §§ 53a-48[2] and 53a-54a,[3] assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). Following a jury trial, the defendant was convicted of conspiracy to commit murder and acquitted of all other charges. The court subsequently denied the defendant's motion for a judgment of acquittal and sentenced the defendant to eleven years incarceration. The defendant filed this appeal. Additional facts will be set forth as necessary.

The defendant claims that there was insufficient evidence to support his conviction for conspiracy to commit murder. First, the defendant argues that the jury lacked sufficient evidence to find that he and his coconspirators had entered into an agreement to kill the victim. Specifically, he contends that the jury lacked

[2] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

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

sufficient evidence to find the existence of a formal or express agreement, of a dispute between himself and the victim from which the jury reasonably could have inferred that an implied agreement was made to kill the victim, or of a swiftly formed agreement between the defendant and his coconspirators to murder the victim at the time of the incident. Second, the defendant claims that the jury lacked sufficient evidence to find that he had the requisite specific intent to kill the victim. We disagree.

We first set forth our standard of review and the relevant law. "The standard of appellate review of a denial of a motion for a judgment of acquittal has been settled by judicial decision. . . . The issue to be determined is whether the jury could have reasonably concluded, from the facts established and the reasonable inferences which could be drawn from those facts, that the cumulative effect was to establish guilt beyond a reasonable doubt . . . . The facts and the reasonable inferences stemming from the facts must be given a construction most favorable to sustaining the jury's verdict." (Internal quotation marks omitted.) *State* v. *Bonner*, 110 Conn. App. 621, 636, 955 A.2d 625, cert. denied, 289 Conn. 955, 961 A.2d 421 (2008). "In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation

marks omitted.) *State* v. *Taft*, 306 Conn. 749, 755–56, 51 A.3d 988 (2012).

When evaluating the sufficiency of the evidence, "[t]here is no distinction between direct and circumstantial evidence so far as probative force is concerned . . . . Indeed, [c]ircumstantial evidence . . . may be more certain, satisfying and persuasive than direct evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Jackson*, 257 Conn. 198, 206, 777 A.2d 591 (2001). Therefore, "the probative force of the evidence is not diminished because it consists, in whole or in part, of circumstantial evidence rather than direct evidence." (Internal quotation marks omitted.) *State* v. *Crump*, 43 Conn. App. 252, 256, 683 A.2d 402, cert. denied, 239 Conn. 941, 684 A.2d 712 (1996).

"To prove the crime of conspiracy, in violation of § 53a-48, the state must establish beyond a reasonable doubt that an agreement existed between two or more persons to engage in conduct constituting a crime and that subsequent to the agreement one of the conspirators performed an overt act in furtherance of the conspiracy." (Internal quotation marks omitted.) Id., 257–58. "The state must also show intent on the part of the accused that conduct constituting a crime be performed." (Internal quotation marks omitted.) *State* v. *Taft*, supra, 306 Conn. 756. Here the crime underlying the conspiracy is murder. "Intent to cause the death of a person is an element of the crime [of murder] and must be proved beyond a reasonable doubt. . . . Intent may, however, be inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Citations omitted.) *State* v. *Crump*, supra, 43 Conn. App. 257.

"The existence of a formal agreement between parties need not be proved. It is sufficient to show that they are knowingly engaged in a mutual plan to do a

forbidden act. . . . Because of the secret nature of a conspiracy, a conviction is usually based on circumstantial evidence. . . . The state need not prove that the defendant and a coconspirator shook hands, whispered in each other's ear, signed papers, or used any magic words such as we have an agreement." (Citations omitted; internal quotation marks omitted.) Id., 258. Rather, "[t]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts. . . . Further, [c]onspiracy can seldom be proved by direct evidence. It may be inferred from the activities of the accused persons." (Internal quotation marks omitted.) *State* v. *Green*, 261 Conn. 653, 669, 804 A.2d 810 (2002). Moreover, "[a] conspiracy can be formed in a very short time period . . . ." Id., 671.

In addition, "[t]he size of a defendant's role does not determine whether that person may be convicted of conspiracy charges. Rather, what is important is whether the defendant willfully participated in the activities of the conspiracy with knowledge of its illegal ends. . . . Participation in a single act in furtherance of the conspiracy is enough to sustain a finding of knowing participation." (Citations omitted; internal quotation marks omitted.) *State* v. *Boykin*, 27 Conn. App. 558, 565, 609 A.2d 242, cert. denied, 223 Conn. 905, 610 A.2d 179 (1992).

In *State* v. *Taft*, supra, 306 Conn. 749, our Supreme Court considered a claim of insufficient evidence to support a conviction of conspiracy to commit murder in factual circumstances similar to the present case. In *Taft*, a group of individuals chased after the victim. Two of the individuals, including the defendant, had guns. Someone in the pursuing group shouted, " '[l]ets get this mother fucker,' " and gunfire ensued. Id., 754. The Supreme Court held that sufficient evidence of a

conspiracy is found if the coconspirators are armed aggressors who act in concert to pursue the victim. Id., 757–58. Specifically, the Supreme Court held that shouting, " '[l]et's get this mother fucker,' " pursuing the victim while carrying weapons, and firing the weapons was sufficient evidence to establish the existence of an agreement to attack the victim. Id., 757. In addition, the court in *Taft* held that even if the defendant was not armed during the pursuit, the jury reasonably could have found that the defendant was aware that some of the pursuers were armed and would use their weapons in the pursuit, and, thus, the defendant's active participation was strong evidence of his agreement to the conspiracy. Id., 757–58. Therefore, the court concluded that "there was sufficient evidence to support the defendant's conviction for conspiracy to commit murder." Id., 761.

In the present case, our review of the record in the light most favorable to sustaining the verdict discloses that sufficient evidence existed from which the jury could have found beyond a reasonable doubt that the defendant conspired to kill the victim. First, sufficient evidence existed from which the jury reasonably could have determined that there was an agreement among the defendant and his cohorts to kill the victim. The defendant arrived with five other individuals, at the same time, outside the home of the victim's aunt and began vandalizing a car owned by the victim's brother. The defendant argues that this was an occurrence by chance and not actions designed and intended to lure the victim outside. Nevertheless, on the basis of the evidence presented at trial, the jury reasonably could have found that the victim and the Balbuena brothers had known each other for eight years, and that the defendant and his brothers targeted a specific car upon their arrival, suggesting that they knew to whom the vehicle belonged. Such evidence thus supported the

inference that the group's acts of vandalism had not been directed at a random vehicle, but instead had been directed at the specific vehicle in order to get the attention of those at the Three Kings Day celebration, including the victim. The jury had sufficient evidence to support the reasonable inference that it was not mere coincidence that the defendant and his cohorts arrived on the scene together and vandalized the car of the victim's brother.

Moreover, upon seeing the victim, the group, armed with guns and knives, began to advance on, and subsequently to pursue, the victim. See *State* v. *Taft*, supra, 306 Conn. 757–58 (sufficient evidence of conspiracy found when coconspirators are armed aggressors who act in concert to pursue victim). Members of the group taunted the victim, stating, "how does it feel to have a pistol in your face?" and that they were going to kill him. The latter statement describes precisely what the group attempted to do; they fired multiple shots in the direction of the victim, one of which hit and severely injured him. See *State* v. *Young*, 157 Conn. App. 544, 553, 117 A.3d 944 (arriving at scene together, firing weapons simultaneously, and fleeing scene together was sufficient evidence for jury to conclude beyond reasonable doubt that defendant and his cohort entered into agreement to commit assault in first degree), cert. denied, 317 Conn. 922, 118 A.3d 549 (2015). Accordingly, we conclude that a jury reasonably could have found that taunting the victim that they were going to kill him and advancing on the victim with weapons in hand indicated that the defendant and his cohorts agreed to kill the victim.

Furthermore, even if the defendant was not armed with a gun while he and his group pursued the victim, testimony reveals that the group's weapons, two of which were guns, were visible during the pursuit. The

jury thus reasonably could have inferred that the defendant was aware that some of his cohorts were armed and intended to use their weapons. Aware of this information, the defendant actively participated in the pursuit, which is strong circumstantial evidence of the defendant's agreement with the others to engage in this pursuit with the purpose of killing the victim. See *State* v. *Taft*, supra, 306 Conn. 757–58. Therefore, the jury reasonably could have determined that the defendant and his cohorts entered into an agreement to kill the victim.

The defendant's remaining argument focuses on the lack of sufficient evidence to demonstrate the defendant's specific intent to kill the victim.[4] The words yelled by the group that they were going to kill the victim, coupled with their concerted activities, of which the defendant was aware and participated in, are sufficient evidence from which the defendant's intent may be inferred. Whether the defendant himself uttered these words is of no consequence, because these words were accompanied by the defendant and his cohorts' active pursuit of the victim for some distance and their shooting in his direction. The jury reasonably could have inferred from the circumstantial evidence, if viewed together, that the defendant actively participated in the pursuit with the specific intent to kill the victim.

[4] Counsel for the defendant appears to confuse intent with motive, stating that "the state offered no evidence or explanation to the jury as to why the defendant and his brothers would conspire to commit the murder of Erick Cruz; thus there is even less evidence here than in *Green* that can logically and reasonably be construed to support an inference that (1) the defendant intended to conspire to commit the murder of Erick Cruz; (2) the defendant intended to commit the murder of Erick Cruz . . . ." Motive, however, is not an element of the crime of conspiracy to commit murder. Although motive may strengthen the state's case, its absence does not require the court to grant a motion for a judgment of acquittal. See *State* v. *Pinnock*, 220 Conn. 765, 773, 601 A.2d 521 (1992).

The defendant relies, however, on *State* v. *Green*, supra, 261 Conn. 653, to support his claim of insufficiency of the evidence. In *Green*, several members of a gang, armed with guns, approached four individuals, including the defendant, Charles Green, and Duane Clark. Id., 657–58. In response, Clark said, " 'shoot the motherfucker.' " Id., 658. Shots were fired, and one of the gang members was fatally wounded. Id. Green and Clark were tried together for murder and conspiracy to commit murder, and although Clark was found not guilty of both counts, Green was found guilty of both. Id., 659. Our Supreme Court found that the evidence was insufficient to prove that Green conspired to commit murder because of the inconsistent verdicts. Id., 669–71.

The present case is distinguishable from *Green*. In *Green*, the Supreme Court noted that the testimony offered at trial indicated that Green and his cohorts were accosted by a group of aggressors, Clark yelled to shoot, and, in response, some members of the group simultaneously reached for their guns and opened fire. Id., 658. In the present case, the entire group engaged in extended activity demonstrative of its being the aggressor with the collective intent to kill the victim. In addition, in *Green*, the alleged coconspirators were tried together, and one was found guilty while the other was not. Thus, the Supreme Court concluded that "the jury rejected the state's claim that [Green] had conspired with Clark to kill [the victim]."[5] Id., 671. In the present case, the defendant was not tried together with any of his alleged coconspirators in a single trial and

[5] The Supreme Court in *Green* noted that the evidence arguably could have supported a finding that Green had agreed with his cohorts to shoot the gang members. Green and Clark, however, were tried together, and the jury found Clark not guilty and Green guilty. On the basis of the inconsistent verdicts, the Supreme Court concluded that the evidence was insufficient to find Green guilty of conspiracy to commit murder. *State* v. *Green*, supra, 261 Conn. 669–70.

did not receive a factually or legally inconsistent verdict from another verdict rendered from the same jury.

The defendant also relies on *State* v. *Pond*, 315 Conn. 451, 108 A.3d 1083 (2015), to support his claim that his being found guilty of conspiracy to commit murder is inconsistent with his being found not guilty of the charges of attempt to commit murder, assault in the first degree, and criminal possession of a firearm. His reliance is misplaced. In *Pond*, our Supreme Court concluded that "[t]he commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes. . . . [This reflects the fact that] [t]he crime of conspiracy . . . has characteristics and ingredients which separate it from all other crimes. . . . The prohibition of conspiracy is directed not at the unlawful object . . . but at the process of agreeing to pursue that object. . . . A defendant can be convicted of conspiracy . . . even if the criminal plot never comes to fruition." (Citations omitted; internal quotation marks omitted.) Id., 473–74.

In the present case, the defendant's acquittal on the substantive charges does not undermine his conviction for conspiracy to commit murder. The crime of conspiracy to commit murder requires that the defendant agree to commit murder, perform an overt act in furtherance of committing murder, and hold the requisite intent to commit murder. General Statutes §§ 53a-48 and 53a-54a. A jury reasonably could have found that the defendant agreed to and held the requisite specific intent to kill the victim based on his active participation in a group that collectively made threatening comments to the victim, brandished weapons, pursued the victim, and shot at the victim. Proof of the substantive crimes, on the other hand, required the jury to find, inter alia, that the defendant himself had performed an action or omission constituting a substantial step toward causing the victim's death; see General Statutes §§ 53a-49 (a) (2) and

53a-54a; had caused injury to the victim; see General Statutes § 53a-59 (a) (1); or had possessed a firearm. See General Statutes § 53a-217. None of these is an element of the crime of conspiracy to commit murder, and therefore, the jury's verdict was not inconsistent with its conclusion that the defendant was guilty of conspiracy to commit murder.

Viewing this evidence in the light most favorable to sustaining the verdict, we conclude that the jury reasonably could have found that the evidence established beyond a reasonable doubt that the defendant was guilty of conspiracy to commit murder. Therefore, the trial court properly denied the defendant's motion for a judgment of acquittal.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN MOYE *v.* COMMISSIONER OF CORRECTION (AC 37234)

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

Syllabus

The petitioner, who had been convicted of murder and carrying a pistol without a permit, sought a writ of habeas corpus. He claimed that his trial counsel rendered ineffective assistance by failing to ask the trial court to issue a sequestration order for certain witnesses. During the habeas trial, the habeas court refused the petitioner's request to issue a capias for a witness who failed to appear to testify in response to a subpoena. The court thereafter denied the habeas petition in an oral decision in which it stated that it had not reviewed all of the evidence that was admitted at the habeas trial. The court then denied the petition for certification to appeal, and the petitioner appealed to this court. He claimed that the habeas court abused its discretion in denying his petition for certification to appeal, and violated his rights to due process when it failed to issue the capias for the absentee witness and denied the habeas petition without having reviewed all of the evidence that was admitted at the habeas trial. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's claim that his trial counsel rendered ineffective assistance by failing to request a sequestration order: trial counsel testified at the habeas trial that he believed that he had discredited a certain witness' testimony and had shown the jury that her testimony was influenced by other witnesses, even though he did not know if any of the witnesses were in the courtroom prior to their own testimony, he could not recall why he did not request a sequestration order, and he could not recall whether he had concerns about witnesses discussing each other's testimony; furthermore, the petitioner did not establish that he was prejudiced by his trial counsel's conduct, the trial court having struck from the record and instructed the jury to ignore the only portion of the criminal trial transcript that the petitioner relied on as proof that the witnesses had discussed and tailored their testimony.
2. The habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's claim that the court violated his right to due process when it stated during its oral decision denying the habeas petition that it had not reviewed all of the evidence in determining that the petitioner was not prejudiced by his trial counsel's failure to request a sequestration order: the habeas court was not required to review the entire criminal trial transcript before rendering its oral decision denying the habeas petition, as the petitioner's claim focused on the testimony of certain witnesses; moreover, although it was unclear which portions of the transcript the court did read, this court declined to interpret the habeas court's statement to mean that it did not review all the relevant transcripts, that court having stated that it reviewed the petitioner's pretrial brief, which specified, inter alia, the portions of the transcript that were relevant.
3. The record was insufficient for this court to review the petitioner's claim that the habeas court improperly refused his request to issue a capias for a witness who had failed to appear to testify in response to a subpoena, the petitioner having failed to make a sufficient offer of proof that the witness received and knew the subpoena's contents; although the petitioner's habeas counsel stated that she had an electronic copy of a voice mail in which the witness acknowledged receipt of the subpoena, the electronic copy was not marked as an exhibit for identification, habeas counsel's description of its content was so vague that it failed to establish that the witness had actual notice of the subpoena's content, and the petitioner failed to tender the statutory (§ 52-143 [e]) witness attendance and travel fees.

Argued April 11—officially released September 13, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district

of Tolland, where the petition was withdrawn in part; thereafter, the matter was tried to the court, *Fuger*, *J.*; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

April E. Brodeur, assigned counsel, for the appellant (petitioner).

Emily D. Trudeau, deputy assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, John Moye, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion by denying his petition for certification to appeal, and improperly (1) determined that his criminal trial counsel had not provided ineffective assistance by failing to request a sequestration order, (2) violated his right to due process by failing to review all of the evidence admitted at the habeas trial, and (3) refused to issue a capias for an absentee witness.[1] Having thoroughly reviewed the record, we conclude that the habeas court properly denied the petition for certification to appeal. Accordingly, we dismiss the appeal.

The following facts, as set forth by this court on direct appeal or as found by the habeas court, and procedural history are relevant to this appeal. "On the

[1] For ease of discussion, we have addressed the petitioner's claims in a different order than presented in his brief on appeal.

evening of April 30, 2005, after Clarence Jones, the victim, asked him for a ride, Jerry Booker picked up Jones, Roderick Coleman and the [petitioner]. The group briefly stopped at Booker's house in West Haven and then proceeded to the Ebony Lounge in New Haven. Coleman and the [petitioner] went inside for approximately fifteen minutes, while Booker and the victim waited in the car. When Coleman and the [petitioner] returned to the car, Coleman asked Booker to drive to the Pleasant Moments Cafe in Bridgeport, where his girlfriend worked as a dancer.

"Upon arriving at Pleasant Moments Cafe, Booker, Coleman and the victim entered the club while the [petitioner] stayed in the car. The three men who went inside the club were searched for weapons before they were allowed to enter. When Pleasant Moments Cafe closed for the night, Booker, Coleman and the victim emerged from the club with Tamara Wilson, Coleman's girlfriend, Tawana Little and a third woman by the name of Jada. They all got into Booker's car. Booker was the driver, the victim and Jada rode in the front passenger seat, the [petitioner] sat behind Booker, Little was seated next to him, and Wilson sat on Coleman's lap behind the front passenger's seat.

"Booker next drove to a nearby gasoline station. Booker, the victim and Jada got out of the car and entered the gasoline station. With the two men and Jada out of the car, the [petitioner] began telling the other passengers about his belief that Booker and the victim planned to rob him. He said that he was going to 'act up.' Those who went into the gasoline station returned to the car, and the group left the gasoline station to drop off Jada.

"As Booker was driving to Jada's house, his cellular telephone rang. He answered the telephone and handed it to the victim when he realized that it was the victim's

mother calling. Then a loud bang came from the backseat. The victim's mother heard someone say: 'Call 911. He's been shot.' The [petitioner], holding a gun, ordered everyone to get out of the car. Booker and Jada got out of the car, the [petitioner] got into the driver's seat, pushed the victim's body out of the car and drove away.

"After driving a short distance, the [petitioner] stopped the car, wiped down the steering wheel and car handles, and exited the car with Little, Wilson and Coleman. The group got into a taxicab and went to Little's house in New Haven. Once at Little's house, the [petitioner] again told the others that he believed that he was going to be robbed and that was why he shot the victim. He told Little that he had tried to shoot the victim in the face and also told Little and Wilson that they should 'take it to the grave.'

"The [petitioner] was arrested on May 20, 2005. He was found in a house in Stamford, lying across the seats of several chairs under a dining room table. The [petitioner] was charged with murder, carrying a pistol without a permit and criminal possession of a pistol. He was found guilty of murder and carrying a pistol without a permit, and entered an *Alford*[2] plea with regard to the criminal possession of a pistol charge." (Footnote added.) *State* v. *Moye*, 119 Conn. App. 143, 146–47, 986 A.2d 1134, cert. denied, 297 Conn. 907, 995 A.2d 638 (2010).

The petitioner appealed to this court from the judgment of conviction. On direct appeal, "[he claimed] that (1) there was insufficient evidence to support his conviction of murder, (2) the [trial] court improperly instructed the jury on the murder charge, (3) the prosecutor committed reversible impropriety during the [petitioner's] testimony and (4) the court improperly

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

canvassed the [petitioner] with regard to his *Alford* plea to the charge of criminal possession of a pistol. We [affirmed] the [petitioner's] conviction of murder and carrying a pistol without a permit. We reverse[d], however, [his] conviction of criminal possession of a pistol." Id., 145–46.

Following this court's decision on direct appeal, the petitioner filed a petition for a writ of habeas corpus. In his third amended petition, the petitioner claimed that his trial counsel, Gary A. Mastronardi, rendered ineffective assistance by failing (1) to request a sequestration order for witnesses, (2) to object to certain testimony by the state's firearms examiner, and (3) to file a motion in limine to preclude testimony from the victim's mother.[3]

In regard to his claim that Mastronardi rendered ineffective assistance by failing to request a sequestration order, the petitioner alleged that if Mastronardi had requested a sequestration order, the state's witnesses, specifically, the eyewitnesses to the shooting and the victim's mother, would not have been able to corroborate falsely each other's testimony. According to the petitioner, because Mastronardi did not request a sequestration order that prohibited the state's witnesses from discussing their testimony, they were able to discuss and conform their testimony prior to testifying. As proof that the state's witnesses had discussed and tailored their testimony, the petitioner emphasized the testimony of Wilson, who, at the criminal trial, testified that she had "*just found out* [that the victim] was on the phone with his mother [at the time he was shot]. I

[3] In this appeal, the petitioner does not challenge the habeas court's determination that he had not established ineffective assistance of counsel with respect to his claims that Mastronardi failed to object to certain testimony by the state's firearms examiner, and to file a motion in limine to preclude testimony from the victim's mother. Accordingly, we deem any such claims abandoned.

didn't know that at the time . . . ." (Emphasis added.) Subsequent to Wilson's testimony at the criminal trial, the victim's mother testified that at the time that the victim was shot, she was on the telephone with him. According to the petitioner, the victim's mother and Wilson discussed their testimony prior to either testifying in order to conform their testimony and, thus, falsely corroborate each other, which would not have occurred if Mastronardi had requested a sequestration order.

On July 28, 2014, the court, *Fuger*, *J.*, held a habeas trial, which lasted less than one full day. At the start of the habeas trial, both parties offered and had admitted without objection all of their exhibits. Following the admission of both parties' exhibits, the petitioner testified on his own behalf and then offered the testimony of Mastronardi. After Mastronardi's testimony, the petitioner requested that the court issue a capias for Wilson, who had not appeared at the habeas trial, although the petitioner had attempted to subpoena her. The court declined to do so. Both parties then rested and proceeded to make closing arguments. Immediately following closing arguments, the court issued an oral decision from the bench denying the petition.

The court began its oral decision, the transcript of which it later signed and filed with the clerk of the trial court,[4] by stating that it had "read the petitioner's pretrial brief. I have not read all of the transcripts that have been provided. I don't know that it is necessary to do so." The court then determined, inter alia, that

[4] Practice Book § 64-1 (a) provides in relevant part: "The trial court shall state its decision either orally or in writing . . . . If oral, the decision shall be recorded by a court reporter, and, if there is an appeal, the trial court shall create a memorandum of decision for use in the appeal by ordering a transcript of the portion of the proceedings in which it stated its oral decision. The transcript of the decision shall be signed by the trial judge and filed with the clerk of the trial court. . . ."

the petitioner had not established that Mastronardi's failure to request a sequestration order constituted deficient performance. The court also found that the petitioner had failed to establish that he was prejudiced by Mastronardi's actions, in accordance with *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

On August 5, 2014, the petitioner sought certification to appeal to this court, which the habeas court denied. This appeal followed. Additional facts will be set forth as necessary.

Prior to addressing the petitioner's claims on appeal, we set forth the applicable standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal 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 then 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.) *Riddick* v. *Commissioner of Correction*, 113 Conn. App. 456, 459, 966 A.2d 762, appeal dismissed, 301 Conn. 51, 19 A.3d 174 (2011). "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." (Internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 544, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015).

I

The petitioner first claims that the court improperly determined that Mastronardi had not rendered ineffective assistance by failing to request a sequestration order. Specifically, the petitioner alleges that Mastronardi's failure to request a sequestration order constituted deficient performance because his conduct was not reasonable given the importance of eyewitness testimony in this case. We are not persuaded.

The following additional facts and procedural history are relevant to this claim. At the underlying criminal trial, neither Mastronardi nor the state requested a sequestration order. Wilson, who was in the vehicle with the petitioner at the time that the victim was shot, testified at the criminal trial. During cross-examination, Mastronardi asked Wilson if the victim was on a cellular phone at the time of the incident. Wilson responded: "From my knowledge, I just found out he was on the phone with his mother. I didn't know that at the time cause he had drugs and I wasn't all in his face. So, I didn't know what he was doing at that time. I just know he was sitting there." Mastronardi had Wilson's entire response stricken from the record as unresponsive, and the jury was instructed to disregard Wilson's statement.

The following colloquy then ensued between Wilson and Mastronardi:

"Q. You never told the police about [the victim] being on a cell phone?

"A. No. . . .

"Q. You just told the jury a few minutes ago that you found out that [the victim] was on a cell phone. Is that right? . . . Yes or no.

"A. Yes.

"Q. And you found that out from [whom]? The prosecutor?

"A. No. I'd rather not say. It don't matter.

"Q. Well, somebody had to tell you something like that? . . .

"A. I'm not sure. I don't remember."

Two days later, the victim's mother testified at the criminal trial. She testified that she was speaking to her son on the telephone at the time he was shot. She did not hear a gunshot, but she did hear someone say that he had been shot and to call 911.

At the habeas trial, the petitioner argued that Mastronardi should have requested a sequestration order because the state's case relied heavily on eyewitness testimony. According to the petitioner, if Mastronardi had requested such an order, the state's witnesses would not have been allowed to speak with each other prior to testifying, and, therefore, Wilson never would have learned that the victim was on the telephone with his mother at the time he was shot. Because Wilson heard and repeated this information to the jury, the petitioner contended that she bolstered the credibility of the testimony of the victim's mother. The petitioner further contended that if the state's witnesses had tailored their testimony regarding whether the victim was on the telephone at the time he was shot, they may have discussed and tailored their testimony concerning other events.

In support of this claim, at the habeas trial, the petitioner offered the testimony of Mastronardi. Mastronardi could not recall whether he had any concerns about the eyewitnesses overhearing or discussing outside of court each other's testimony at the criminal trial. He also had no recollection concerning why he did not request a sequestration order in this case. Nor could he recall whether any of the witnesses were present in the courtroom prior to their own testimony. Mastronardi did recall, however, that he had cross-examined Wilson regarding from whom she had heard that the victim was on the telephone with his mother at the time he was shot, and that she did not have personal knowledge of the victim being on the telephone with his mother at the time of the shooting. Mastronardi believed that he had discredited her testimony and presented to the jury that her testimony had been influenced by other witnesses or the prosecutor.

The habeas court determined that Mastronardi's performance was not deficient, and, even if it was deficient, the petitioner was not prejudiced by his actions: "[The court does not] find that the failure to seek a sequestration order is in and of itself deficient performance on the part of a trial defense counsel. . . . [Even] assuming that that was deficient performance—and I'm not making that finding; I'm assuming it for the purpose of argument—I don't see that it generated any prejudice toward [the petitioner]."

The following legal principles guide our analysis of this claim. "In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the

defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . .

"To prove that his counsel's performance was deficient, the petitioner must demonstrate that trial counsel's representation fell below an objective standard of reasonableness. . . . Competent representation is not to be equated with perfection. The constitution guarantees only a fair trial and a competent attorney; it does not ensure that every conceivable constitutional claim will be recognized and raised. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Citations omitted; internal quotation marks omitted.) *Toccaline* v. *Commissioner of Correction*, 80 Conn. App. 792, 798–99, 837 A.2d 849, cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline* v. *Lantz*, 543 U.S. 854, 125 S. Ct. 301, 160 L. Ed. 2d 90 (2004).

Pursuant to General Statutes § 54-85a, "[i]n any criminal prosecution, the court, upon motion of the state or the defendant, shall cause any witness to be sequestered during the hearing on any issue or motion or any part of the trial of such prosecution in which he is not testifying." "Either party may invoke the court's authority

to issue a sequestration order during any portion of the trial; the court lacks discretion to deny such a request." *State* v. *Morgan*, 70 Conn. App. 255, 277, 797 A.2d 616, cert. denied, 261 Conn. 919, 806 A.2d 1056 (2002). "[A] sequestration order merely prohibits a sequestered witness from being in the courtroom when he is not testifying." *State* v. *Williams*, 169 Conn. 322, 331, 363 A.2d 72 (1975). "[A]t the request of counsel, the court, in its discretion, [also may] order that the testimony of any witness should not be discussed with any other past or prospective witness." (Internal quotation marks omitted.) Id.

"Sequestration serves a broad purpose. It is a procedural device that serves to prevent witnesses from tailoring their testimony to that of earlier witnesses; it aids in detecting testimony that is less than candid and assures that witnesses testify on the basis of their own knowledge. . . . In essence, it helps to ensure that the trial is fair." (Citations omitted.) *State* v. *Robinson*, 230 Conn. 591, 600, 646 A.2d 118 (1994).

In *Toccaline* v. *Commissioner of Correction*, supra, 80 Conn. App. 804,[5] this court held that a defense counsel's decision whether to request a sequestration order is a matter of trial strategy, and that under the facts of the case, defense counsel's trial strategy was reasonable: "The uncontradicted testimony of [defense counsel] was that the decision not to press for the

[5] In *Toccaline*, the petitioner claimed that his criminal defense counsel had rendered ineffective assistance by failing to request a sequestration order. "At the criminal trial, [defense counsel] moved to sequester all the witnesses prior to the beginning of evidence with the exception of the petitioner's wife. In response, the trial court indicated that if a sequestration order were to be granted, it would include all potential witnesses, including the petitioner's wife. Confronted with those alternatives, [defense counsel] and the petitioner conferred and mutually decided not to pursue the sequestration motion so that the petitioner's wife could be present at the trial." (Footnote omitted.) *Toccaline* v. *Commissioner of Correction*, supra, 80 Conn. App. 804.

sequestration of witnesses reflected the consensus he and the petitioner had reached . . . . [I]t is well established that a habeas court cannot in hindsight second-guess an attorney's trial strategy. . . . The court should not have found for the petitioner on that ground, as the evidence adduced at the habeas hearing did not overcome the strong presumption that counsel's actions represented sound trial strategy." (Citation omitted.) Id., 804–805.

In the present case, the petitioner bore the burden of presenting sufficient evidence to establish that Mastronardi's actions constituted deficient performance. See *Morales* v. *Commissioner of Correction*, 99 Conn. App. 506, 509, 914 A.2d 602 (in habeas action, burden of proof on petitioner), cert. denied, 282 Conn. 906, 920 A.2d 308 (2007). The record is silent regarding why Mastronardi did not request a sequestration order. He could not recall why he did not request that the witnesses be sequestered. Thus, we do not know whether Mastronardi made a conscious decision not to request that the witnesses be sequestered. The decision, however, regarding whether to request a sequestration order is a matter of trial strategy, and the petitioner has not argued otherwise. Because the decision to request a sequestration order is a matter of trial strategy, the petitioner was required to demonstrate that Mastronardi's failure to request a sequestration order was unreasonable in order to satisfy his burden of proof and overcome the strong presumption that counsel's conduct regarding matters of trial strategy is reasonable.[6]

[6] After conducting a nationwide search, we have failed to find a single case in which a court has determined that defense counsel's failure to request a sequestration order constituted deficient performance. See, e.g., *Cannon* v. *Mullin*, 383 F.3d 1152, 1166 (10th Cir. 2004) (failure to request sequestration order did not constitute deficient performance), cert. denied, 544 U.S. 928, 125 S. Ct. 1664, 161 L. Ed. 2d 491 (2005); *State* v. *Scott*, 829 S.W.2d 120, 123 (Mo. App. 1992) (same); *Garcia* v. *State*, 678 N.W.2d 568, 573–74 (N.D. 2004) (same).

This case is unlike *Holloway* v. *Commissioner of Correction*, 145 Conn. App. 353, 367, 77 A.3d 777 (2013), in which we held that certain failures by criminal trial counsel, whether motivated by strategy or not, will always constitute deficient performance in light of the fundamental right at stake. In *Holloway*, this court held that defense counsel's failure to object to the trial court's jury instruction, which omitted an explanation of an essential element of an offense with which the petitioner had been charged, constituted deficient performance because "[r]egardless of counsel's particular trial strategy on behalf of his client, he simply has no excuse not to insist that the jury be properly instructed on each essential element of every charged offense . . . ." Id., 366–67. The right to sequestration of witnesses, however, is not of such magnitude that a court will presume that, in the words of *Holloway*, "there is no conceivable tactical justification for defense counsel" to decide to forgo the right. Id., 367. Indeed, in any given case, there may well be valid and significant strategic reasons to decide not to seek sequestration of witnesses. See *Toccaline* v. *Commissioner of Correction*, supra, 80 Conn. App. 804–805.

Accordingly, the petitioner in this case was required to establish that Mastronardi's performance was deficient by overcoming the presumption that counsel's conduct was reasonable. As the habeas court noted, "the quality of the evidence presented to [the habeas court] in connection with this habeas corpus petition [was] not very good as far as establishing the elements that need to be established to grant the petition." The record contains no evidence from which the habeas court or this court could determine whether Mastronardi's conduct was reasonable. It is true that, in *Franko* v. *Commissioner of Correction*, 165 Conn. App. 505, 520, 139 A.3d 798 (2016), this court held that we "may look to the record of the criminal trial as circumstantial

evidence of trial counsel's strategy." In *Franko*, defense counsel did not testify at the habeas trial; id., 515; but this court determined that his closing argument at the criminal trial constituted evidence of his strategy for not requesting a jury instruction on a lesser included offense. Id., 517–18. The record in this case, however, contains little or no circumstantial evidence from which the habeas court could have divined Mastronardi's reason(s) to forgo sequestration or from which the habeas court could have concluded that Mastronardi's failure to seek sequestration was simply negligence or inadvertence. On this record, we decline to speculate as to why sequestration was not sought.

Absent any evidence regarding the basis for Mastronardi's failure to request a sequestration order, we are guided by the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) *Toccaline* v. *Commissioner of Correction*, supra, 80 Conn. App. 799. Because the petitioner failed to adduce sufficient evidence at the habeas trial to overcome this strong presumption and satisfy his burden of proof, the court properly determined that he did not establish that Mastronardi's failure to request a sequestration order constituted deficient performance.

Even if we assume for purposes of argument that Mastronardi's performance was deficient, we also conclude that the petitioner failed to establish that he was prejudiced by Mastronardi's failure to request sequestration. The petitioner argues that he was prejudiced because prior to testifying, Wilson spoke to another witness and learned information of which she had no personal knowledge—that the victim had been on the telephone with his mother when he was shot. Thus, according to the petitioner, Wilson's testimony falsely bolstered the credibility of the testimony of the victim's

mother. The petitioner also argues that if Wilson colluded with another witness, it is possible that other witnesses colluded, and, therefore, it is impossible to know which portions of the testimony from the state's witnesses were accurate. We are not persuaded.

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (Citation omitted; internal quotation marks omitted.) Id.

The court properly determined that the petitioner had not established that he was prejudiced by Mastronardi's conduct for two reasons. First, the only portion of the criminal trial transcript that the petitioner relies on as proof that the witnesses discussed and tailored their testimony is Wilson's testimony that she had learned recently about the victim being on the telephone with his mother at the time he was shot. This testimony, however, was stricken from the record, and the jury was instructed to disregard it. Unless proven otherwise, this court will presume that the jury acted lawfully and in accordance with the instructions given by the habeas court. See *State* v. *Santiago*, 269 Conn. 726, 762, 850 A.2d 199 (2004) ("[i]n the absence of a showing that

the jury failed or declined to follow the court's instructions, we presume that it heeded them" [internal quotation marks omitted]). Therefore, the petitioner has failed to establish that any discussion between Wilson and another witness, assuming that such a discussion had occurred, prejudiced the outcome of his trial.

Second, the remaining argument set forth by the petitioner concerning prejudice is grounded in mere speculation. He contends that "[t]here is no telling what other information may have shaped the testimony of witnesses that would have been prevented by a sequestration order." The petitioner does not, however, cite to any portion of the criminal trial transcript or offer the testimony of witnesses to establish that witnesses discussed their testimony with one another. "It is well established that, in a claim of ineffective assistance of counsel, [m]ere conjecture and speculation are not enough to support a showing of prejudice." (Internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 166, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011). Accordingly, the habeas court properly determined that the petitioner had failed to establish prejudice.

In sum, the habeas court properly determined that the petitioner did not establish that Mastronardi's failure to request a sequestration order constituted deficient performance. On the basis of this record, this claim is not debatable among jurists of reason, a court could not resolve the issue in a different manner, and the question does not deserve encouragement to proceed further. Accordingly, we conclude that the court did not abuse its discretion by denying the petition for certification to appeal as to this claim.

II

The petitioner next claims that the court violated his right to due process by rejecting his claims of ineffective

assistance of counsel without reviewing all of the exhibits admitted into evidence. Specifically, the petitioner contends that the court could not have determined whether he was prejudiced by Mastronardi's actions, which must be viewed in the context of the entire criminal trial, without reviewing all the transcripts from the underlying criminal trial. See *Strickland* v. *Washington*, supra, 466 U.S. 695 ("[i]n making [the prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury").

The respondent, the Commissioner of Correction, contends that this claim is unpreserved and that the petitioner is not entitled to have it reviewed pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third condition of *Golding*); because the claim is not constitutional in nature. Alternatively, the respondent contends that even if this claim is preserved or reviewable pursuant to *Golding*, the court was not required to review every page of the trial transcripts in order to evaluate and dispose of the petitioner's claims. Although we agree with the petitioner that this claim is sufficiently preserved, we are not persuaded that the court failed to consider the relevant evidence in reaching its determination that the petitioner did not establish that Mastronardi's failure to request a sequestration order constituted deficient performance. Accordingly, we conclude that the court did not abuse its discretion by denying the petition for certification to appeal as to this claim.

As an initial matter, we address whether this claim is preserved. The petitioner did not object to the court's statement that it did not read all of the transcripts, which was made as part of the court's oral decision. The respondent argues that because the petitioner did not object to this statement at the habeas trial, this claim

is not preserved. In response, the petitioner argues that this claim is preserved because he was not required to object to the statement and this claim was asserted in his petition for certification to appeal. We agree with the petitioner that he was not required to object to the court's statement, which was part of its oral decision, in order to preserve this claim for appeal.

An oral decision is the equivalent of a written memorandum of decision. See Practice Book § 64-1. If the court's decision in this case had been written, rather than oral, there would have been no opportunity for the petitioner to voice an objection to the statement, unless he did so in a motion seeking reconsideration or reargument. We generally do not require such a procedure in order to preserve a claim of this nature for appellate review. See *State* v. *Paul B.*, 315 Conn. 19, 34 n.5, 105 A.3d 130 (2014) (defendant not required to file motion for reconsideration to preserve claim that appellate court in its written memorandum of decision improperly construed his claim); see also Practice Book §§ 61-10 (b) and 66-5; *Solomon* v. *Aberman*, 196 Conn. 359, 376, 493 A.2d 193 (1985) (although motion for articulation or rectification may be necessary to correct ambiguous or incorrect statement in written memorandum of decision, no requirement to do so in order to preserve claim for appeal). We will not require a party to take additional steps to preserve a claim simply because the court's decision was oral, not written. We have found no authority, nor has the respondent cited any, requiring that a litigant object to statements made by a court while rendering an oral decision in order to preserve a claim.

To hold otherwise would require a party to interrupt the court while it rendered its oral decision every time the court stated something with which a party did not agree. Such a rule would be unwise and unwieldy. Accordingly, the petitioner was not required to object

to the statement at issue in order to preserve this claim, and, therefore, we conclude that this claim is preserved.

Having determined that this claim is preserved, the following additional facts are relevant to our review. Prior to the start of the habeas trial, the petitioner filed a brief. In the portion of the pretrial brief regarding his claim that Mastronardi rendered ineffective assistance of counsel by failing to request a sequestration order, the petitioner cited to the relevant portions of the underlying criminal trial transcript and to the written statement that Wilson had given to the police. The petitioner attached to his pretrial brief the cited portions of the criminal trial transcript. Included in the attached portions of the criminal trial transcript were Wilson's testimony that she recently had discovered that the victim was on the telephone with his mother at the time he was shot, Mastronardi's cross-examination of Wilson regarding this topic, and a portion of the testimony of the victim's mother. Also attached to the pretrial brief was the written statement that Wilson had given to the police following the shooting.

At the start of the habeas trial, both parties offered and had admitted without objection all of their exhibits. The petitioner offered and had admitted nineteen exhibits into evidence, eight of which were select portions[7] of the transcript from the underlying criminal trial. Of the nineteen exhibits that the petitioner offered into evidence, only four of the exhibits had not been

[7] The exhibits included (1) the transcript of closing argument, (2) the transcript of the court's instructions to the jury, (3) the transcript of the jury's return of its verdict and the petitioner's plea under *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), (4) the transcript of the sentencing, (5) a two page excerpt of the transcript of Booker's testimony, (6) a nine page excerpt from the transcript of Wilson's testimony, (7) an eight page excerpt from the transcript of an expert witness' testimony concerning firearms, and (8) a thirty-two page excerpt from the transcript of the testimony of the victim's mother.

attached to his pretrial brief: (1) the criminal trial transcript of closing argument, (2) the criminal trial transcript of the court's instructions to the jury, (3) the criminal trial transcript of the jury's return of its verdict and the petitioner's subsequent *Alford* plea, and (4) the sentencing transcript.

The respondent offered and had admitted into evidence nine exhibits. The first five exhibits were the transcripts from the five days of the criminal trial during which evidence was presented to the jury. The sixth exhibit was the criminal trial transcript of closing argument. The seventh exhibit was the criminal trial transcript of the court's instructions to the jury. The eighth exhibit was the criminal trial transcript of the jury's return of the verdict and the petitioner's subsequent *Alford* plea. The final exhibit was the sentencing transcript.

Following the admission of both parties' exhibits, the petitioner testified on his own behalf. After he finished testifying, the petitioner informed the court that Mastronardi was not available to testify until after 2 o'clock in the afternoon. The court then stood in recess until Mastronardi was present. After the recess, Mastronardi, who was subpoenaed by the petitioner, testified. Both parties then rested. Without any further recess, the parties proceeded to make closing arguments.

Immediately following closing argument, the court issued its oral decision: "I'm going to deny the petition for a writ of habeas corpus. I've read the petitioner's pretrial brief. I have *not read all of the transcripts* that have been provided. I don't know that it is necessary to do so. There have been references to those—to what has taken place.

"The first comment I would make is that the quality of the evidence presented to this court in connection with this habeas corpus petition is not very good as far

as establishing the elements that need to be established to grant the petition. . . .

"[T]he court finds that the overwhelming majority—if not the entirety—of [the petitioner's] testimony is not worthy of much credit, which then leaves us with [the testimony of Mastronardi], who . . . may have provided a little bit of insight into why he did what he did during trial, adequately . . . [explained] his actions during the trial.

"Now, when I look specifically at the items that are listed as the basis for a finding that [Mastronardi] was ineffective, the first one is the failure to seek sequestration. I cannot find that the failure to seek a sequestration order is in and of itself deficient performance on the part of a trial defense counsel.

"Apparently, by his testimony and the transcript, [Mastronardi] did not seek a sequestration order. Now, in this case, assuming that that was deficient performance—and I'm not making that finding; I'm assuming it for the purpose of argument—I don't see that it generated any prejudice toward [the petitioner]." (Emphasis added.)

The following legal principles guide our review of this claim. "[T]he trier [of fact] is bound to consider all the evidence which has been admitted, as far as admissible, for all the purposes for which it was offered and claimed. . . . [W]e are not justified in finding error upon pure assumptions as to what the court may have done. . . . We cannot assume that the court's conclusions were reached without due weight having been given to the evidence presented and the facts found. . . . Unless the contrary appears, this court will assume that the court acted properly." (Citations omitted; internal quotation marks omitted.) *Giamattei* v. *DiCerbo*, 135 Conn. 159, 162, 62 A.2d 519 (1948); *Riddick* v. *Commissioner of Correction*, supra, 113 Conn. App. 465

("generally [a] judge is presumed to have performed his duty properly unless the contrary appears" [internal quotation marks omitted]). "[I]f . . . [a] statement [by the court may] suggest that the court did not consider [certain] testimony, we . . . are entitled to presume that the trial court acted properly and considered all the evidence. . . . There is, of course, no presumption of error." (Citations omitted.) *Solomon* v. *Aberman*, supra, 196 Conn. 375–76.[8]

The issue of whether the habeas court must read every word of the underlying criminal trial transcript has been addressed previously by this court. In *Evans* v. *Warden*, 29 Conn. App. 274, 276–77, 613 A.2d 327 (1992), the petitioner alleged that his criminal appellate counsel rendered ineffective assistance by failing to raise a sufficiency of the evidence claim on direct appeal. At the habeas trial, the habeas court stated that "I really don't think that I have any cause whatsoever to review the transcripts [of the underlying criminal trial]," and then denied the petition for a writ of habeas corpus. Id., 276 n.1. On appeal, this court held that the habeas court abused its discretion by failing to read the trial transcript because "[a] full and fair review of the petitioner's claim that . . . appellate counsel provided ineffective assistance in failing to include a sufficiency of the evidence claim in his direct appeal required the habeas court to read the trial transcript." Id., 278.

Since *Evans*, this court has clarified that *Evans* does not stand for the proposition that "a new hearing is

[8] In *Solomon* v. *Aberman*, supra, 196 Conn. 375, the trial court in its memorandum of decision stated that only two trustees testified at trial, although four trustees actually had testified. The petitioners also had offered and had admitted a portion of the deposition testimony of a fifth trustee. Id., 375–76 and 376 n.13. On appeal, our Supreme Court stated that it would not presume that the trial court had not considered all of the relevant evidence on the basis of the trial court's statement, especially in light of the strong presumption that the court acted properly. Id., 375–76.

[always] warranted [if] the habeas court does not review all of the evidence. . . . Although we recognize that the habeas court must consider all of the evidence admitted for all the purposes it is offered and claimed . . . we also recognize that the court is not obligated to review evidence that is not relevant to any issue under consideration." (Citation omitted.) *Hull* v. *Warden*, 32 Conn. App. 170, 177, 628 A.2d 32, cert. denied, 227 Conn. 920, 632 A.2d 691 (1993). Additionally, "[a]lthough a habeas court is obligated to give careful *consideration* to all the evidence . . . it does not have to read the full text of every exhibit." (Citations omitted; emphasis in original.) Id., 178.

In *Hull*, this court emphasized that the extent that the criminal trial transcript must be reviewed by the habeas court depends upon the nature and scope of the particular claim of ineffective assistance of counsel. The petitioner in *Hull* had alleged that his criminal trial counsel rendered ineffective assistance by failing to object to certain testimony. Id., 173. The habeas court determined that trial counsel's conduct was not deficient, and, thus, did not reach the prejudice prong of *Strickland*. Id., 174–75. The habeas court further stated that it did not review certain exhibits admitted at the habeas trial because it did not consider them necessary to its decision. Id., 176–77.

On appeal, this court, in reaching its decision, distinguished between the claim at issue in *Hull* and the claim at issue in *Evans*. In *Evans*, the petitioner's habeas claim had implicated the sufficiency of the evidence presented at the criminal trial, which "require[s] the reviewing court to construe all of the evidence presented at trial." Id., 177. Thus, the habeas court's refusal to review any, let alone all, of the criminal trial transcript required a new hearing. By contrast, in *Hull*, "the petitioner's claims [were] exceedingly narrow in scope and concerned solely with the testimony of [certain

witnesses]. This [was] particularly true because the habeas court . . . concluded that . . . the petitioner's counsel was not ineffective for failing to object to [certain testimony, and, thus], had no need to proceed to the second prong of the *Strickland* test concerning the potentially broader issue of prejudice." Id., 178. Accordingly, this court concluded that the habeas court did not abuse its discretion by not reviewing the entire trial transcript because "the habeas court reviewed the parties' pretrial briefs, heard substantial testimony and argument at the hearing, read the transcripts of [the testimony of the witness at issue], and was properly satisfied that . . . a review of the entire trial transcript . . . would [not] have been of any additional benefit." Id.

Likewise, in *Rivera* v. *Commissioner of Correction*, 51 Conn. App. 336, 338, 721 A.2d 918 (1998), this court held that the habeas court, in determining whether trial counsel rendered ineffective assistance, did not abuse its discretion by reading only the portions of the criminal trial transcript that counsel specifically referenced, although the entire criminal trial transcript had been admitted into evidence.[9] In so doing, this court emphasized that the habeas court had reviewed the portions of the criminal trial transcript that the petitioner identified at the habeas trial as relevant to his claims, and, on appeal, the petitioner "was unable to articulate in his brief or at oral argument any reason why the habeas court was required to read the entire transcript in light of his discrete, particularized claims of ineffective assistance of counsel [none of which implicated the sufficiency of the evidence admitted at the criminal trial]." Id.

In the present case, the petitioner claims that Mastronardi rendered ineffective assistance by failing to

[9] We note that *Evans*, *Hull*, and *Rivera* were not cited by either the petitioner or the respondent in their appellate briefs.

request a sequestration order. In deciding this claim, as *Hull* and *Rivera* make clear, the extent to which the court was required to review the criminal trial transcript in this case was dependent upon the particular claim made and on which prong of *Strickland* the court based its determination. The petitioner's claim, unlike the claim in *Evans*, does not implicate the sufficiency of the evidence admitted at the underlying criminal trial; rather, his claim focuses on the testimony of particular witnesses. Additionally, similar to *Hull*, the habeas court found that the petitioner had failed to establish that Mastronardi's performance was deficient. Although the habeas court did address the prejudice prong, it was not required to do so, and, thus, it was not required to review the entire criminal trial transcript.[10] See *Hull* v. *Warden*, supra, 32 Conn. App. 177.

Additionally, in deciding this claim, it is important to note that the habeas court did not state, as occurred in *Evans*, that it had not reviewed any of the criminal trial transcripts, but, rather, stated that it did not read *all* of the transcripts provided. It is unclear from that statement which portions of the criminal trial transcript the court did read. As a result, we must presume that the court acted properly and decline to interpret the court's statement to mean that it did not review all the *relevant* transcripts. Such a presumption is particularly

[10] Even if the habeas court had relied solely on the prejudice prong, it was not required to review every word of the criminal trial transcript. The criminal trial court struck from the record, and instructed the jury to ignore, Wilson's testimony that she recently had learned that the victim was on the telephone with his mother at the time of the shooting. Additionally, Mastronardi later cross-examined Wilson on this topic. The habeas court was aware of these facts because they were included in the portions of the criminal trial transcript attached to the petitioner's pretrial brief, which the habeas court read. Accordingly, the habeas court was not required to review the remainder of the criminal trial transcript because the portions of the transcript that the habeas court did read established that any harm caused by Mastronardi's conduct was cured by the trial court's instructions to the jury and Mastronardi's cross-examination of Wilson.

apt in light of the petitioner's pretrial brief specifying which portions of the criminal trial transcript were relevant and the admission into evidence of irrelevant portions of the transcript, such as the transcripts of the jury's return of the verdict and the sentencing.

Moreover, the habeas court did state that it had reviewed the petitioner's pretrial brief. In his pretrial brief, the petitioner referred the court to specific, relevant portions of the criminal trial transcript, which he attached to the pretrial brief. The portions of the criminal trial transcript attached to the pretrial brief were contained in the transcripts that the court subsequently admitted into evidence at the habeas trial. Although the petitioner also offered and had admitted four other portions of the criminal trial transcript at the habeas trial, he has not articulated what significance these portions have to his particularized claim of ineffective assistance of counsel. To the extent that the habeas court did not review all the portions of the criminal trial transcript admitted into evidence at the habeas trial by the parties, the petitioner has failed to explain why the habeas court was required to read the entire transcript in light of his particular claim of deficient performance. Absent the petitioner identifying those portions of the transcript that (1) would have altered the court's determination and (2) the court failed to read, this court is guided by the presumption that the habeas court acted properly and considered all the relevant evidence. See *Solomon* v. *Aberman*, supra, 196 Conn. 376.

In rejecting the petitioner's claim, we caution habeas courts to avoid making ambiguous statements, like the one made by the court here. "A [trier of fact] is bound to *consider* all the evidence which has been admitted, as far as admissible, for all the purposes for which it was offered and claimed. . . . [This principle is] fully applicable in habeas corpus trials." (Citations omitted;

emphasis altered; internal quotation marks omitted.) *Evans* v. *Warden*, supra, 29 Conn. App. 277. "Just as a jury should give careful consideration to all the evidence in a case, so too should a habeas court give careful consideration to all the evidence . . . ." (Citation omitted.) Id., 278. If a habeas court concludes that it is not necessary to review certain exhibits in light of the manner in which it has disposed of the claims, it should endeavor to explain what it has not reviewed and why it is not necessary to do so. A court should strive to avoid leaving litigants with the impression that it has failed to discharge its duty or somehow acted unlawfully. Public confidence in our justice system is undermined if parties perceive that a court has not met its obligation to provide them with a full and fair review of their claims. We caution courts not to abrogate their duty to review the evidence admitted at trial or to give litigants the erroneous impression that they have done so.

In sum, we are not persuaded that the habeas court failed to consider all of the evidence pertaining to the issue of whether Mastronardi's failure to request a sequestration order constituted deficient performance. Because we are convinced on this record, and in light of the particular manner in which the court disposed of the petitioner's claim, that this claim is not debatable among jurists of reason, a court could not resolve the issue in a different manner, and the question does not deserve encouragement to proceed further, we conclude that the habeas court did not abuse its discretion by denying certification to appeal as to this claim.

III

Finally, the petitioner claims that the court improperly refused to issue a capias for a witness who failed to appear to testify at the habeas trial. Specifically, the

petitioner contends that the court improperly determined that it did not have the authority to issue a capias for the witness because the subpoena issued by the petitioner failed to conform to the statutory requirements of General Statutes § 52-143.[11] In response, the respondent argues that the court correctly determined that it could not issue a capias for the missing witness because the subpoena (1) was not personally served on her and was simply left at her abode, and (2) did not include either statutorily required language or payment of the witness fee. On the record before us, we are not persuaded by the petitioner's claim.

The following additional facts and procedural history are relevant to this claim. Prior to the start of the habeas trial, the petitioner sought to subpoena Wilson to offer testimony related to his claim that Mastronardi provided ineffective assistance of counsel by failing to ask the criminal trial court for an order of sequestration. The subpoena commanded that Wilson appear in court on the date of the habeas trial. The subpoena further notified Wilson that should she not appear in court on

[11] General Statutes § 52-143 provides in relevant part: "(a) Subpoenas for witnesses shall be signed by the clerk of the court or a commissioner of the Superior Court and shall be served by an officer, [or] indifferent person . . . . The subpoena shall be served not less than eighteen hours prior to the time designated for the person summoned to appear, unless the court orders otherwise. . . .

"(e) If any person summoned by the state, or by the Attorney General or an assistant attorney general, or by any public defender or assistant public defender acting in his official capacity, by a subpoena containing the statement as provided in subsection (d) of this section, or if any other person upon whom a subpoena is served to appear and testify in a cause pending before any court and to whom one day's attendance and fees for traveling to court have been tendered, fails to appear and testify, without reasonable excuse, he shall be fined not more than twenty-five dollars and pay all damages to the party aggrieved; and the court or judge, on proof of the service of a subpoena containing the statement as provided in subsection (d) of this section, or on proof of the service of a subpoena and the tender of such fees, may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify. . . ."

the day and at the time stated, "the court may order that you be arrested. Also, if one day's attendance and traveling fees have been paid to you and you do not come to court and testify, without reasonable excuse, you will be fined not more than [$25] . . . ." The subpoena was not accompanied by payment for attendance and travel expenses.

On July 24, 2014, a person indifferent to the action was given the subpoena to serve it on Wilson. Such person left the subpoena at Wilson's last usual place of abode, but did not make personal contact with Wilson. Thus, the subpoena was not left in Wilson's physical presence, nor was its contents read aloud to her. Wilson subsequently failed to appear in court in response to the subpoena.

At the habeas trial, after offering the testimony of the petitioner and Mastronardi, the petitioner's counsel stated that the only further evidence she had was the testimony of Wilson, who had failed to appear. The petitioner requested that the court issue a capias in accordance with § 52-143 (e). The respondent objected, arguing that for a capias warrant to issue, in-hand service of the subpoena was required. The petitioner responded that in-hand service was not necessary because he could establish that Wilson had actual notice of the subpoena through a copy of an electronic voice mail from Wilson acknowledging that "she [had] received [the subpoena], and she knows she needs to be in court." The petitioner did not request that an audio recording of the voice mail be marked for identification in order to make it part of the record on appeal.[12]

[12] We note that the petitioner alleged during oral argument to this court that the habeas court refused to listen to the voice mail on two occasions. The record, however, does not support this contention. The petitioner never requested that the habeas court listen to the voice mail or that it mark the voice mail as an exhibit. Furthermore, the petitioner admitted at oral argument to this court that his habeas counsel did not discuss the contents of the voice mail in any depth at the habeas trial.

The court also noted that the petitioner had failed to tender travel and witness fees or to include statutorily required language in the subpoena. The court concluded that it was not authorized to issue a capias.

"The issuance of a capias is not mandatory, and lies within the discretion of the trial court. . . . If, however, a witness is not warranted in refusing to honor a subpoena and his absence will cause a miscarriage of justice, the court should issue a capias. . . . [If, however] the court never exercised any discretion because it believed its authority to do so was lacking [our review is plenary]. It is clear that the court [has] the power, if the witness had actually been served [properly with the subpoena] and refused to appear, to issue a capias." (Citations omitted.) *State* v. *Burrows*, 5 Conn. App. 556, 558–59, 500 A.2d 970 (1985), cert. denied, 199 Conn. 806, 508 A.2d 33 (1986); see *State* v. *Maldonado*, 193 Conn. 350, 360 n.6, 478 A.2d 581 (1984) ("[u]pon proof that a witness has been served with notice to appear, the trial court has authority to issue a capias to compel his or her attendance"); *Housing Authority* v. *DeRoche*, 112 Conn. App. 355, 371 n.9, 962 A.2d 904 (2009) (same).

Section 52-143 (e) sets forth, in relevant part, the requirements that must be met for the court to be authorized to issue a capias: "[I]f any other *person upon whom* a subpoena is served to appear and testify in a cause pending before any court . . . fails to appear and testify, without reasonable excuse, he shall be fined . . . and the court or judge, *on proof of the service of a subpoena* . . . and the tender of such fees, may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify." (Emphasis added.)

Section 52-143 (e) does not, by its terms, require in-hand service of the subpoena. This court has interpreted the phrase "person upon whom a subpoena is served"

to "not require physical acceptance of [the subpoena], if the person is given *notice of it and its contents*." (Emphasis added.) *State* v. *Burrows*, supra, 5 Conn. App. 559. Thus, abode service of the subpoena authorizes the court to issue a capias only if the party requesting the capias establishes that the absentee witness received the subpoena and knows of the contents of the subpoena. See *State* v. *Frye*, 182 Conn. 476, 483, 438 A.2d 735 (1980) (leaving subpoena with witness' wife at his abode without proof that witness knew contents of subpoena, although he confirmed by telephone that he had received it, was not adequate service under § 52-143).

To the extent that this court must examine the record to determine whether the habeas court properly found that an absentee witness was not served properly, "[t]he duty to provide this court with a record adequate for review rests with the appellant. . . . Conclusions of the trial court cannot be reviewed where the appellant fails to establish through an adequate record that the trial court incorrectly applied the law or could not reasonably have concluded as it did . . . ." (Internal quotation marks omitted.) *Finan* v. *Finan*, 287 Conn. 491, 495, 949 A.2d 468 (2008).

A party may establish an adequate record for appeal by making an offer of proof or marking an exhibit for identification. "As a general matter, a trial court should always allow a party to make an offer of proof and mark an item as an exhibit for identification, for both practices generally are necessary to preserving the trial record for appellate review. . . . [I]f necessary [to properly preserve a claim for appellate review], the appellant . . . must make an offer of proof or offer an exhibit for identification . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 150–51, 124 A.3d 501 (2015); see *Finan* v. *Finan*, supra, 287

Conn. 495 ("[t]he purpose of marking an exhibit for identification is to preserve it as part of the record and to provide an appellate court with a basis for review" [internal quotation marks omitted]).

A proper offer of proof requires the proffering party to disclose on the record the substance of the proffered evidence. *State* v. *Conrod*, 198 Conn. 592, 597, 504 A.2d 494 (1986). The court will not speculate as to the possible substance of excluded evidence in the absence of a proper offer of proof. Id., 598. Such an offer may be made by (1) presenting the substance of the evidence or testimony to the court outside the presence of the jury or (2) a good faith representation by counsel as to the contents of the evidence or testimony. See *State* v. *Barnes*, 232 Conn. 740, 747, 657 A.2d 611 (1995). Additionally, the record independently may be adequate to establish the substance of the exhibit, if its content is read into the record. *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 151.

In the present case, the petitioner failed to make a sufficient offer of proof that Wilson received the subpoena and knew its contents. The petitioner could have made a proper offer of proof in two ways: (1) he could have had a copy of the voice mail marked for identification or (2) he could have described the voice mail's contents adequately to make clear that it established that Wilson had actual notice of its content. The petitioner's counsel did not have a copy of the voice mail marked as an exhibit for identification, and her description of its content was so vague that it failed to establish that Wilson had actual notice of the subpoena's content. Although the petitioner's counsel stated that the voice mail established that Wilson received the subpoena and knew that she needed to be in court, counsel did not state whether the voice mail established that Wilson knew the particular contents of the subpoena, such as the date and time that she was required to appear in

court. The petitioner's counsel admitted at oral argument to this court that her description of the voice mail's content was minimal. Without including a copy of the voice mail as part of the record or describing the voice mail's contents in sufficient detail, we only can speculate as to the contents of the voice mail, which we will not do. See *Daigle* v. *Metropolitan Property & Casualty Ins. Co.*, 257 Conn. 359, 364–65, 777 A.2d 681 (2001) ("[The role of an appellate court] is not to divine the possibilities, but to review the claims and exhibits presented to the trial court. In the present case, the record is deficient [because] we are left to speculate as to the factual predicates for [the plaintiff's] argument.").

Accordingly, the record is insufficient to review whether Wilson properly was served and whether the court improperly declined to issue a capias. Thus, the claim is not debatable among jurists of reason, a court could not resolve the issue in a different manner, and the question does not deserve encouragement to proceed further. The court did not abuse its discretion by denying the petition for certification to appeal as to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

ARNALDO SAEZ *v.* COMMISSIONER OF CORRECTION
(AC 37451)

Beach, Mullins and Mihalakos, Js.

Syllabus

The petitioner, who had been convicted of murder in connection with the stabbing death of the victim following an altercation between them, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. The habeas court rendered judgment

denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not err in concluding that the petitioner's trial counsel did not render ineffective assistance in the presentation of the petitioner's self-defense claim by advising the petitioner not to testify and by failing to offer certain photographic evidence that he alleged would have impeached R, a key witness for the prosecution: contrary to the petitioner's claim that his testimony at the criminal trial would have strongly supported his claim of self-defense, the habeas court expressly found that the petitioner's testimony that he was not the initial aggressor in the fight with the victim was less than fully believable, and the habeas court properly determined that trial counsel's performance fell within the range of reasonable professional assistance, the petitioner having failed to overcome the strong presumption that counsel's strategic decision to advise the petitioner not to testify was reasonable and the result of counsel's professional judgment; moreover, it was not clear how the introduction of photographs that depicted the crime scene with lighting conditions similar to those present at the time the fight began would have impeached R's testimony, and counsel's strategic decision to challenge R's ability to see the altercation through cross-examination, as opposed to introducing photographic evidence of the lighting conditions, was an exercise of sound professional judgment.

2. The petitioner could not prevail on his claim that the habeas court improperly precluded him from testifying concerning certain attacks on him by gang members prior to the fight between the petitioner and the victim, which the petitioner claimed would have shown that he had a subjective fear for his life during the fight with the victim and that his fear was objectively reasonable, as it was unclear from the record whether the circumstances of the prior attacks had any similarity to the circumstances of the confrontation between the petitioner and the victim; furthermore, any error resulting from the preclusion of the testimony was harmless, this court having determined that trial counsel's overall trial strategy, even in light of the petitioner's allegations of the prior attacks, constituted reasonable professional judgment, and it was not likely that the evidence of the prior attacks would have changed the outcome of the criminal trial.

Argued May 10—officially released September 13, 2016

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. *Appeal dismissed.*

James E. Mortimer, with whom, on the brief, was *Michael D. Day*, for the appellant (petitioner).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Lisamaria T. Proscino*, special deputy assistant state's attorney, for the appellee (respondent).

Opinion

BEACH, J. Following the habeas court's denial of his amended petition for a writ of habeas corpus, the petitioner, Arnaldo Saez, appeals from the judgment of the court denying his petition for certification to appeal. On appeal, the petitioner claims that the court abused its discretion by denying his petition for certification to appeal on the following grounds: (1) his trial counsel rendered ineffective assistance in the presentation of the petitioner's self-defense claim; and (2) the habeas court improperly prohibited the petitioner from testifying that he was the victim of attacks prior to committing the homicide of which he was convicted. We conclude that the court did not abuse its discretion in denying the petition for certification to appeal, and, accordingly, we dismiss the appeal.

The record reveals the following relevant factual and procedural history. At the petitioner's criminal trial, the state presented evidence that in the early morning of July 3, 1994, the petitioner had been a passenger in a van traveling on Benton Street in Hartford. Upon seeing the victim, Lazaro Rodriguez, and Janette Reyes, a friend of both the petitioner and the victim, walking along the street, the petitioner yelled out, "Who own the street?" Reyes assumed the petitioner was joking and responded that she did. The petitioner asked the question again, but this time he directed it to the victim.

The victim replied, "What do you mean?" The victim approached the van, and according to Reyes, the petitioner punched the victim in the face. The victim punched the petitioner back.

During the ensuing fight between the victim and the petitioner, the petitioner withdrew a knife from his pocket and stabbed the victim. The victim raised his arm to protect himself and jumped backward to get away from the petitioner. After continuing to stab him in the chest area, the petitioner told the victim, "You dead man. You dead." The petitioner got back into the van and left the scene. The victim died.

The petitioner fled to New York and ultimately was apprehended in California two months later. As he awaited trial, the petitioner informed his cellmate that on the night of the murder he had been at a bar and was "looking to get out and take someone out." He told the cellmate that he had thought he was losing the fight when he took out his knife and began stabbing the victim.

On February 5, 1997, following a trial before a three judge panel, the petitioner was convicted of one count of murder in violation of General Statutes § 53a-54a. He thereafter was sentenced to fifty years incarceration.

The petitioner filed an appeal from his conviction, but he did not pursue the appeal and it was dismissed after his appointed appellate counsel was granted permission to withdraw pursuant to *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) (establishing procedure by which appointed counsel may withdraw from criminal appeal on ground of frivolousness). On July 18, 2014, the petitioner filed an amended petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel. On October 30, 2014, in an oral decision, the habeas court denied the petition. On November 12, 2014, the court denied the

petitioner's petition for certification to appeal. The present appeal followed.

We begin by setting forth our standard of review following the denial of certification to appeal from the denial of a petition for a writ of habeas corpus. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal 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. . . . 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. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *Wilson* v. *Commissioner of Correction*, 150 Conn. App. 53, 56–57, 90 A.3d 328, cert. denied, 312 Conn. 918, 94 A.3d 641 (2014).

"Finally, we note that [t]he conclusions reached by the [habeas] court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether

they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Misenti* v. *Commissioner of Correction*, 165 Conn. App. 548, 559, 140 A.3d 222 (2016).

I

The petitioner argues that the habeas court erred in rejecting his claim that his trial counsel was ineffective in the presentation of the petitioner's claim of self-defense by advising him not to testify and by failing to offer photographic evidence tending to impeach a key witness for the prosecution. We disagree.

"In order to establish an ineffective assistance of counsel claim a petitioner must meet the two-pronged test enunciated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Specifically, the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, *and* (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Because both prongs of *Strickland* must be demonstrated for the petitioner to prevail, failure to prove either prong is fatal to an ineffective assistance claim. . . . In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Atkins* v. *Commissioner of Correction*, 158 Conn. App. 669, 675, 120 A.3d 513, cert. denied, 319 Conn. 932, 125 A.3d 206 (2015).

Specifically, the petitioner argues that trial counsel was ineffective in the presentation of the petitioner's

self-defense claim because he did not introduce certain evidence, namely, testimony of the petitioner and photographic evidence of lighting conditions at the time of the victim's murder.

"In order sufficiently to raise self-defense, a defendant must introduce evidence that the defendant reasonably believed his adversary's unlawful violence to be 'imminent' or 'immediate.'. . . [A] person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that his attacker is using or is about to use deadly force against him and that deadly force is necessary to repel such attack." (Citation omitted.) *State* v. *Carter*, 232 Conn. 537, 545–46, 656 A.2d 657 (1995). "A defendant who acts as an initial aggressor is not entitled to the protection of the defense of self-defense. . . . The initial aggressor is the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used based upon that other person." (Citations omitted.) *State* v. *Skelly*, 124 Conn. App. 161, 167–68, 3 A.3d 1064, cert. denied, 299 Conn. 909, 10 A.3d 526 (2010).

A

The petitioner first argues that trial counsel should have advised him to testify because such testimony was the only way to establish that the petitioner: (1) subjectively believed that, during his fight with the victim, the victim was using or about to use deadly force; (2) reasonably believed that deadly force was necessary under the circumstances; and (3) could not have retreated with complete safety from the victim.

"It is axiomatic that [i]t is the right of every criminal defendant to testify on his own behalf . . . and to make that decision after full consideration with trial counsel. . . . [A]lthough the due process clause of the [f]ifth [a]mendment may be understood to grant the accused

the right to testify, the if and when of whether the accused will testify is primarily a matter of trial strategy to be decided between the defendant and his attorney." (Internal quotation marks omitted.) *Coward* v. *Commissioner of Correction*, 143 Conn. App. 789, 799, 70 A.3d 1152, cert. denied, 310 Conn. 905, 75 A.3d 32 (2013). "[T]he presentation of testimonial evidence is a matter of trial strategy. . . . The failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Adorno* v. *Commissioner of Correction*, 66 Conn. App. 179, 186, 783 A.2d 1202, cert. denied, 258 Conn. 943, 786 A.2d 428 (2001). "[T]here is a strong presumption that the trial strategy employed by a criminal defendant's counsel is reasonable and is a result of the exercise of professional judgment . . . ." (Internal quotation marks omitted.) *Dunkley* v. *Commissioner of Correction*, 73 Conn. App. 819, 825, 810 A.2d 281 (2002), cert. denied, 262 Conn. 953, 818 A.2d 780 (2003).

"[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (Internal quotation marks omitted.) *Boyd* v. *Commissioner of Correction*, 130 Conn. App. 291, 297, 21 A.3d 969, cert. denied, 302 Conn. 926, 28 A.3d 337 (2011).

The record reveals the following additional facts. During the criminal trial, defense counsel introduced a statement made by the petitioner to the Los Angeles Police Department when he finally was apprehended. The statement contained the petitioner's account of what had occurred on the morning of the murder, and it generally was consistent with the self-defense theory the petitioner presented at trial and supported the petitioner's proposition that he had not been the initial aggressor in the confrontation with the victim.[1] The statement does not include an express reference to the petitioner's state of mind during the confrontation with the victim.[2]

The habeas court concluded that the evidence presented by the petitioner was "woefully lacking in trying to prove any ineffective assistance . . . ." It further rejected the petitioner's claims, noting that "[t]he only thing that could be potentially considered evidence that wasn't presented to the three judge panel, was the self-serving testimony presented by [the petitioner]." The court expressly found that the petitioner's testimony was "less than fully believable" and that he "demonstrated evasiveness." These credibility determinations

[1] The petitioner's statement provided in relevant part: "Suddenly, [the victim] approached the van and began to strike me in the face with his fists. He hit me several times through the open window. I managed to open the van door and stepped out of the vehicle. [The victim] continued to attack me with his fists. He never let up. I was feeling the [effects] of the blows. I removed a pocket knife from my right jeans pocket. It had a three inch blade. I kept it in . . . my jeans. I managed to open the blade as I crouched alongside the van trying to move away from him. I had the knife in my left hand and struck my left hand out toward [the victim] to stop the attack on me. I don't know if I struck him or not. I may have. I made repeated attempts to stab him. He beat me until we reached the back of the van. Then he backed away a couple of feet and was bouncing like a boxer. I did not see any blood on him. I had blood on my [shirt] but I thought it was mine. . . . I got into the van and the guy drove off."

[2] It is arguable that elements of intent could be inferred from the statement the petitioner made to the Los Angeles Police Department.

as well as other evidence in the record overcome the petitioner's assertion on appeal that his testimony at trial "would have strongly supported his defense."

At the habeas trial, the petitioner's trial counsel testified that he had had several tactical reasons for advising the petitioner not to testify on his own behalf: (1) the petitioner would have come "across as a street hustler" to the jury, (2) the petitioner's statement to the Los Angeles Police Department had been admitted into evidence, and (3) there would be "some impeachment as to [the petitioner's] record" regarding the petitioner's gang involvement. Nevertheless, the petitioner argues that counsel should have advised him to testify. The petitioner claims that he would have testified as to relevant subjects not addressed in the statement he had made to the Los Angeles Police Department. The subjects include his subjective belief that the victim was about to use deadly force, that this belief was objectively reasonable, that he had not been the initial aggressor, and that he had been unable to retreat. See General Statutes § 53a-19 (b) (1) (individual is not entitled to use deadly physical force if he can avoid using such force with complete safety by retreating). This testimony, the petitioner reasons, was necessary to establish a viable self-defense claim.

On our review of the record, we conclude that the habeas court properly determined that trial counsel's performance fell within the range of reasonable professional assistance. The petitioner failed to overcome the presumption that counsel's strategic decision to advise the petitioner not to testify was reasonable and the result of counsel's professional judgment. Moreover, at his criminal trial, the petitioner was thoroughly canvassed by the court about his right to testify, and the petitioner does not now claim otherwise or that his waiver was not intelligently or voluntarily made. The circumstances of this case appear to present a classic

example of second-guessing trial counsel's performance after it has proved unsuccessful. See *Boyd* v. *Commissioner of Correction*, supra, 130 Conn. App. 297. Accordingly, counsel's decision to advise the petitioner not to testify constituted reasonable professional judgment.

B

The petitioner next argues that counsel should have sought to introduce photographic evidence depicting the crime scene with lighting conditions similar to those present in the early morning when the fight began. Such photographs, the petitioner asserts, "would have impeached the testimony of [Reyes]" as it pertained to the petitioner acting as the initial aggressor.

At the petitioner's criminal trial, photographs that depicted the crime scene during daylight hours were introduced into evidence. At the habeas trial, the petitioner introduced photographs that depicted the crime scene in dark early morning conditions. He claims that a comparison of the photographs introduced at the criminal trial and the photographs introduced at the habeas trial reveals that the lighting conditions shown in the latter would impair a witness' ability to "accurately perceive anything visually." Had trial counsel submitted the photographs depicting the poor lighting conditions, the petitioner argues, Reyes' testimony about the petitioner initiating the altercation with the victim would have been called into question; without any such photographs, the trial judges had to speculate as to Reyes' ability to perceive events.

In its memorandum of decision following the habeas trial, the court described the evidence presented by the petitioner to prove trial counsel's ineffective assistance as "woefully lacking." It added that, "[a]s far as any new evidence that would undermine the confidence [in] the conviction, it is next to nothing," and "[t]he court

hasn't [seen anything] . . . that would in any way allow [it] to conclude that [trial counsel] did anything other than properly investigate this matter."

The record reveals that trial counsel thoroughly cross-examined Reyes with respect to the lighting at the time of the murder, her vantage point, and her general ability to observe the petitioner and the victim as they fought. The petitioner asserted that he had not been able to overcome the presumption that he was the initial aggressor because trial counsel did not impeach Reyes with photographs; yet, it is not clear how the introduction of the early morning photographs would have impeached Reyes' testimony,[3] and the petitioner has made no claim that the cross-examination itself was otherwise deficient. Counsel's strategic decision to challenge Reyes' ability to see the altercation through cross-examination—as opposed to introducing photographic evidence of the lighting conditions—was an exercise of sound professional judgment.

The petitioner has failed to satisfy the performance prong of *Strickland*; see *Strickland* v. *Washington*, supra, 466 U.S. 687–91; therefore, the habeas court did not err in concluding that trial counsel did not provide the petitioner with ineffective assistance at his criminal trial.[4]

II

We next consider the petitioner's claim that the habeas court abused its discretion in its evidentiary

[3] In fact, the photographs may have supported Reyes' testimony. Reyes testified that when she observed the fight between the petitioner and the victim, it had been nighttime, and it was very dark. She also testified that the only lighting came from a single streetlight. The photographs, which show the crime scene at nighttime, then, are consistent with Reyes' testimony.

[4] We need not address the petitioner's claim that prejudice resulted from counsel's performance. See *Atkins* v. *Commissioner of Correction*, supra, 158 Conn. App. 675 ("[b]ecause both prongs of *Strickland* must be demonstrated for the petitioner to prevail, failure to prove either prong is fatal to an ineffective assistance claim" [internal quotation marks omitted]).

rulings at the habeas trial. The court precluded the petitioner's testimony as to certain attacks on him in the period of time prior to his stabbing the victim. He argues that this evidence "would have been offered to prove that the petitioner had a subjective fear for his life during [the fight with the victim] and that his fear was objectively reasonable. Ultimately, such evidence would have been used to prove that trial counsel was ineffective for failing to elicit such evidence to prove that the petitioner was entitled to a claim of self-defense." We conclude that any error resulting from the exclusion of this evidence was harmless.

The standard of review for evidentiary claims is well established. "Unless an evidentiary ruling involves a clear misconception of the law, the [habeas] court has broad discretion in ruling on the admissibility . . . of evidence. . . . The [habeas] court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the [habeas] court's ruling . . . ." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 285 Conn. 585, 602–603, 940 A.2d 789 (2008). "Evidence is relevant if it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.) *Gibson* v. *Commissioner of Correction*, 135 Conn. App. 139, 152, 41 A.3d 700, cert. denied, 305 Conn. 922, 47 A.3d 881 (2012).

At the habeas trial, the petitioner attempted to offer testimony that he had been attacked previously within the three months preceding his fight with the victim on July 3, 1994. Members of the Latin Kings, a gang, allegedly shot at the petitioner on April 15, 1994, and two of the petitioner's acquaintances allegedly attacked him

with a knife at a bar on June 24, 1994. The court sustained two objections made by the respondent, the Commissioner of Correction, on the ground of relevancy. The petitioner submitted an offer of proof the following day; the court noted its filing, but it did not comment on it further. The petitioner posits that his testimony about the prior attacks would have been relevant to a finding of subjective fear and the reasonableness of the fear at the criminal trial, and, thus, the evidence was relevant to his substantive claim at the habeas trial that counsel was ineffective by advising him not to testify. Had he testified about the prior assaults, the petitioner reasoned, the tribunal would have heard additional facts tending to support his claim of self-defense.

It is unclear from the record whether the circumstances of the prior attacks had any similarity to the circumstances of the confrontation between the petitioner and the victim; if the circumstances of the prior attacks were entirely different from the circumstances of the fight in this case, it is possible that the prior attacks might not have been relevant to the petitioner's underlying self-defense claim. If it is assumed, however, that the circumstances were similar enough so that the testimony of the prior attacks was relevant to the self-defense claim, and it is further assumed that trial counsel knew or should have known of these prior assaults, then it is conceivable that the petitioner's testimony about these attacks would have been relevant to the petitioner's claim that counsel provided ineffective assistance.

Nevertheless, the preclusion of this testimony from the habeas trial was harmless in any event because, for the reasons we stated in part I of this opinion, trial counsel's overall trial strategy—even in light of the petitioner's allegations of the prior attacks—constituted reasonable professional judgment. Counsel testified at

the habeas trial that, among other reasons, he had advised the petitioner not to testify because his testimony would suggest possible gang involvement. The introduction of any evidence about an attack on the petitioner by a gang, then, would have been inconsistent with that strategy, in that it would at the very least raise the specter of gang involvement. Moreover, the evidence of the prior attacks, though perhaps marginally relevant to the self-defense claim, likely would not have changed the outcome of the criminal trial. Beyond having the potential to support the proposition that the petitioner generally may have been fearful, there is no indication that evidence about prior attacks had any correlation to the petitioner's specific self-defense claim as it pertained to the victim and to the fight in this case. For these reasons, the preclusion of the petitioner's testimony at the habeas trial could not reasonably have affected the conclusion of the habeas court that counsel provided effective assistance at the petitioner's criminal trial; therefore, the preclusion of the testimony was at most harmless.

In light of the foregoing, we conclude that the habeas court properly denied the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

KIM MILLER *v.* DEPARTMENT OF AGRICULTURE ET AL.
(AC 37527)

Lavine, Keller and West, Js.

Syllabus

The plaintiff appealed to the trial court from the final decision of the commissioner of the Department of Agriculture, upholding disposal orders regarding the plaintiff's dogs. A town animal control officer issued the

disposal orders pursuant to the statute (§ 22-358) pertaining to biting animals after the plaintiff's dogs had escaped from their fenced enclosure and attacked the victim. The plaintiff appealed the disposal orders to the department, which appointed a hearing officer and conducted a hearing pursuant to the Uniform Administrative Procedure Act (§ 4-166 et seq.). Following the hearing, the disposal orders were affirmed by both the hearing officer in a proposed final decision and the commissioner in his final decision. The plaintiff appealed the final decision to the trial court, claiming that the hearing officer had violated her right under the sixth amendment to the federal constitution by allowing into evidence hearsay statements from individuals who did not testify and were not available for cross-examination, that he improperly forced a witness to leave the hearing before testifying, and that he acted arbitrarily and capriciously by interjecting his opinion about a substantive matter while questioning a witness. The trial court dismissed the appeal, and the plaintiff appealed to this court, claiming that the commissioner had overlooked a severe deprivation of her rights by the hearing officer with respect to the same claims that she had raised in the trial court. The plaintiff additionally claimed that the hearing officer had issued a proposed final decision upon unlawful procedure because the department lacked written procedural rules that applied specifically to dog disposal orders. *Held*:

1. The commissioner properly considered the hearsay statements from two individuals who did not testify and were not available for cross-examination, as the admission of those statements into evidence did not violate the confrontation clause of the sixth amendment: notwithstanding the plaintiff's claim that the confrontation clause applied to the administrative proceeding because it was quasi-criminal in nature, the appeal of a disposal order for a biting animal pursuant to § 22-358 is not a criminal prosecution, and the constitutional right to confrontation is expressly limited to criminal proceedings; furthermore, because hearsay evidence is admissible in administrative proceedings so long as the evidence is reliable and probative, the commissioner did not err by considering the statements, which he found to be reliable and probative.
2. The plaintiff could not prevail on her claim that the commissioner erred in failing to find that the hearing officer violated her right to due process of law by improperly forcing a witness to leave the hearing before she was able to testify; the record was bereft of any indication that the hearing officer forced the witness to leave, and at no time during the hearing did the plaintiff either object on that ground, request that the witness be allowed to testify at another time, or request to file an affidavit regarding the nature of the witness' testimony.
3. This court declined to review the plaintiff's unpreserved claim that the proposed final decision of the hearing officer was made upon unlawful procedure because the department lacked written procedures that applied specifically to hearings on dog disposal orders, as that claim

was raised for the first time on appeal to this court; moreover, despite the fact that the plaintiff's claim was premised on a transcript of an unrelated status conference that occurred after the administrative hearing, her claim did not arise subsequent to the trial as the lack of specific procedures was as apparent before the hearing as it was afterward.

4. This court concluded that the plaintiff had abandoned her claim that the commissioner erred in finding that the hearing officer did not act arbitrarily and capriciously when he allegedly interjected his opinion about a substantive matter while questioning a witness, that claim having been inadequately briefed.

Argued May 10—officially released September 13, 2016

Procedural History

Appeal from the decision of the named defendant affirming disposal orders for the plaintiff's dogs, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of New Britain, where the matter was tried to the court, *Schuman*, *J.*; judgment dismissing the appeal; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed.*

Frank T. Canace, for the appellant (plaintiff).

Gail S. Shane, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (named defendant).

Scott R. Ouellette, for the appellee (defendant town of Hamden).

Opinion

KELLER, J. The plaintiff, Kim Miller, appeals from the judgment of the Superior Court dismissing her appeal from the final decision of the defendant Department of Agriculture (department),[1] to uphold, pursuant to General Statutes § 22-358, two disposal orders of an animal control officer of the town of Hamden to

[1] Because the commissioner of the Department of Agriculture acts on behalf of the department, references in this opinion to the department include the commissioner.

euthanize the plaintiff's two rottweiler dogs after they attacked the victim, Cynthia Reed.[2] The plaintiff argues that the court erred in dismissing her appeal because the commissioner of the Department of Agriculture (commissioner), prior to adopting the recommendation of the department hearing officer, Bruce Sherman, to affirm the disposal orders, overlooked "a severe deprivation" of her rights by the hearing officer. The plaintiff claims that the hearing officer violated her constitutional rights to due process and to confront the witnesses against her, acted arbitrarily and capriciously in rendering his proposed final decision, and made his decision upon unlawful procedure. See General Statutes § 4-183 (j) (3) (Superior Court may overturn administrative decision "made upon unlawful procedure").[3] More specifically, the plaintiff claims that the hearing officer: (1) violated her right under the sixth amendment to the United States constitution to confront the witnesses against her when he allowed the statements of Reed and another witness to the attack, Monique Jones, to be admitted as evidence despite the fact that they did not testify and were not available for cross-examination; (2) improperly forced one of the plaintiff's witnesses to leave the hearing before testifying, thereby depriving the plaintiff of due process; (3) issued a proposed final decision that was made upon unlawful procedure because the department lacked written rules of

[2] The town of Hamden is also a defendant in this appeal and has adopted the department's brief in full.

[3] Administrative hearings to consider appeals of disposal orders issued pursuant to § 22-358 (c) are conducted in accordance with the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; and the department rules of practice, specifically, §§ 22-7-20 through 22-7-38 of the Regulations of Connecticut State Agencies. Pursuant to General Statutes § 4-176e, hearings in contested cases in agency proceedings may be conducted before a hearing officer, who, pursuant to General Statutes § 4-179, renders a written, proposed final decision to the commissioner. After affording each party adversely affected by the proposed final decision an opportunity to file exceptions and present briefs and oral argument pursuant to § 4-179 (a), the commissioner is vested with the authority to render the final decision in matters involving disposal orders under § 22-358 (c).

procedure that applied specifically to hearings on dog disposal orders; and (4) acted arbitrarily and capriciously when he "interjected his opinion" about a substantive matter while questioning a witness for the plaintiff. We affirm the judgment of the trial court dismissing the plaintiff's appeal.

The following facts and legal conclusions, as set forth by the commissioner,[4] are relevant to this appeal. On October 16, 2012, Hamden animal control officer Christopher Smith issued disposal orders concerning two dogs owned by the plaintiff. The disposal orders were based upon an October 3, 2012 incident in which Reed sustained bite injuries from the two dogs outside of her residence in Hamden. After the two dogs escaped from their fenced enclosure located at the plaintiff's residence, a witness, Corey Saulsbury, saw the dogs approaching from the street on which the plaintiff resided and making a "beeline" toward a little girl, Reed's granddaughter, who began crying and screaming. The dogs first jumped on Reed's granddaughter and pawed her. Once Reed exited her upstairs apartment on the building's exterior stairs and came down to see what was happening to her granddaughter, the dogs jumped on her, bit her, pulled her, and dragged her from the stairs, eventually dragging her across the curb, grass, driveway, and sidewalk. Saulsbury observed the dogs "pulling off chunks of [Reed's] neck and her back." At this point, Reed was on Saulsbury's automobile asking for help as the dogs pulled and bit her. Saulsbury attempted to use his automobile to hit the dogs in order to halt the attack. Later, two male bystanders retrieved a baseball bat and a pole and struck the dogs until they stopped attacking Reed and ran away. After the attack,

[4] In his final decision, the commissioner set forth detailed factual findings of the events underlying this case, many of which were in agreement with the factual findings contained in the hearing officer's proposed final decision.

there was blood on the driver's side window of Saulsbury's automobile, where Reed had approached in an attempt to obtain assistance. The dogs were later located at the plaintiff's residence and a fourteen day quarantine order was issued for them. After conducting an investigation, in which he concluded that Reed did not strike the dogs at all, Smith issued disposal orders.

Reed's injuries required onsite treatment by emergency medical personnel and transport to a hospital in New Haven for further treatment for dog bite injuries to her head, the back of her neck, and her back. Reed remained hospitalized until her release on October 5, 2012.

The commissioner concluded in relevant part as follows: "Because the dogs did not merely bite and release [Reed] after their physical contact with her, but continued to attack and bite her until they were physically beaten or removed from her body, it is not difficult to conclude that the injuries to [Reed] could have been even worse if these citizens did not risk their own welfare to come to her aid. The evidence in the record establishes that the attack and dog bite involving [the two dogs] that occurred on October 3, 2012, was a dangerous incident, impacting public safety.

"There was no evidence in the record to support the assertion that [Reed] somehow provoked the attack.[5]

[5] Both before and during the hearing, the plaintiff maintained, with varying degrees of conviction, that it was Reed who incited the attack. In his detailed factual findings, the commissioner recounted how, following the attack, the plaintiff "told [a television reporter] that she blamed the victim for this incident." Furthermore, the commissioner recounted that "[a] Facebook page was established to save [the dogs] and [the plaintiff] testified that she wrote on that Facebook site, as did the 'Lexus Project' [an organization assisting her]. . . . [The plaintiff] was asked if on that site she wrote, 'I can't believe I have to go through all this because of one deranged woman [who] decided to attack my bab[ies].' [The plaintiff] responded, 'I may have written some of that. Lexus Project edited some. They were the managers from that page.' " (Citation omitted.) Finally, during the hearing, "[w]hen asked if [the plaintiff] thought the dog bite attack to [Reed] was [Reed's] fault, [the plaintiff] testified that she saw [Reed] being aggressive with her

Instead, the record supports the fact that when [Reed] came down the stairs of her residence, apparently in response to the screams of her granddaughter . . . the dogs surprised [Reed] and she tried to retreat. [The dogs] immediately attacked, bit, and dragged [Reed], and [she] sustained injuries from the dog bites that required her to be transported by ambulance to a hospital for treatment for these injuries. [Reed] was admitted to the hospital for treatment from these injuries. There is substantial evidence in the record to support the notion that the attack and dog bites to [Reed] were severe.[6] There is, however, no magic to the word 'severe.' The record establishes that the attack and dog bites to [Reed] could alternatively have been called or deemed serious, or vicious, or aggressive, or any number of other adjectives. There is certainly 'a substantial basis of fact from which the fact in issue can be reasonably inferred' . . . . The point is that the nature of the attack and dog bites to [Reed] by [the dogs] and her resulting injuries were significant enough to justify issuance of the disposal orders, or stated alternatively, the disposal orders were appropriately 'deemed necessary' by the [t]own of Hamden [a]nimal [c]ontrol [o]fficer." (Citation omitted; footnotes added.)

dogs and that 'if it had been handled differently, [Reed's granddaughter] wasn't touched at all, because my dogs are not vicious. If they were vicious they would have bit the little girl and other people, probably. It was only her. And she was the only one that went after them. And I did see that, sir.' " The commissioner found, however, that "[the plaintiff] did not observe how the initial attack by [the dogs] on [Reed] occurred."

[6] The commissioner also took note of the fact that Hamden police officer Michael Cirillo, who arrived on the scene following the attack, "[had] responded to an estimated [forty to sixty] dog bites in his career [and, based upon his observations] . . . the injuries to [Reed] were the most significant in terms of injuries he has encountered." (Citation omitted.) Similarly, the commissioner noted that Smith, who observed Reed's bandaged injuries following her discharge from the hospital, "[had] seen a couple dozen dog bites in his career as an animal control officer and in terms of injuries to the victim, this was the most severe." A video depicting Reed's injuries, also was submitted in evidence as a full exhibit.

After the issuance of the disposal orders pursuant to § 22-358,[7] the plaintiff appealed to the commissioner. Thereafter, a notice of hearing was provided to the parties by certified mail, which provided the time and location of the appeal and the commissioner's authority for the hearing under § 22-358 (c) in accordance with the Uniform Administrative Procedure Act (UAPA); General Statutes § 4-166 et seq.; and the department rules of practice, §§ 22-7-20 through 22-7-38 of the Regulations of Connecticut State Agencies. The applicable regulations and a copy of the department's order of procedure[8] were provided to the parties' attorneys,

[7] General Statutes § 22-358 provides in relevant part: "(b) Any person who is bitten, or who shows visible evidence of attack by a dog, cat or other animal when such person is not upon the premises of the owner or keeper of such dog, cat or other animal . . . shall make complaint concerning the circumstances of the attack to the Chief Animal Control Officer, any animal control officer or the municipal animal control officer or regional animal control officer of the town wherein such dog, cat or other animal is owned or kept. Any such officer to whom such complaint is made shall immediately make an investigation of such complaint. . . .

"(c) If such officer finds that the complainant has been bitten or attacked by such dog, cat or other animal when the complainant was not upon the premises of the owner or keeper of such dog, cat or other animal the officer shall quarantine such dog, cat or other animal in a public pound or order the owner or keeper to quarantine it in a veterinary hospital, kennel or other building or enclosure approved by the commissioner for such purpose. . . . The commissioner, the Chief Animal Control Officer, any animal control officer, any municipal animal control officer or any regional animal control officer may make any order concerning the restraint or disposal of any biting dog, cat or other animal as the commissioner or such officer deems necessary. . . . Any person aggrieved by an order of any municipal animal control officer, the Chief Animal Control Officer, any animal control officer or any regional animal control officer may request a hearing before the commissioner within fourteen days of the issuance of such order. . . . After such hearing, the commissioner may affirm, modify or revoke such order as the commissioner deems proper."

[8] The order of procedure consisted of: (1) the hearing officer's opening remarks; (2) introduction of the hearing participants and witnesses; (3) the parties' opening statements; (4) documentary evidence marked for identification; (5) the municipality's case-in-chief, including (a) direct examination of the witnesses and offering of documentary evidence, (b) cross-examination by the opposing side, (c) questions from the hearing officer, (d) redirect examination, (e) recross-examination, if necessary, and (f) questions from the hearing officer; (6) the animal owner's case presentation, which would

along with a copy of the notice of hearing. The department appointed a hearing officer, Sherman, and convened a formal administrative hearing to determine whether the orders should stand. The hearing was held and concluded in its entirety on October 23, 2013, before the hearing officer. The hearing officer issued a proposed final decision recommending affirmance of Smith's two orders. After reviewing the entire record, hearing oral argument from the parties, and considering the plaintiff's brief in response to the hearing officer's proposed final decision, the commissioner issued a final decision affirming the two disposal orders. The plaintiff appealed to the trial court, which rejected the first, second, and fourth claims she raises on appeal to this court. The trial court found "ample evidence to support the conclusion that the bites were severe and that disposal was an appropriate remedy," and dismissed the plaintiff's appeal. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that her right under the sixth amendment to the United States constitution to confront the witnesses against her was violated when the statements of Reed and Jones were admitted as evidence by the hearing officer, despite the fact that these two witnesses did not testify and were not available for cross-examination.[9] Specifically, the plaintiff argues

proceed in the same order as the municipality's case-in-chief; (7) rebuttal; (8) the parties' closing statements; and (9) closure of the hearing.

[9] The plaintiff also makes several assertions that are ancillary to her sixth amendment claim. We dispose of these assertions as follows:

First, as part of her sixth amendment claim, the plaintiff asserts that the hearing officer violated her right to confrontation under article first, § 8, of the Connecticut constitution. However, "[b]ecause the [plaintiff] has not set forth a separate state constitutional analysis pursuant to *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we deem that claim abandoned," and therefore proceed by evaluating the plaintiff's confrontation claim under the sixth amendment to the federal constitution. *State* v. *Benedict*, 158 Conn. App. 599, 604 n.5, 119 A.3d 1245, cert. granted on other grounds, 319 Conn. 924, 125 A.3d 200 (2015).

that the administrative hearing was "quasi-criminal" in nature, and, as such, the right to cross-examine one's accusers attaches. Therefore, according to the plaintiff, "the [commissioner] should not be able to rely on or use any statements, allegations, conclusions, etc., by Reed or Jones in [his final] decision as neither was . . . present for cross-examination." We do not agree.

The following additional facts are relevant to this issue. At the proceeding before the hearing officer, the town of Hamden submitted as evidence statements made to the police by Reed and Jones, as well as police reports containing references to statements made by Reed and Jones about the dogs' attack.[10] Over the plaintiff's objections that such evidence was inadmissible hearsay because neither Reed nor Jones was present at the hearing,[11] the hearing officer admitted the evidence on the ground that hearsay is admissible in

Second, the plaintiff appears to argue separately that the violation of her right to confrontation also deprived her of due process under the fourteenth amendment to the federal constitution, at one point stating that "the town of Hamden violated [the plaintiff's] *due process* rights to cross-examine." (Emphasis added.) Whether this is a separate constitutional claim, or merely a recognition that the sixth amendment has been applied to the states through the due process clause of the fourteenth amendment; see *Pointer* v. *Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); or both, is not entirely clear. To the extent that the plaintiff relies on the fourteenth amendment, however, we view that argument, in its essence, to be the functional equivalent of her sixth amendment claim, and reject it.

Third, the plaintiff adds in passing that, by admitting statements of the two witnesses as evidence at the hearing when they did not testify, the hearing officer also violated the plaintiff's rights under the fifth amendment to the United States constitution. The plaintiff provides no further elaboration or analysis of this issue. We therefore consider it inadequately briefed and decline to review it. See *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008).

[10] These items were far from the only sources of information about the attack. At the hearing, Saulsbury provided detailed eyewitness testimony about the attack. Furthermore, police officer Michael Cirillo and Smith both testified about their observations of Reed's injuries.

[11] The commissioner found that the town of Hamden, through Smith, "attempted to locate [Reed] to come to th[e] administrative hearing by going to her residence, but she did not appear to be living there, and by calling her on the phone, but the phone was not in service."

administrative hearings. On appeal, the trial court, *Schuman*, *J.*, concluded that the sixth amendment to the federal constitution was not implicated because the proceeding was not quasi-criminal in nature, and that the statements were properly admitted as reliable and probative hearsay evidence.

Our analysis begins by setting forth the applicable standard of review. "Our standard of review of administrative agency rulings is well established. . . . Judicial review of an administrative decision is a creature of statute . . . and [§ 4-183 (j)] permits modification or reversal of an agency's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) [i]n violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error or law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." (Citations omitted; internal quotation marks omitted.) *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, 270 Conn. 778, 787, 855 A.2d 174 (2004).

Under the UAPA, the scope of our review of an administrative agency's decision is "very restricted." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Dept. of Environmental Protection*, 257 Conn. 128, 136, 778 A.2d 7 (2001). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the

evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion."[12] (Internal quotation marks omitted.) *Okeke* v. *Commissioner of Public Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012). "We have stated that not all procedural irregularities require a reviewing court to set aside an administrative decision . . . . The complaining party has the burden of demonstrating that its substantial rights were prejudiced by the error." (Citation omitted; internal quotation marks omitted.) *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, supra, 270 Conn. 787–88. "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . ." (Internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343–44, 757 A.2d 561 (2000).

"In addition, although we have noted that [a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts . . . we have maintained that [c]ases that present pure questions of law . . . invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, supra, 270 Conn. 788. The plaintiff's constitutional claims are therefore entitled to plenary review. See *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 711, 99 A.3d 1038 (2014).

[12] Our restricted scope of review is further constrained by the fact that the legislature, by promulgating § 22-358, vested the animal control officer with broad discretion to make orders that "such officer deems necessary" with respect to "the restraint or disposal of any biting dog . . . ." General Statutes § 22-358 (c).

In administrative proceedings under the UAPA, evidence is not inadmissible solely because it constitutes hearsay. See, e.g., *Gagliardi* v. *Commissioner of Children & Families*, 155 Conn. App. 610, 620, 110 A.3d 512, cert. denied, 316 Conn. 917, 113 A.3d 70 (2015); see also *Roy* v. *Commissioner of Motor Vehicles*, 67 Conn. App. 394, 397, 786 A.2d 1279 (2001) ("[a]dministrative tribunals are not strictly bound by the rules of evidence . . . so long as the evidence is reliable and probative" [internal quotation marks omitted]). Additionally, a party to an administrative proceeding under the UAPA is not required to call any particular witness.[13] Therefore, the UAPA did not bar admission of and the commissioner did not err in considering the statements of Reed and Jones, the victim of the attack and an eyewitness to it, which the commissioner found to be "reliable and probative."[14] We thus turn to the plaintiff's constitutional claim.

The sixth amendment to the United States constitution provides in relevant part that "[*i*]*n all criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." (Emphasis added.) The right to confrontation guaranteed by this provision is thus expressly limited to criminal proceedings. It is well established in the case law that "[t]he sixth amendment relates to a prosecution of an accused person which is technically criminal in its nature." *United States* v. *Zucker*, 161 U.S. 475, 481, 16 S. Ct. 641, 40 L. Ed. 777 (1896); see also *Austin* v. *United States*, 509 U.S. 602, 608 and n.4, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) ("The protections provided by

[13] Of course, if a witness does testify at an administrative proceeding, he or she is subject to cross-examination. See General Statutes § 4-177c.

[14] We note that during the proceedings before the hearing officer, the plaintiff objected to the statements of Reed and Jones only due to the fact that neither of them was present. The plaintiff did not argue that their statements were unreliable or not probative.

the Sixth Amendment are explicitly confined to 'criminal prosecutions.' As a general matter, th[e] Court's decisions applying constitutional protections to civil forfeiture proceedings have adhered to th[e] distinction between provisions that are limited to criminal proceedings and provisions that are not. Thus, the Court has held that the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings . . . but that the Sixth Amendment's Confrontation Clause does not . . . ." [Citations omitted.]); *United States* v. *Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980) ("The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to 'any criminal case.' Similarly, the protections provided by the Sixth Amendment are available only in 'criminal prosecutions.' Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court."); *Hannah* v. *Larche*, 363 U.S. 420, 440 n.16, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960) ("[the Sixth] Amendment is specifically limited to 'criminal prosecutions,' and the proceedings of the Commission [on Civil Rights] clearly do not fall within that category"). Our Supreme Court and this court have held likewise. See *State* v. *Anonymous*, 179 Conn. 155, 159, 425 A.2d 939 (1979) ("[t]he right to effective assistance of counsel . . . is grounded in the sixth amendment to the United States constitution, which is expressly limited to a defendant in a criminal action"); see also *In re Noel M.*, 23 Conn. App. 410, 420–21, 580 A.2d 996 (1990) (concluding that confrontation rights under sixth amendment "cannot logically be extended to . . . [parental] neglect hearing").

An appeal of a disposal order for a biting animal pursuant to § 22-358 (c) is not a criminal prosecution.[15]

[15] In so holding, we also conclude that it is immaterial for purposes of the sixth amendment whether the disposal orders are quasi-criminal or not.

The issuance of a disposal order under § 22-358 (c) does not, by itself, trigger the imposition of a fine or prison term on the owner.[16] Rather, by obviating the threat that dangerous animals pose to the public, the provision is remedial and civil in nature.

The plaintiff nonetheless argues that "[s]ince the seizure and subsequent [disposal] orders [concerning her

As explained previously in the body of this opinion, it is well established that confrontation rights under the sixth amendment to the federal constitution are afforded only to *criminal* defendants. The cases that the plaintiff cites are inapposite because they do not involve sixth amendment claims. *Boyd* v. *United States*, 116 U.S. 616, 617–18, 6 S. Ct. 524, 29 L. Ed. 746 (1886), for instance, involved a proceeding by the United States to execute the forfeiture of cases of plate glass, which allegedly had been illegally imported without payment of the customs duty. The Supreme Court held that proceedings instituted for the purpose of declaring the forfeiture of property by reason of crimes committed by the owner, though civil in form, are quasi-criminal in nature, and, therefore, under the fourth and fifth amendments, the owner cannot be compelled to produce documents that justify the forfeiture by proving the criminal violation occurred. Id., 634–35. Similarly, in *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 702, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965), the Supreme Court held that the state could not seize evidence in violation of the fourth amendment for use in a quasi-criminal forfeiture proceeding intended to penalize the owner of an automobile for the commission of a criminal offense. In that case, police officers stopped an automobile and searched the rear and trunk without a warrant and without probable cause, ultimately finding thirty-one cases of liquor not bearing Pennsylvania tax seals, which constituted a violation of Pennsylvania law. Id., 694–95. In the present case, by contrast, the animal control officer was not required to find that the plaintiff violated any criminal law in order to justify his disposal orders under § 22-358 (c).

[16] A municipality may assess on the owner certain fees, including a nominal "redemption fee" for owners claiming a captured or impounded animal, and a payment representing the cost to the municipality of quarantining a biting animal. General Statutes § 22-333. These fees, however, merely compensate a municipality for costs incurred while impounding an animal, and thus cannot be described as punitive in nature. Compare Black's Law Dictionary (7th Ed. 1999) p. 629 (defining "fee" as "[a] charge for labor or services, esp. professional services"), with Black's Law Dictionary, supra, p. 647 (defining "fine" as "[a] pecuniary criminal punishment or civil penalty payable to the public treasury").

And, although, pursuant to § 22-358 (c), the state may punish an animal owner with a thirty day prison term and $250 fine for failing to comply with a quarantine order issued after a biting incident, such criminal penalty is distinct from a disposal order, and, in any event, is not at issue in this case.

dogs] were the result of an arrest of [the plaintiff], the proceedings to determine whether [the dogs] should be destroyed were quasi-criminal, and, therefore, [the plaintiff's] constitutional rights, including her sixth amendment right to confrontation, should have been observed and protected." There are several problems with this argument. First, the record does not reveal an arrest of the plaintiff.[17] The record does reveal, however, that the town of Hamden issued infractions against the plaintiff for nuisance under General Statutes § 22-363,[18] and intentional or reckless release of a domestic animal that causes damage under General Statutes § 22-364a.[19] In Connecticut, however, an infraction is not a crime. See *State* v. *Caracoglia*, 134 Conn. App. 175, 187, 38 A.3d 235 (2012) ("An infraction is not defined as a crime or criminal prosecution by the applicable General Statutes. [General Statutes §] 53a-24 [a] provides that 'the term crime comprises felonies and misdemeanors.' An infraction is neither."). Second, even if the plaintiff were charged with a criminal offense as a result of the biting incident, such prosecution does not automatically render criminal in nature any civil actions arising from the same incident. See *United States* v. *Ursery*, 518 U.S. 267, 292, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996) ("[i]t is well settled that Congress may impose both a criminal

[17] At the administrative hearing, the plaintiff's prior counsel acknowledged that the plaintiff was not arrested.

[18] General Statutes § 22-363 provides: "No person shall own or harbor a dog or dogs which is or are a nuisance by reason of vicious disposition or excessive barking or other disturbance, or, by such barking or other disturbance, is or are a source of annoyance to any sick person residing in the immediate vicinity. Violation of any provision of this section shall be an infraction for the first offense and a class D misdemeanor for each subsequent offense and the court or judge may make such order concerning the restraint or disposal of such dog or dogs as may be deemed necessary."

[19] General Statutes § 22-364a provides: "Any person who intentionally or recklessly releases a domestic animal that enters upon the real property of another person and causes damage to such real property in an amount in excess of one hundred dollars shall have committed an infraction."

and a civil sanction in respect to the same act or omission" [internal quotation marks omitted]); see also *State* v. *Burnell*, 290 Conn. 634, 641–42, 966 A.2d 168 (2009) (administrative license revocation proceeding and criminal prosecution arising out of same offense did not violate federal or state double jeopardy clauses).

Finally, with respect to the plaintiff's claim that she was deprived of her right to confront Reed and Jones, we note that the plaintiff was free to subpoena both witnesses to compel their attendance at the hearing, or, in the alternative, to request that the hearing be held open in order to afford her more time to prepare such subpoenas or to submit a request to file late any affidavits refuting their testimony. The record does not disclose that the plaintiff attempted to pursue any of these options.

We conclude that the hearing officer's admission of the hearsay statements of Reed and Jones did not violate the sixth amendment to the United States constitution and that these statements were therefore properly considered by the commissioner prior to issuing his final decision.

II

The plaintiff next contends that the commissioner erred in failing to find that the hearing officer improperly forced one of her witnesses to leave the hearing before testifying.[20] Specifically, the plaintiff claims that "a witness essential to the matter, with facts surrounding the incident . . . was forced to leave the hearing despite a medical condition that was the reason for her behavior." This claim is wholly without merit.

[20] In a section heading of her appellate brief, the plaintiff also asserts that this alleged conduct violated her constitutional right—presumably under the sixth amendment—to call witnesses on her own behalf. Although such a claim is not adequately presented, we note that our analysis herein would also govern our analysis of such claim.

The following additional facts are pertinent to this issue. The record discloses that the hearing officer twice admonished Satanya Hudson, a friend of the plaintiff, for creating some sort of disturbance in the hearing room.[21] The precise nature of the disturbance is not apparent on the record. It further appears that Hudson later left the hearing room to tend to a medical condition and never returned.[22] The commissioner found that the

[21] The exchanges surrounding the disturbance are as follows:

"[The Defendant's Counsel]: But a witness described the way the dogs were [attacking], was like an alligator. If somebody described that to you—

"[The Witness]: Yeah, if a dog rolled on its side on a bite, that would be completely, I have never seen that. I have never—

"[The Defendant's Counsel]: Ma'am, it has been all day, and—

"[The Hearing Officer]: I'll step in here too.

"[Hudson]: I am tired. I am sorry.

"[The Defendant's Counsel]: Yeah, but this started first thing in the morning.

"[Hudson]: I am sorry.

"[The Defendant's Counsel]: I understand you may not agree with my questions, you may not agree with some of the answers, but now it is getting distracting.

"[Hudson]: I am sorry. I apologize to you, sir.

"[The Hearing Officer]: And if you want to stay in the hearing that is going to have to stop.

"[Hudson]: No problem."

Later, the following exchange occurred:

"[The Hearing Officer]: So, if you had a five year old child or four year old child out in its yard, these two dogs got loose after you, well let's say before you train them. These two dogs got loose, and they, you know, they travelled a few hundred feet, couple blocks—ma'am, one more time. This is the second warning.

"[Hudson]: I am not doing anything, sir. I am falling asleep.

"[The Hearing Officer]: As far as I can see, you are.

"[Hudson]: I didn't do anything—

"[The Hearing Officer]: Well, you know.

"[The Plaintiff]: Satanya—

"[Hudson]: Kim, I didn't do anything. I rubbed my eye and I went like this. I am falling asleep."

[22] We glean this from the following exchange between the hearing officer and Evan Wilson, who would later testify for the plaintiff:

"[The Hearing Officer]: Excuse me.

"[Wilson]: I apologize. I just need the keys to her truck. Satanya is on medication and she is having seizures, which is also the reason why she is having issues.

"[The Hearing Officer]: All right.

hearing officer did not request, require, or force Hudson to leave the hearing, but merely asked that she not be disruptive, and that Hudson did not state or reveal that a medical condition caused her to be disruptive. He further found that it was not the hearing officer's responsibility to ascertain whether counsel for the plaintiff wanted to call Hudson to testify. On appeal, the trial court concluded that there was nothing in the record to support the plaintiff's claim that Hudson was forced out of the hearing room and that, in any event, the plaintiff failed to establish any prejudice arising from the episode as no proffer by counsel for the plaintiff regarding Hudson's proposed testimony was ever made.

The premise of the plaintiff's claim is belied by the record, which is simply bereft of any indication that the hearing officer "forced [Hudson] to leave and not testify" or that she "was not allowed back to testify." Notably, at no time during the hearing did the plaintiff object by claiming that Hudson had been forced to leave or had not been allowed back to testify. Additionally, as the commissioner found, "[t]here was no request made to the hearing officer to have [Hudson] testify after a break or recess, there was no request to continue or hold open the hearing to have [Hudson] testify on another date, [and] there was no proffer by counsel for [the plaintiff] regarding the alleged nature of [Hudson's] testimony." Further, "[t]here was no request to file an affidavit regarding the nature of [Hudson's] testimony . . . and no request was made to late file such an exhibit." Thus, the plaintiff has not demonstrated that her right to due process of law was violated as a result of the hearing officer's verbal exchanges with Hudson.

"[Wilson]: So I just want to get—

"[The Hearing Officer]: I apologize—

"[Wilson]: No, that's all right. That's why I went outside to go check on her."

This final exchange is the first time that a reference to Hudson's medical condition appears on the record.

III

The plaintiff next argues that the proposed final decision of the hearing officer was made upon unlawful procedure because the department lacked written procedures that applied specifically to hearings on dog disposal orders, thereby depriving the plaintiff of due process.[23] According to the plaintiff, the hearing officer "rel[ied] solely on the codified sections of the [UAPA] . . . and the Department of Agriculture's rules of practice, both of which are *general* in nature and apply to all hearings before the department, and not *specifically* to appeals of dog disposal orders." (Emphasis added.) Thus, the plaintiff asserts, her right to due process was violated because the hearing officer lacked sufficient guidance as to how to conduct the administrative hearing. As support for this claim, the plaintiff relies on a transcript of a status conference in an unrelated case before the United States District Court for the District of Connecticut, which the plaintiff claims, shows the lack "of any written rules, procedures or guidelines used by the department . . . as they relate to the department's practices and procedures pursuant to § 22-358." This claim, including its reference to the appended transcript, is raised for the first time before this court. We therefore decline to review it.

"Practice Book § 60-5 provides in relevant part that [this] court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . . Indeed, it is the appellant's responsibility to present such a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious,

[23] In her brief, the plaintiff frames this alleged error as arbitrary and capricious conduct by the hearing officer. In substance, however, this claim is one of unlawful procedure under § 4-183 (j) (3). Accordingly, we refer to it as such.

take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge. . . . We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal. . . . This rule applies to appeals from administrative proceedings as well." (Citation omitted; internal quotation marks omitted.) *Ferraro* v. *Ridgefield European Motors, Inc.*, 313 Conn. 735, 758–59, 99 A.3d 1114 (2014); see also *Dragan* v. *Connecticut Medical Examining Board*, 223 Conn. 618, 632, 613 A.2d 739 (1992) ("A party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board. We have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial." [Internal quotation marks omitted.]).

The record reveals that the plaintiff failed to raise this distinct claim before the hearing officer, the commissioner, or the trial court. The plaintiff, however, appears to argue that because the District Court status conference on which she relies took place *after* the administrative hearing, she is entitled to rely on it in the present claim. See Practice Book § 60-5. Even assuming, arguendo, that the status conference transcript supports the plaintiff's proposition, the record reflects that the department informed the plaintiff in a letter prior

to the hearing that "[the] hearing will be conducted in accordance with the [UAPA] and the Department of Agriculture [r]ules of [p]ractice, [s]ections 22-7-20 through 22-7-38 as found in the Regulations of Connecticut State Agencies (enclosed)." Thus, the plaintiff had notice of what procedural rules would—and, importantly, would *not*—be used during the hearing. If, as the plaintiff asserts, "there [were] no written guidelines, rules, or procedures for parties to follow" specifically in administrative hearings on dog disposal orders, such lack of specific procedures was as apparent before the hearing as the plaintiff contends it is now. Thus, the plaintiff's claim did not "ar[ise] subsequent to the trial." Practice Book § 60-5. Accordingly, we conclude that this claim was not preserved and we decline to review it.[24]

IV

Finally, the plaintiff argues that the commissioner erred in finding that the hearing officer did not act

[24] In responding to her other claims, the commissioner noted: "In response to her brief, [the plaintiff] was provided with sufficient due process in this administrative proceeding. There was adequate notice of the hearing and the basis for the hearing. [The plaintiff], through counsel, was given the opportunity to cross-examine all witnesses produced by the town, to put on her own witnesses and to submit documentary evidence. . . . There was no violation of fundamental fairness to [the plaintiff]. In assessing the common-law right to fundamental fairness, courts review whether there was due notice of the hearing, that the parties had the right to produce relevant evidence and that there was the right to cross-examine witnesses produced by its adversary. . . . Again, in this case, [the plaintiff] had notice and the opportunity to participate in a fair and impartial administrative hearing. [The plaintiff] had the opportunity to present all relevant evidence in this matter. All of the documents presented by [the plaintiff] were accepted as evidence and made part of the record for the final decision maker's consideration. [The plaintiff] had the opportunity to cross-examine all of the witnesses produced by the town. [The plaintiff] had the opportunity to call any and all witnesses that she determined to present for testimony before the hearing officer. [She] was provided with the opportunity to file exceptions to the proposed final decision and argue them before the final decision maker at an oral argument prior to the issuance of a final decision." (Citation omitted.)

arbitrarily and capriciously when he "interjected his opinion" about a substantive matter while questioning a witness for the plaintiff. Because the plaintiff failed to adequately brief this issue, we decline to review its merits.

"Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Citations omitted; internal quotation marks omitted.) *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008).

The plaintiff cites to only one instance of the allegedly inappropriate interjection of opinion as follows:

"[The Hearing Officer]: So do you think if that bite to the neck coupled with dragging, dragging the victim, might be more than just flight?

"[The Witness]: Potentially. But there are a lot of variables, especially with this case here.

"[The Hearing Officer]: I understand there are a lot of variables. I was a practicing large animal veterinarian for eighteen years before I came here, and I saw plenty of attacks by dogs. And I think that there are a lot of different opinions on neck bites."

The trial court found no merit to this claim, concluding that "[a] trial judge, and presumably a hearing officer, has authority, particularly in a nonjury case, to question a witness as long as he remains neutral and does not take over counsel's role," and further noting that the hearing officer's statement was "essentially innocuous."

The plaintiff's brief does not explain how the hearing officer's statement constitutes error except to say that it is an example of his "interject[ing] his opinion rather than acting as a finder of fact," and that, from what we can discern from a section heading earlier in the plaintiff's appellate brief, it is claimed to be possibly arbitrary and capricious as well. The plaintiff cites no legal authority in support of this argument, provides no further reference to the record, and engages in no further analysis. We thus deem this claim abandoned and decline to review it.

The judgment of the trial court dismissing the plaintiff's appeal is affirmed.

In this opinion the other judges concurred.

WASHINGTON MUTUAL BANK *v.* LINDA S. COUGHLIN ET AL.
(AC 37645)

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

Syllabus

The plaintiff bank, J Co., sought to foreclose a mortgage on certain real property in Mystic owned by the defendants, L and D, which they originally had purchased as a summer residence. The defendants' principal residence was a home that L owned in Norwalk. In 2008, the original plaintiff bank, W Co., commenced this action after the defendants had defaulted on the subject note by failing to make required monthly payments. Thereafter, J Co. acquired the note and mortgage and was substituted as the plaintiff. The defendants filed a motion to dismiss the action, arguing that the trial court lacked subject matter jurisdiction due to W Co.'s purported failure to comply with the notice requirement set forth in the statute (§ 8-265ee) that requires a mortgagee to provide specific notice to the mortgagor before it can commence a foreclosure of a qualifying mortgage under the emergency mortgage assistance program. The trial court denied the defendants' motion, and, after a court trial, rendered judgment of strict foreclosure. On the defendants' appeal to this court, *held* that the defendants could not prevail on their claim that the trial court improperly denied their motion to dismiss, the notice requirement in § 8-265ee having been inapplicable under the facts of

this case: by its express terms, the obligation to give notice pursuant to § 8-265ee applied only if J Co. was seeking to foreclose the mortgage on the defendants' principal residence, and the record revealed that when W Co. commenced this action in 2008, the subject mortgage related to property that was not the defendants' principal residence; the evidence in the record indicated that the defendants' counsel made what amounted to a judicial admission that, until 2009, the defendants did not live at the subject property other than on weekends and in the summer, that L gave undisputed testimony at trial that, until 2009, the defendants listed their Norwalk home as their address on their federal tax returns, that D's deposition stated that the subject property had been the defendants' principal residence beginning in 2009, and that at the time the defendants purchased the subject property they had signed a second home rider indicating their agreement to utilize the subject property only as a secondary residence.

Argued May 19—officially released September 13, 2016

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Devine*, *J.*, granted the motion to substitute JPMorgan Chase Bank, National Association, as the plaintiff; thereafter, the court granted the motion to substitute Greystone Business Credit REO, LLC, as a defendant; subsequently, the court granted the motion to be made a party defendant filed by CUDA & Associates, LLC; thereafter, the court, *Hon. Robert C. Leuba*, judge trial referee, denied the motion to dismiss filed by the named defendant et al.; subsequently, the defendant National City Bank et al. were defaulted for failure to plead; thereafter, the matter was tried to the court, *Hon. Robert C. Leuba*, judge trial referee; subsequently, the court, *Hon. Robert C. Leuba*, judge trial referee, denied the motion to open the evidence filed by the named defendant et al.; thereafter, the court, *Hon. Robert C. Leuba*, judge trial referee, rendered judgment of strict foreclosure, from which the named defendant et al. appealed to this court; subsequently, the court, *Hon.*

Robert C. Leuba, judge trial referee, denied the motion to reargue filed by the named defendant et al., and the named defendant et al. filed an amended appeal. *Affirmed.*

Paulann H. Sheets, for the appellants (named defendant et al.).

Brian D. Rich, with whom was *Peter R. Meggers*, for the appellee (substitute plaintiff).

Opinion

PRESCOTT, J. The defendants Linda S. Coughlin and Daniel F. Coughlin[1] appeal from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, JPMorgan Chase Bank, National Association.[2] The defendants' sole claim on appeal[3] is that the court improperly denied their motion to dismiss, filed on the eve of trial. In that motion, they argued that the court lacked subject matter jurisdiction due to the original plaintiff's purported failure to comply with the notice

[1] The following parties also were defendants in the underlying action by virtue of an interest in the subject property: National City Bank, Greystone Business Credit, LLC, Greystone Business Credit REO, LLC, Thirty Five Thirty Nine West Thirty Three Street, LLC, and Cuda & Associates, LLC. None of these additional defendants participated in the underlying action or in the present appeal. Accordingly, in this opinion, we refer to the Coughlins as the defendants.

[2] JPMorgan Chase Bank, National Aassociation, was substituted as the plaintiff for Washington Mutual Bank in January, 2009.

[3] The defendants raised a number of other claims in their preliminary statement of the issues, but, because they have not addressed those claims in their appellate brief, the claims are deemed abandoned. See *Brown* v. *Otake*, 164 Conn. App. 686, 698–99 n.8, 138 A.3d 951 (2016). Furthermore, although the defendants filed an amended appeal on August 18, 2015, purportedly challenging postjudgment rulings rendered by the trial court on February 26, 2015, the defendants have not briefed any claims of error pertaining to the amended appeal and, therefore, any such claims also are deemed abandoned. See *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 687 n.10, 41 A.3d 1013 (2012).

requirement set forth in General Statutes § 8-265ee (a),[4] which is part of the Emergency Mortgage Assistance Program (EMAP). See General Statutes §§ 8-265cc through 8-265kk. The plaintiff responds that the original plaintiff did provide notice of EMAP to the defendants out of an abundance of caution, but that the defendants were not entitled to notice under § 8-265ee because the subject property was not their principal residence at the time the action was commenced. See General Statutes § 8-265ff.[5] Accordingly, it contends that the court properly denied the defendants' motion to dismiss. Having thoroughly reviewed the record, we agree with the plaintiff that the defendants were not entitled to notice pursuant to § 8-265ee, and, thus, we do not decide whether, in a case in which § 8-265ee is applicable, failure to comply with its notice requirement implicates the court's subject matter jurisdiction. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. In June, 2004, the defendants purchased real property located at 848-850 Noank Road in

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

[5] General Statutes § 8-265ff (e) provides in relevant part: "No emergency mortgage assistance payments may be provided unless the authority finds that: (1) The real property securing the mortgage . . . is the principal residence of the mortgagor . . . ."

Mystic (subject property). At the time they purchased the subject property, the defendants' intent was to use it as a summer residence. The defendants' main residence was a home that Linda Coughlin owned in Norwalk.

In order to finance the purchase of the subject property, the defendants executed a promissory note in the amount of $1,700,000 in favor of Washington Mutual Bank, FA. As security for that note, the defendants also executed a purchase money mortgage on the subject property in favor of Washington Mutual Bank, FA. In addition to the note and mortgage, the defendants also signed other documents at the real estate closing, including a second home rider. The second home rider provided that the defendants would use the subject property only as a second home.

On July 1, 2008, Washington Mutual Bank, formerly known as Washington Mutual Bank, FA, commenced this action seeking foreclosure of the mortgage because the defendants had defaulted on the note by failing to make required monthly payments. The note and mortgage later were acquired by the plaintiff, which, in January, 2009, was substituted as the plaintiff in place of Washington Mutual Bank.

For approximately six years, the defendants represented themselves in the foreclosure action.[6] During that time, the defendants filed multiple bankruptcy actions that halted progress of the foreclosure proceedings for several years. Eventually, however, the plaintiff obtained relief from the latest bankruptcy stay, and a trial date was set. The defendants then retained their current counsel.[7] On the day before trial, after 5 o'clock

[6] Daniel Coughlin is a patent attorney.

[7] The trial originally was scheduled for September 16, 2014. The court granted the defendants' request for a continuance, setting a new trial date of October 21, 2014. The defendants twice requested additional continuances to permit new counsel to conduct additional discovery. The court denied both requests.

in the afternoon, the defendants electronically submitted a motion to dismiss the action.[8]

In their motion to dismiss, the defendants alleged that the original plaintiff had not complied with § 8-265ee (a) because it failed to provide them with notice of EMAP, and that, because of the lack of the statutorily required notice, the court did not have subject matter jurisdiction to hear the foreclosure action. Attached to the motion were affidavits by the defendants averring that they never were notified about EMAP. The defendants also suggested that the plaintiff had not remedied any lack of notice by filing "a defective and untrue affidavit of compliance five years and three months after commencement of the suit." The defendants were referring to an affidavit that the plaintiff had filed with the court a few weeks earlier. In that affidavit, a paralegal for Bendett & McHugh, P.C., the firm that represented the original plaintiff,[9] averred in relevant part as follows: "Based on Bendett & McHugh, PC's business records and its regular business practices, the plaintiff has complied with the provisions of [§] 8-265ee (a) (also known as Public Act[s] [2008, No.] 08-176, § 7) by Bendett & McHugh, PC giving on June 30, 2008 to all mortgagors a notice containing the information required by said statute."

The parties appeared for trial on the morning of October 21, 2014. Because the arguments raised in the defendants' motion to dismiss purported to implicate the court's subject matter jurisdiction, the defendants asked the court to postpone the trial to a later date. The plaintiff argued against any further continuances and requested a summary hearing on the motion to dismiss, suggesting that there was no merit to the

[8] Because the motion was received electronically after 5 p.m., it was deemed filed on October 21, 2014. See Practice Book § 7-17.

[9] At the time the foreclosure action was commenced, Bendett & McHugh, P.C., was known under its former name of Reiner, Reiner & Bendett, P.C.

motion and that it was simply intended to cause further delay. In support of its argument that the motion lacked merit, the plaintiff brought to the court's attention that the defendants had conceded in their motion to dismiss that EMAP notice was required only with respect to mortgages that encumbered a mortgagor's principal residence, and that it was prepared to offer the defendants' own deposition testimony establishing that the subject property was not their principal residence when the foreclosure action was commenced.[10] After taking a short recess, the court decided not to grant the defendants' request for a continuance, but to hear arguments on the motion to dismiss.

Counsel for the defendants argued that her clients never received the statutorily mandated notice concerning EMAP, and that they did not learn of the program until after she began representing them and made inquiry about it. As proof of this assertion, she directed the court's attention to the defendants' affidavits appended to the motion to dismiss. Counsel also challenged the earlier affidavit filed by the plaintiff in which a paralegal asserted that proper notice was given to all mortgagors, arguing that the affidavit was not timely and questioning its veracity. She asserted that the legislature had intended that proper notice be a jurisdictional prerequisite to filing a foreclosure action, explaining in detail the history of the EMAP program and its importance in helping to keep parties in their homes during the financial crisis. Although counsel suggested that the defendants were eligible for EMAP because the subject property was the defendants' principal residence, she did not offer any evidence in support of that assertion.

[10] In addition to this argument, the plaintiff also asserted that the court should deny the motion because the defendants had been provided notice despite no obligation to do so and, in any event, the defendants had failed to provide any legal authority establishing that failure to provide notice implicated the court's subject matter jurisdiction.

The plaintiff opposed the motion to dismiss, arguing that the defendants had been provided with the required notice as indicated in the affidavit filed with the court and that the defendants had failed to demonstrate beyond mere conjecture that the notice requirement implicated the court's subject matter jurisdiction. The plaintiff also again emphasized that the notice provision was not applicable here because the subject property was not the defendants' primary residence when the action was commenced. By way of proof, the plaintiff cited to portions of the defendants' July 1, 2014 deposition testimony.

When the court later stated that it would not be "able to consider the residency issue without the evidence which [the plaintiff] referred to, which is not of record," the plaintiff indicated it was prepared to offer the original deposition transcripts but did not believe there was any dispute over what the transcripts said. An extensive colloquy then ensued, during which the defendants' counsel made the following statements regarding the defendants' residency: "I think I'm able to speak that this—she was in Norwalk and made—always come every weekend and all summer was spent here after they bought the house *and it became permanent in 2009*." (Emphasis added.) Although she later asserted that the subject property had been the defendants' "primary residence since they bought the house," she also stated: "Have they been continuously living there? No. You have been—it's been there since 2009 . . . ." The transcripts of the defendants' depositions were not made a part of the evidentiary record at that time.[11]

At the conclusion of arguments, and after taking a short recess, the court issued an oral ruling denying the motion to dismiss. The court stated as follows: "I

[11] They were admitted as full exhibits at trial, however, and, thus, are part of the record before us on appeal.

want to assure counsel that the court has considered the arguments which have been advanced and the material which has been filed prior to today as well as the citations of authority which have been given to the court for review. Having done that, the court will deny the motion to dismiss for the reason that it finds that the compliance with [EMAP] is not a jurisdictional matter which requires the granting of the motion. For this reason, the motion is denied." The court made no factual findings, cited no legal authority, and gave no further explanation for its ruling.

After denying the motion to dismiss, the court heard other pretrial motions before it proceeded with the trial on the foreclosure complaint. The trial continued that afternoon and concluded the following day. The parties filed posttrial briefs. The defendants later filed a motion asking the court to open the evidence so that they could present additional evidence. The court denied the motion.

On January 8, 2015, the court rendered a judgment of strict foreclosure finding, in relevant part, that the total debt owed by the defendants, including attorney's fees, was $2,666,207.13, and that the fair market value of the property was $2,100,000. As part of its decision, the court also made the following factual findings relevant to the present appeal: the defendants had become interested in purchasing the subject property as a summer residence, they signed a second home rider at closing in 2004 indicating that the property would be used only as a second home, and, "in 2009, the defendants moved to make the [subject property] their permanent residence when their Norwalk residence was foreclosed." The court set law days to commence on February 24, 2015. This appeal followed.[12]

[12] During the pendency of this appeal, the defendants filed a motion for articulation with the trial court asking it to articulate the basis for its decision denying the motion to dismiss. The trial court, after a hearing, denied the motion for articulation without comment. The defendants filed a motion

The defendants' sole claim on appeal is that the court improperly denied their motion to dismiss the foreclosure action by concluding that "compliance with [EMAP] is not a jurisdictional matter which requires the granting of the motion." They allege that, because the original plaintiff failed to provide them with proper notice in accordance with § 8-265ee, which they maintain was a statutory prerequisite to filing the present foreclosure action, the trial court lacked subject matter jurisdiction over the action and should have granted their motion to dismiss. The plaintiff's principal response is that it is unnecessary in the present case to consider whether the defendants received proper notice or whether compliance with § 8-265ee is a jurisdictional prerequisite to the filing of a foreclosure action because it is apparent from the record that the defendants were not entitled to the EMAP notice. According to the plaintiff, because its predecessor sought to foreclose a mortgage that did not encumber property that was the defendants' "principal residence" at the time the action was commenced, § 8-265ee is inapplicable and we should affirm the court's denial of the motion to dismiss on that basis.[13] We agree with the plaintiff.[14]

for review of that decision pursuant to Practice Book § 66-7. This court granted the motion for review, but denied the relief requested therein.

[13] Although the plaintiff suggests in its appellate brief that a determination by this court that § 8-265ee is inapplicable would render the defendants' appeal moot, we disagree that its argument truly implicates the mootness doctrine. In determining whether an appeal is moot, we ordinarily do not decide the merits of the claims raised; rather, we ask whether there is any practical relief that could be granted even assuming that the appellant *prevails* on appeal. Here, the plaintiff's argument, which was raised at the hearing on the motion to dismiss as a basis for denying the motion, is more akin to an alternative ground on which to affirm the court's decision.

[14] Deciding this case in this posture is not unfair to the defendants because they were fully apprised of the issue prior to the appeal by the fact that it was part of the plaintiff's argument in opposition to the motion to dismiss. The issue of when the subject property became the defendants' main residence also was explored both at the hearing on the motion to dismiss and during the foreclosure trial. Accordingly, the defendants had a full and fair opportunity to develop the record to establish that the subject property

"Our standard of review of a trial court's findings of fact and conclusions of law in connection with a motion to dismiss is well settled. A finding of fact will not be disturbed unless it is clearly erroneous. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts . . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *JPMorgan Chase Bank National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 135–36, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016). "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.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

To the extent that our review requires us to construe statutory provisions, this presents a legal question over which our review also is plenary. Id., 525. "That review is guided by well established principles of statutory interpretation . . . . As with all issues of statutory interpretation, we look first to the language of the statute. . . . In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended." (Citation omitted; internal quotation marks omitted.) Id.

Because the court denied the motion to dismiss without clearly stating either the factual or legal basis for

was, in fact, their principal residence when the foreclosure action was commenced. The defendants also had an opportunity to respond to the plaintiff's argument in their reply brief and at oral argument before this court.

its decision, it is difficult to discern with any degree of certainty whether the court broadly concluded that the EMAP notice requirements in § 8-265ee did not implicate the court's subject matter jurisdiction, or whether it concluded more narrowly that subject matter jurisdiction simply was not implicated under the facts of the present case, either because it determined that proper notice had in fact been provided to the defendants or because it agreed with the plaintiff that notice was never required as the subject mortgage did not encumber the defendant's principal residence. Nevertheless, because we exercise plenary review regarding a court's legal conclusion in deciding a motion to dismiss, we may affirm the court's decision on any of these grounds. See *Rafalko* v. *University of New Haven*, 129 Conn. App. 44, 51 n.3, 19 A.3d 215 (2011) ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" [internal quotation marks omitted]).

Further, although it is axiomatic that this court cannot make factual findings, factual conclusions may be drawn on appeal if "the subordinate facts found [by the trial court] make such a conclusion inevitable as a matter of law . . . or where the undisputed facts or uncontroverted evidence and testimony in the record make the factual conclusion so obvious as to be inherent in the trial court's decision." (Citations omitted; internal quotation marks omitted.) *State* v. *Reagan*, 209 Conn. 1, 8–9, 546 A.2d 839 (1988); see also *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 171–72, 117 A.3d 876, cert. denied, 318 Conn. 902, 122 A.3d 631 (2015). In deciding whether the trial court lacked jurisdiction over the action, we are cognizant that this question invokes the existing record, which, at this juncture, necessarily includes those facts established at trial.[15] We note that the defendants have not challenged as clearly erroneous

[15] Although we are aware that facts found by the court at trial may not have been part of the record when the trial court decided the motion to

any of the court's factual findings that underlie the judgment of strict foreclosure.

Section 8-265ee (a) provides in relevant part: "On and after July 1, 2008, a mortgagee who desires to foreclose *upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff*, shall give notice to the mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. . . ." (Emphasis added.) It is the defendants' claim on appeal that the legislature intended that last sentence to divest the trial court of jurisdiction if notice was not properly provided. By its express terms, however, the obligation to give notice pursuant to § 8-265ee before commencing a foreclosure action applies only if the plaintiff is seeking to foreclose a mortgage that satisfies certain standards enumerated in § 8-265ff (e). Because those standards are stated in the conjunctive, each must be satisfied before a mortgage falls within § 8-265ee. See *Penn* v. *Irizarry*, 220 Conn. 682, 687, 600 A.2d 1024 (1991) ("[t]he use of [a] conjunctive . . . indicates that both conditions must be fulfilled"). For purposes of the present analysis, the relevant provision is that found in subdivision (1) of subsection (e) of § 8-265ff.

Section 8-265ff (e) provides in relevant part: "No emergency mortgage assistance payments may be provided unless the authority finds that: (1) The real property securing the mortgage . . . is *the principal residence of the mortgagor* . . . ." (Emphasis added.) The defendants conceded at oral argument before this

dismiss moments before the start of trial, in reviewing the propriety of the court's decision, it would be inefficient to ignore those facts on appeal and to remand the matter back to the trial court for additional fact-finding if those same facts subsequently were determined and are not challenged on appeal.

court that unless the subject property was their principal residence at the time the present foreclosure action was commenced in July, 2008, their claim that they were entitled to notice of EMAP and that the failure to receive such notice deprived the court of subject matter jurisdiction fails as a matter of law.

The term "principal residence" is not defined by any statute, regulation or case law of which we are aware, nor have the parties cited to any. The term, therefore, must be afforded its plain and ordinary meaning. "[If] a statute does not define a term, it is appropriate to look to the common understanding expressed in the law and in dictionaries." (Internal quotation marks omitted.) *Funaro* v. *Baisley*, 57 Conn. App. 636, 638, 749 A.2d 1205, cert. denied, 254 Conn. 902, 755 A.2d 218 (2000).

Merriam-Webster's Collegiate Dictionary, 11th Edition, defines residence as "the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn . . . ." It defines the adjective "principal" as meaning "most important, consequential, or influential: chief . . . ." Thus, the ordinary or plain meaning of the term "principal residence" in this context means the person's chief or primary home, as distinguished from a secondary residence or a vacation home. We also take note of the fact that the statute refers to *the* principal residence of the mortgagor not *a* principal residence, suggesting that a person can have only one principal residence at any given time for purposes of this statute.

The trial court in the present case never made an express finding that the subject property was not the defendants' "principal" residence in July, 2008, when the foreclosure action was commenced, either in denying the motion to dismiss or in its memorandum of decision rendering the judgment of strict foreclosure. The

court did find, however, that the defendants lived in a home in Norwalk at the time they purchased the subject property as their summer residence, and that it was not until 2009, after the Norwalk residence was foreclosed on, that the defendants sought to make the subject property their "permanent" residence. The court also found that the defendants had signed a second home rider at the time they purchased the subject property, indicating their agreement to utilize the subject property only as a secondary residence. That document, although not itself dispositive of the issue before us, lends additional support to the notion that, until the Norwalk residence was lost in foreclosure in 2009, the subject property was not the defendants' principal residence. Those findings in conjunction with the following additional subordinate facts in the record support the inevitable conclusion that the subject property was not the defendants' principal residence when the foreclosure action was commenced.

As part of her argument at the hearing on the motion to dismiss, counsel for the defendants made what amounted to a judicial admission that, until 2009, which was after the foreclosure action was commenced, the defendants did not live at the subject property other than on weekends and in the summer.[16] She later appeared to qualify an assertion that the subject property was the defendants' principal residence, by again recognizing that it was not their full-time residence until 2009.

Even if we were to discount the statements of the defendants' counsel at the hearing on the motion to dismiss, Linda Coughlin gave undisputed testimony at trial that, until 2009, she and her husband listed their Norwalk home, not the subject property, as their

[16] "Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring during judicial proceedings." *Jones* v. *Forst*, 41 Conn. App. 341, 346, 675 A.2d 922 (1996).

address on their federal tax returns. Although Daniel Coughlin did not testify at trial, his deposition transcript, which the plaintiff had referenced at the hearing on the motion to dismiss as establishing that the subject property was not the defendants' principal residence, was entered as a full exhibit. In his deposition, after identifying the subject property by address as his "primary residence," Daniel Coughlin is asked: "How long have you lived at this address?" He responds: "It's been our primary address since 2009."

Thus, the factual record leads us to only one reasonable conclusion. Namely, before 2009, the subject property was not the defendants' chief or primary home and, thus, not "the principal residence." Accordingly, when the present foreclosure action was filed in 2008, the defendants' mortgage was not "a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff"; General Statutes § 8-265ee; and, thus, the original plaintiff did not have to provide EMAP notice in accordance with § 8-265ee prior to commencing the foreclosure action. Having concluded that the notice requirement in § 8-265ee was inapplicable here, it is irrelevant for purposes of this appeal whether proper notice in fact was provided as sworn in the plaintiff's pretrial affidavit, or whether failure to give such notice, if applicable, implicates the subject matter jurisdiction of the court. Under these facts, the defendants could not prevail on their motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

VANCE JOHNSON *v.* COMMISSIONER OF CORRECTION (AC 37856)

Keller, Mullins and Norcott, Js.

Syllabus

The petitioner, who had been convicted of murder and criminal possession of a firearm, sought a writ of habeas corpus claiming that he had received ineffective assistance from the various counsel who had represented him in his prior habeas actions. The gravamen of his claim as to each of the four prior habeas counsel was that they were ineffective because they each had failed to allege that his trial counsel was ineffective for failing to file a motion for a competency evaluation of the petitioner. The habeas court rendered judgment dismissing the petition as to each of the four prior habeas counsel on the ground of res judicata and the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly concluded that the petitioner's claims concerning ineffective assistance by his first and second habeas counsel were barred by the doctrine of res judicata; the petitioner's allegations as to his first and second habeas counsel in the present habeas petition alleged the same ground concerning the ineffectiveness of his trial counsel as had been fully litigated on the merits in prior habeas petitions, which had been denied, and he failed to state new facts or proffer new evidence not reasonably available at the time of the prior petitions as required by our rules of practice (§ 23-29 [3]).
2. The habeas court's dismissal of the count of the habeas petition alleging ineffective assistance by the petitioner's third habeas counsel was affirmed on the alternative ground that it was barred by collateral estoppel; although the petitioner had not alleged in any of his prior petitions that his third habeas counsel was ineffective for failing to claim that his trial counsel improperly failed to file a motion for a competency evaluation, and thus the claim was not barred by res judicata, litigation of that claim necessarily required litigating the underlying question of his trial counsel's effectiveness in failing to move for such evaluation, which had been fully and fairly litigated and actually decided in a prior habeas proceeding concerning the petitioner's other habeas counsel, such that the petitioner was precluded from relitigating that claim in the present case.
3. The habeas court's dismissal of the petitioner's claim that his fourth habeas counsel was ineffective was affirmed on the alternative ground that the present habeas petition failed to state a claim for which relief could be granted; the record revealed that, contrary to the claim of ineffectiveness alleged in the present petition, the fourth habeas counsel

did in fact challenge the effectiveness of trial counsel on the ground that he improperly failed to move for a competency examination.

Argued May 17—officially released September 13, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Fuger*, *J.*, granted the respondent's motion to dismiss the petition and rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed*.

Arnold V. Amore, assigned counsel, for the appellant (petitioner).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Jo Anne Sulik*, supervisory assistant state's attorney, and *Randall Blowers*, special deputy assistant state's attorney, for the appellee (respondent).

Opinion

NORCOTT, J. The petitioner, Vance Johnson, appeals from the judgment of the habeas court dismissing his sixth petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court, *Fuger*, *J.*, improperly granted the motion to dismiss filed by the respondent, the Commissioner of Correction. We conclude that the court properly dismissed that portion of the petition for a writ of habeas corpus alleging ineffective assistance of his first and second habeas counsel on the ground of res judicata, and that the court also properly dismissed that portion of the petition alleging ineffective assistance of his third and fourth habeas counsel, albeit on alternative grounds than those on which the court relied.

[1] The habeas court granted the petitioner's petition for certification to appeal. See General Statutes § 52-470 (g).

The record reveals the following facts and procedural history. On August 29, 1994, the petitioner was charged with murder in violation of General Statutes (Rev. to 1993) § 53a-54a and with criminal possession of a firearm in violation of General Statutes (Rev. to 1993) § 53a-217. On December 9, 1996, the petitioner pleaded guilty to the charge of criminal possession of a firearm and received a sentence of five years incarceration in the custody of the respondent. At a subsequent jury trial, in which he was represented by M. Fred DeCaprio (trial counsel), the petitioner was convicted of murder and sentenced to sixty years incarceration, to run concurrently with the sentence on the firearm charge for a total effective sentence of sixty years of imprisonment. The petitioner's murder conviction was affirmed on direct appeal in *State* v. *Johnson*, 53 Conn. App. 476, 733 A.2d 852, cert. denied, 249 Conn. 929, 733 A.2d 849 (1999).

Since his conviction, the petitioner has filed six relevant habeas corpus petitions.[2] In the present petition, he alleges ineffective assistance of counsel as to every counsel that has represented him in the prior habeas actions; therefore, we describe each in turn.

In 2001, the petitioner filed a four count revised amended petition for a writ of habeas corpus (first habeas petition), alleging ineffective assistance of trial counsel. See *Johnson* v. *Warden*, Superior Court, judicial district of Danbury, Docket No. CV-99-0336854-S (January 15, 2002). The petitioner was represented by

[2] The petitioner's first habeas action was *Johnson* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-98-0002729, 1999 WL 413047 (April 27, 1999), in which he alleged that his right to receive visitors at the prison had been denied. The petition was dismissed for lack of jurisdiction. Id. Nevertheless, the amended petition dated November 14, 2014, at issue in the present case, describes the petitioner's second habeas action as the first action and refers to counsel in that case as the first habeas counsel. Thus, for the sake of simplicity, we will do the same.

Attorney Vicki Hutchinson (first habeas counsel) during the first habeas trial. As set forth in the memorandum of decision in the first habeas proceeding, the petitioner specifically claimed that trial counsel: (1) failed to investigate the state's factual allegations properly and failed to preserve a 911 tape related to misconduct evidence that was admitted at the criminal trial; (2) was "distracted" by the participation of a second defense lawyer during the jury selection process; (3) improperly permitted a juror to be dismissed in spite of the petitioner's wishes to the contrary; and (4) for various reasons, failed to seek permission to withdraw from the case. Id.

After a trial, the first habeas court, *White*, *J.*, denied the petition for a writ of habeas corpus, concluding that trial counsel's conduct did not amount to ineffective assistance and that the petitioner failed to prove any of the allegations in the petition. Id. The first habeas court also denied a subsequent petition for certification to appeal. This court dismissed the petitioner's appeal from the first habeas court's denial of certification to appeal, and the Supreme Court denied certification to appeal. See *Johnson* v. *Commissioner of Correction*, 76 Conn. App. 901, 819 A.2d 940, cert. denied, 264 Conn. 904, 823 A.2d 1221 (2003).

In 2005, the petitioner, represented by Attorney William P. Burns (second habeas counsel) filed a second habeas petition, claiming again that trial counsel had rendered ineffective assistance of counsel, but in different respects than he had claimed in the first petition. *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 57, 951 A.2d 520 (2008), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 754, 91 A.3d 862 (2014). In the second habeas petition, the petitioner also alleged that "counsel at his first habeas proceeding had also rendered ineffective assistance on his behalf by, inter alia, failing to secure certain witness testimony

at the first habeas proceeding, to present certain relevant evidence at that proceeding, and to prepare adequately an argument on the petitioner's behalf." Id. The petitioner further claimed ineffective assistance of first habeas counsel for failing to allege that trial counsel was ineffective for failing to secure a ballistics expert to testify on the petitioner's behalf. Id., 64. "The petitioner also asserted that the respondent's method of recalculating the petitioner's presentence confinement credit violated his constitutional rights to due process and equal protection." Id., 57.

After a trial, the second habeas court concluded that the petitioner's claims of ineffective assistance by his first habeas counsel failed under both prongs of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and that his claim as to trial counsel's ineffectiveness was "barred by the doctrine of res judicata as the petitioner had litigated the effectiveness of his trial counsel's performance in his first habeas proceeding." *Johnson* v. *Commissioner of Correction*, supra, 288 Conn. 58.

The second habeas court dismissed the petition for habeas corpus and subsequently granted certification to appeal. Id. The Supreme Court affirmed the judgment of the second habeas court, concluding that first habeas counsel had not provided ineffective assistance as the petitioner failed to establish prejudice resulting from that counsel's failure to raise the issue of trial counsel's failure to present testimony of a ballistics expert at trial. Id., 65. The Supreme Court further agreed with the second habeas court that, despite the petitioner's allegation of different factual bases in the second habeas petition, his claims of ineffective assistance of trial counsel were barred by the doctrine of res judicata as "the petitioner had an opportunity to litigate fully the effectiveness of his trial counsel in his first habeas proceeding." Id., 67.

On December 20, 2005, the self-represented petitioner filed a third habeas petition. On July 10, 2008, the habeas court, *Schuman*, *J.*, dismissed the petition without a hearing. No appeal followed.

On February 13, 2007, the petitioner, represented by Margaret P. Levy (third habeas counsel), filed a fourth habeas petition that sought, and ultimately obtained, the restoration of his right to sentence review. No appeal followed.

On March 21, 2011, the petitioner, represented by Laljeebhai R. Patel (fourth habeas counsel), filed a fifth habeas petition,[3] alleging that his second habeas counsel provided ineffective assistance by failing to allege in the second habeas action that his first habeas counsel rendered ineffective assistance for failing to allege that trial counsel was ineffective "at the petitioner's plea on the weapons charge and at the murder trial for failing to investigate . . . the [petitioner's] incompetence at plea and trial" and "failing to present the claim of the petitioner's incompetence at plea and at trial." Following the testimony of trial counsel, first habeas counsel and second habeas counsel, the fifth habeas court denied the petition for a writ of habeas corpus, finding the petitioner's claim that his trial counsel had provided ineffective assistance meritless as "there had never been 'a question in anyone's mind' as to the petitioner's competency at the time of his trial." *Johnson* v. *Commissioner of Correction*, 144 Conn. App. 365, 368, 73 A.3d 776, cert. denied, 310 Conn. 918, 76 A.3d 633 (2013).

[3] Previously, the petitioner, acting as a self-represented party, had filed a petition for a writ of habeas corpus on May 16, 2008, which the habeas court, *Schuman*, *J.*, dismissed as successive. See *Johnson* v. *Commissioner of Correction*, 121 Conn. App. 441, 442, 996 A.2d 319 (2010). The petitioner, represented by Patel, appealed the dismissal, and this court reversed the judgment and remanded the matter for further proceedings on June 1, 2010. Id. Again, for simplicity's sake, we do not count the May 16, 2008 petition in the count of the total number of habeas petitions the petitioner has filed.

The fifth habeas court further determined that " 'there is no possibility . . . that [the petitioner] was incompetent. There isn't even a hint of it.' " Id.

The petitioner filed a petition for certification to appeal that decision, which the fifth habeas court granted. Id., 369. On appeal, this court noted that the claims in the fifth petition "were based upon . . . trial counsel's alleged failure to request a competency examination pursuant to General Statutes § 54-56d and the failure of [the petitioner's] two prior habeas attorneys to allege ineffectiveness by their predecessors in prior trial and habeas corpus proceedings." (Footnote omitted.) Id., 367–68. We affirmed the fifth habeas court's conclusion that the petitioner failed to prove that his trial counsel rendered ineffective assistance. Id., 371. We further affirmed the judgment in regard to the claims against the first and second habeas counsel because, as a result of the determination that "[trial counsel] did not render ineffective assistance in failing to request a competency evaluation," the petitioner could not as a matter of law prove prejudice resulting from the first and second habeas counsel's alleged failure to raise a claim against trial counsel on that ground. Id., 369 n.2. Our Supreme Court denied the petitioner's petition for certification to appeal from this court's judgment. *Johnson* v. *Commissioner of Correction*, 310 Conn. 918, 76 A.3d 633 (2013).

On July 22, 2013, the self-represented petitioner filed a sixth habeas petition, which is the subject matter of the present appeal. On November 14, 2014, the petitioner filed the operative amended petition (sixth petition), claiming ineffective assistance of the first, second, third, and fourth habeas counsel for failing to allege in their respective prior habeas petitions that trial counsel was ineffective for failing to file a motion for competency evaluation pursuant to § 54-56d at or before the time of the petitioner's plea on the firearm

charge, at or before sentencing on the firearms charge, at or before the jury trial for murder, at or before sentencing on the murder conviction, and after sentencing for murder for discovery of evidence that trial counsel failed to investigate by way of petition for a new trial.

On November 25, 2014, the respondent filed a motion to dismiss, pursuant to Practice Book § 23-39, alleging that the sixth petition failed to state a claim upon which relief could be granted[4] and that it constituted a successive petition. After a hearing on the motion, the habeas court in the present case, *Fuger*, *J.*, concluded in an oral decision that the sixth petition was precluded on the grounds of res judicata in its entirety as to the claims relating to first, second, third, and fourth habeas counsel and granted the respondent's motion to dismiss.[5] Thereafter, the habeas court granted certification to appeal, and this appeal followed.

We begin by setting forth our standard of review for a challenge to the dismissal of a petition for a writ of habeas corpus. "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, we

[4] The respondent argued in the memorandum of law accompanying his motion to dismiss that the sixth petition failed to state a claim upon which relief could be granted because the petitioner did not have a right to effective assistance of habeas counsel in the fifth habeas action. Whether a habeas petitioner has the right to effective assistance of counsel in a "habeas on a habeas" currently is being litigated before our Supreme Court in *Kaddah* v. *Commissioner of Correction*, SC 19512.

[5] Although the petitioner states in his brief that the habeas court dismissed the sixth petition on the ground of res judicata, he argues that "by dismissing the habeas case without an evidentiary hearing it agreed [with] the [respondent's] claim that pursuant to Practice Book § 23-29 (3) the November 14, 2014 petition . . . constitute[s] a successive petition." Because the habeas court granted the respondent's motion to dismiss on the ground of res judicata, we will not address the petitioner's argument that said dismissal necessarily constituted an acceptance of the respondent's successive petition argument in its motion to dismiss.

must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008). "To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 121 Conn. App. 295, 298, 995 A.2d 641, cert. denied, 297 Conn. 920, 996 A.2d 1192 (2010). With that standard in mind, we turn to the petitioner's claim that the habeas court in the present case improperly granted the respondent's motion to dismiss on the ground of res judicata.

I

The petitioner claims that the court erred when it granted the respondent's motion to dismiss on the basis of res judicata. The sixth petition included four counts alleging that first, second, third, and fourth habeas counsel were ineffective for failing to raise a claim that trial counsel was ineffective for failure to file a motion for a competency evaluation. For the reasons that follow, we conclude that the petitioner's claims as to the first two habeas counsel are barred by the doctrine of res judicata, but that the claims regarding third and fourth habeas counsel are not barred by that doctrine. Nevertheless, the claims regarding third and fourth habeas counsel are precluded, respectively, by collateral estoppel and for failure to state a claim upon which relief can be granted. Thus, we affirm the judgment of the habeas court as to the dismissal of the claims involving first and second habeas counsel on the basis of res judicata, and also affirm the judgment as to the claims involving third and fourth habeas counsel, albeit on the aforementioned alternative grounds.[6]

[6] "It is axiomatic that we may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Coleman* v. *Commissioner of Correction*, 111 Conn. App. 138, 140 n.1, 958 A.2d 790

The standard of review of a motion to dismiss is well established. See *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 277, 35 A.3d 337, cert. granted on other grounds, 304 Conn. 910, 37 A.3d 1120 (2012) (appeal dismissed May 1, 2013). "It is well settled that the petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only on what he alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Internal quotation marks omitted.) Id.

Having set forth the applicable legal standard regarding the granting of a motion to dismiss, we now turn to the court's conclusion that the petitioner's claims were barred by the doctrine of res judicata.

In the second habeas action, the petitioner claimed ineffective assistance of first habeas counsel for failing to allege that trial counsel was ineffective for failing to secure a ballistics expert to testify on the petitioner's behalf. See *Johnson* v. *Commissioner of Correction*, supra, 288 Conn. 61. That claim was adjudicated fully on the merits. See id., 61–65. In the fifth habeas action, the petitioner claimed that first and second habeas counsel were ineffective for failing to allege that trial

(2008), cert. denied, 290 Conn. 905, 962 A.2d 793 (2009). The petitioner makes the novel, but unpersuasive, argument that we cannot address alternative grounds for affirmance because the respondent failed to raise those grounds "at trial in violation of Practice Book § 60-5," which states, in relevant part, that "[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." The term "grounds" is not equivalent to the term "claim." We conclude that the petitioner misconstrues the law when he equates affirmance on alternative grounds with this court's considering an unpreserved claim. The respondent is not raising claims for appellate review; it is the claims of the petitioner that are at stake here. Simply raising alternative legal theories upon which we may affirm the judgment does not constitute request for review of an unpreserved claim that we are not bound to consider. See Practice Book § 60-5.

counsel was ineffective in failing to investigate and present a claim that the petitioner was incompetent at the plea and trial. These claims also were fully adjudicated on the merits. See *Johnson* v. *Commissioner of Correction*, supra, 144 Conn. App. 369–71. Now, the petitioner claims that first and second habeas counsel failed to allege that trial counsel was ineffective for failing to file a motion for a competency evaluation. The petitioner appears to believe that merely providing a procedural gloss of the same factual allegations in a sixth petition in support of the same claim of ineffective assistance of trial counsel raised in an earlier petition is adequate to avoid dismissal of the latter petition. The procedural mechanism that the petitioner alleges that trial counsel was ineffective for failing to use—filing a motion under § 54-56d—is, however, the only means to formally present a claim of incompetency to a trial court. Nonetheless, the petitioner also alleges that these claims do not constitute the "same ground" or grounds as those litigated in the second and fifth habeas actions because the sixth petition alleges a new fact, namely, that trial counsel failed to file a motion for a competency evaluation under § 54-56d.

The respondent argues that the habeas court was correct in dismissing the sixth petition as to the first two counts on the grounds of res judicata, as the petitioner already fully litigated his claims against first and second habeas counsel in the second and fifth habeas actions. Because the petitioner has asserted claims that previously were adjudicated fully on their merits and has made no showing that any new factual allegations contained in the sixth petition were not available to him when he filed his earlier petitions, we agree with the habeas court that the claims against first and second habeas counsel are barred by the doctrine of res judicata. The habeas court therefore properly dismissed those claims.

We first analyze the application of the doctrine of res judicata in the habeas context. "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.) *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 393, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012); see also *Johnson* v. *Commissioner of Correction*, supra, 288 Conn. 66–67 (holding that principles of res judicata prevent claim from being litigated where identical claim was raised, argued, and litigated in previous habeas trial).

In the context of a habeas action, a court must determine whether a petitioner actually has raised a new legal ground for relief or only has alleged different factual allegations in support of a previously litigated claim. "Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . They raise, however the same generic legal basis for the same relief." (Citations omitted.) *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 141, 712 A.2d 947 (1998).

"[T]he doctrine of res judicata in the habeas context must be read in conjunction with Practice Book § 23-29 (3), which narrows its application." (Footnote omitted.)

Kearney v. *Commissioner of Correction*, 113 Conn. App. 223, 235, 965 A.2d 608 (2009). Practice Book § 23-29 states in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ." Thus, a subsequent petition "alleging the same ground as a previously denied petition will elude dismissal if it alleges grounds not actually litigated in the earlier petition and if it alleges new facts or proffers new evidence not reasonably available at the time of the earlier petition." *Kearney* v. *Commissioner of Correction*, supra, 235. "In this context, a ground has been defined as sufficient legal basis for granting the relief sought." (Internal quotation marks omitted.) Id.

Accordingly, having compared the sixth petition to the prior petitions and having determined that they raise the same ground and seek the same relief, we conclude that the habeas court in the present case properly determined that the judgments rendered by the second and fifth habeas courts were judgments on the merits on the issue of ineffective assistance of the petitioner's trial counsel. We further conclude that the habeas court properly found that the petitioner had an opportunity to litigate fully the effectiveness of his trial counsel in the second and fifth habeas proceedings. See *Brown* v. *Commissioner of Correction*, 44 Conn. App. 746, 751, 692 A.2d 1285 (1997) (rejecting petitioner's claim of ineffective assistance of counsel as barred under doctrine of res judicata where petitioner raised additional ineffective assistance claims that could have been raised in first proceeding).

As noted previously, the petitioner failed to prove that the "new" facts alleged in the sixth habeas petition

were "not reasonably available at the time of the prior petition." Practice Book § 23-29 (3). The allegations within the petitioner's sixth habeas petition claiming ineffective assistance of trial counsel constituted the same legal ground as those found in the second and fifth habeas petitions, simply expressed in a reformulation of facts. These "new" allegations could have been raised in those petitions.[7] See *Mejia* v. *Commissioner of Correction*, 98 Conn. App. 180, 189, 908 A.2d 581 (2006).

Because the petitioner asserted claims that previously were adjudicated fully on their merits, we agree with the habeas court in the present case that the claims against the first and second habeas counsel are barred by the doctrine of res judicata. See *Brown* v. *Commissioner of Correction*, supra, 44 Conn. App. 751–52 (rejecting petitioner's claim of ineffective assistance of counsel as barred under doctrine of res judicata where petitioner, after having fully litigated effectiveness of counsel in petition for new trial, made additional ineffective assistance claim as to same attorney before habeas court but cited different factual grounds in support thereof); see also *Asherman* v. *State*, 202 Conn. 429, 443, 521 A.2d 578 (1987) (concluding that defendant's claim of juror misconduct was barred by res judicata because claim was "virtually identical in substance" to claim previously raised and decided); *State* v. *Aillon*, 189 Conn. 416, 423, 456 A.2d 279 (noting that judgment is final not only as to every matter that actually was presented to sustain claim, but also as to any other admissible matter that could have been offered for that purpose), cert. denied, 464 U.S. 837, 104 S. Ct. 124, 78 L. Ed. 2d 122 (1983). Further, the petitioner's argument that the counts involving said counsel in the current petition raise a different legal ground from those

[7] In fact, the petitioner has acknowledged that the "new" facts he intended to present in support of the sixth habeas petition were available to him at the time of the fifth habeas proceeding.

raised in the prior petitions is without merit; both the current and prior petitions alleged ineffective assistance of trial counsel. Accordingly, the habeas court properly dismissed these counts of the sixth petition.

II

The petitioner next claims that the habeas court in the present case improperly dismissed his petition with respect to the ineffective assistance of his third habeas counsel. Specifically, the petitioner argues that res judicata does not preclude his claim against third habeas counsel because it was not litigated in any of the prior habeas proceedings. The petitioner alleged that third habeas counsel was ineffective because she did not raise the issue of whether trial counsel was ineffective for failing to file a motion for a competency evaluation. The respondent concedes that the petitioner's claim of ineffective assistance of third habeas counsel was dismissed by the habeas court on improper grounds. We agree with the petitioner that the doctrine of res judicata does not apply with respect to his claim against his third habeas counsel. Nonetheless, we affirm the dismissal of this count on the alternative ground of collateral estoppel.[8]

Our Supreme Court has ruled that a petitioner has a right to effective assistance of habeas counsel. *Lozada* v. *Warden*, 223 Conn. 834, 838, 613 A.2d 818 (1992). "When a claim of ineffective assistance of habeas counsel is brought for the first time, it is not subject to dismissal on grounds of res judicata." *Brewer* v. *Commissioner of Correction*, 162 Conn. App. 8, 20, 130 A.3d 882 (2015). "The teaching of *Lozada* is that a habeas

[8] Dismissal of a claim on alternative grounds is proper when those grounds present pure questions of law, the record is adequate for review, and the petitioner will suffer no prejudice because he has the opportunity to respond to proposed alternative grounds in the reply brief. *State* v. *Martin M.*, 143 Conn. App. 140, 151–53, 70 A.3d 135 (2013).

petitioner is entitled to make a claim that he or she was deprived of effective habeas counsel in a prior petition, and the petitioner is entitled to advance this claim in an evidentiary proceeding. Regardless of the difficult burden undertaken by a habeas petitioner who claims ineffective assistance of habeas counsel, such a claim is not subject to dismissal on the ground that an earlier habeas petition that was based on the ineffectiveness of trial counsel had been unsuccessful." *Kearney* v. *Commissioner of Correction*, supra, 113 Conn. App. 239.

The current habeas proceeding was the first time the petitioner had raised a claim of ineffective assistance of third and fourth habeas counsel for allegedly failing to raise an ineffective assistance claim regarding trial counsel's failure to file a motion for a competency evaluation. The respondent concedes that the habeas court's dismissal of the claims against third and fourth habeas counsel on the ground of res judicata was incorrect as the petitioner had not raised this particular claim in any of his "numerous prior habeas petitions [alleging] ineffective assistance of counsel claims."

In part I of this opinion, we concluded that the habeas court properly dismissed the petitioner's claims of ineffective assistance of his first and second habeas counsel because they already had been litigated fully in the second and fifth habeas proceedings. The trial court's ruling does not preclude a claim in the current habeas proceeding that a prior habeas counsel was ineffective litigating that claim. "Although the petitioner must, by necessity, repeat his allegations of trial counsel's inadequacy, there may never have been a proper determination of that issue in the [prior] habeas proceeding[s] because of the allegedly incompetent habeas counsel. The claim of ineffective assistance of habeas counsel, when added to the claim of ineffective assistance of trial counsel, results in a different issue." (Internal quotation

marks omitted.) *Brewer* v. *Commissioner of Correction*, supra, 162 Conn. App. 21.

A claim of ineffective assistance of counsel involving a habeas attorney "is not subject to dismissal on the ground that an earlier habeas petition that was based on the ineffectiveness of trial counsel had been unsuccessful." *Kearney* v. *Commissioner of Correction*, supra, 113 Conn. App. 239; see also *Lozada* v. *Warden*, supra, 223 Conn. 844 ("[t]he claim of ineffective assistance of habeas counsel, when added to the claim of ineffective assistance of trial counsel, results in a different issue"). Moreover, as noted previously, the application of the doctrine of res judicata is limited in habeas actions to "claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 288 Conn. 67.

Thus, the habeas court in the present case incorrectly concluded that the petitioner's claim involving third habeas counsel was precluded by the doctrine of res judicata, as the petitioner had not raised that claim in any of the prior habeas petitions. Nonetheless, we affirm the habeas court's judgment on alternative grounds, as the issue of whether the third habeas counsel was ineffective for failing to allege that trial counsel was deficient for failing to file a motion for a competency evaluation was precluded by the doctrine of collateral estoppel.

"The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel . . . is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject

to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered." (Internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 161 Conn. App. 253, 266, 127 A.3d 1001 (2015). "[C]ollateral estoppel [is] based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest." (Internal quotation marks omitted.) Id., 267.

In his brief, the respondent argues that the habeas court's decision should be affirmed on the alternative ground that the claim as to third habeas counsel is barred by collateral estoppel because litigation of that claim necessarily requires relitigation of an issue that already has been fully and fairly decided in the fifth habeas action, specifically, whether trial counsel was ineffective for failing to move for a competency evaluation. We agree. Here, the claim involving third habeas counsel is barred by collateral estoppel because the judgment in the fifth habeas proceeding concerned the petitioner's claim against trial counsel, first habeas counsel, and second habeas counsel necessarily resolved an issue that would need relitigation if the claim involving third habeas counsel were to proceed in this case. To establish that third habeas counsel was ineffective for failing to allege a claim that trial counsel was ineffective for failing to move for a competency

evaluation, the petitioner would be required to prove that trial counsel was ineffective for failing to move for a competency evaluation. This already was decided, after a full evidentiary hearing, by the fifth habeas court when it found that (1) there was never a doubt as to the petitioner's competency at the time of the trial, and (2) trial counsel was not ineffective for failing to move for a competency evaluation. See *Johnson* v. *Warden*, supra, 144 Conn. App. 368.

We therefore conclude that because the fifth habeas court necessarily decided the underlying issue of whether trial counsel was ineffective for failing to move for a competency evaluation, the petitioner is precluded by collateral estoppel from relitigating the same in regard to his claim involving third habeas counsel. Thus, we affirm the dismissal of the claim involving third habeas counsel on the alternative ground that it is barred by collateral estoppel.

III

Finally, the petitioner claims that the habeas court improperly dismissed his count alleging that fourth habeas counsel was ineffective. Specifically, he argues that res judicata does not preclude his claim that fourth habeas counsel rendered ineffective assistance because it was not previously litigated in any of the prior habeas proceedings. The respondent concedes that the count alleging ineffective assistance of fourth habeas counsel for failure to raise the issue of whether trial counsel was ineffective for failure to file a motion for a competency evaluation was dismissed improperly. We agree with the petitioner that the doctrine of res judicata does not apply as to his claim against the fourth habeas counsel. Nonetheless, we affirm the dismissal of this count on the alternative ground that the petition fails to state a claim upon which relief can be granted.

Practice Book § 23-29 (2) provides that a petition may be dismissed by the court if "the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ." On the basis of our plenary review of the record, we conclude that the petitioner's claim involving fourth habeas counsel in his sixth petition fails to state a claim upon which habeas corpus relief can be granted as fourth habeas counsel raised the very claim that petitioner, in the present petition, alleges was not raised. Specifically, fourth habeas counsel raised the claim that first and second habeas counsel were ineffective for failing to allege that trial counsel failed to investigate adequately and present the issue of the petitioner's competency at the time of plea and trial. *Johnson* v. *Commissioner of Correction*, supra, 144 Conn. App. 367–68.

This court explained that in the fifth habeas petition, the petitioner's claims "were based upon his trial counsel's alleged failure to request a competency examination pursuant to . . . § 54-56d and the failure of his two prior habeas attorneys to allege ineffectiveness by their predecessors in prior trial and habeas corpus proceedings." (Footnote omitted.) Id. In the current, sixth petition, the petitioner alleges that fourth habeas counsel, who represented him in the fifth habeas action, was ineffective for failing to allege that trial counsel was ineffective for not filing a motion for competency evaluation pursuant to § 54-56d. The petitioner's allegation that his fourth habeas counsel failed to raise such a claim fails as that claim was, in fact, raised by his fourth habeas counsel in the fifth habeas action. Thus, we conclude that the habeas court properly dismissed the count against fourth habeas counsel on the alternative ground that it fails to state a claim upon which relief can be granted. See *Mejia* v. *Commissioner of Correction*, supra, 98 Conn. App. 197–98.

The judgment is affirmed.

In this opinion the other judges concurred.

JORDAN M. *v.* DARRIC M.*
(AC 38640)

Beach, Keller and Harper, Js.

Syllabus

The defendant father appealed from the trial court's issuance of a civil restraining order against him in favor of the plaintiff, his minor child. The defendant previously had brought a separate action for custody of the plaintiff against the child's mother, and the court granted temporary custody to the defendant's aunt, E, who had been permitted to intervene. Following the custody hearing, the defendant went to E's house with police officers and, when E could not produce the temporary custody order, the officers ordered the plaintiff returned to the defendant's custody. E filed an application seeking an emergency ex parte custody order, which the court granted, finding that an immediate and present risk of danger or psychological harm existed. Subsequently, in a separate action, E, on behalf of the plaintiff, filed an application for a civil restraining order against the defendant pursuant to the statute (§ 46b-15) requiring an applicant to demonstrate a continuous threat of present physical pain or physical injury, stalking, or a pattern of threatening. Following a hearing, the trial court granted the application for a restraining order, and the defendant appealed to this court. On appeal, the defendant claimed that there was insufficient evidence to support the trial court's issuance of a restraining order pursuant to § 46b-15, and that the trial court improperly used the mechanism of a restraining order to grant E custody of the plaintiff. *Held*:

1. The trial court improperly granted the restraining order against the defendant, as there was no evidence presented at the hearing of a continuous threat of present physical pain or physical injury, stalking, or a pattern of threatening regarding the plaintiff; the only evidence presented upon which the trial court could have conceivably based its order was the defendant's behavior in going to E's house, which, although wrongful and in violation of the court's temporary custody order, was not violent or physically threatening and, therefore, did not satisfy the elements of § 46b-15.
2. The record was inadequate to review the defendant's claim that the trial court improperly used the restraining order as a means of determining custody; it was unclear from the record what occurred in the custody

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

case following the issuance of the restraining order, and, moreover, the defendant did not appeal from the orders issued in the custody case.

Argued May 24—officially released September 8, 2016**

Procedural History

Application for a civil restraining order, brought to the Superior Court in the judicial district of New Haven, where the court, *Emons*, *J.*, granted the application; thereafter, following a hearing, the court continued the restraining order, and the defendant appealed to this court; subsequently, the court, *Emons*, *J.*, denied the defendant's motion for an articulation of its decision. *Reversed; judgment directed.*

James Hardy, for the appellant (defendant).

Opinion

BEACH, J. The defendant, Darric M., appeals from the judgment of the trial court granting the application for a restraining order filed on behalf of the plaintiff, Jordan M., by Eleanor M., as next friend. The defendant claims that (1) there was insufficient evidence to support the court's imposition of a civil restraining order pursuant to General Statutes § 46b-15, and (2) the court improperly used the mechanism of a restraining order to grant custody of Jordan to Eleanor M. We agree that there was no evidence to support the restraining order and, accordingly, reverse the judgment of the trial court.

The record in this case is confusing at best and certain portions of the file appear to have been entered under incorrect docket numbers. We note as well that only the defendant has filed a brief. It appears that the two relevant Superior Court docket numbers are from the judicial district of New Haven: FA-15-4066397, which is a custody case; and FA-15-4066531, which is a restraining order case. The relevant facts, so far as they

** September 8, 2016, the date this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

can be discerned from the record, are as follows. The defendant and Heather S. are the parents of Jordan, who was born in 2013. The commissioner of the Department of Children and Families filed a neglect petition against Heather S. In May, 2015, Heather S. purportedly executed an agreement in which she agreed to give temporary custody of Jordan to Eleanor M., the defendant's aunt. In August, 2015, Eleanor M. filed in Probate Court a petition for temporary custody of Jordan and for removal of the defendant and Heather S. as guardians.

On August 7, 2015, the defendant brought an action in Superior Court against Heather S., seeking sole custody of Jordan (custody case). The defendant filed an application for an emergency ex parte order of custody. The court, *Goodrow*, *J.*, issued an emergency ex parte order granting the defendant temporary custody on August 7, 2015.

Following that order, a hearing was held on August 21, 2015, before the court, *Emons*, *J.*, at which the defendant was self-represented.[1] On that date, the court granted Eleanor M., also self-represented, permission to intervene in the case. The court found that the defendant had not established that custody should be transferred from Eleanor M. to him, and ordered that Jordan remain in the temporary custody of Eleanor M. until the resolution of the probate case.[2] The court permitted the defendant visitation with Jordan during the day, with no overnight visitation.

On the night of August 21, 2015, Heather S., the defendant, and Noel R., the defendant's brother, went with police officers to the home of Eleanor M. Eleanor M. did not have a copy of the August 21, 2015 court order,

[1] Heather S. did not attend the hearing.

[2] It is unclear whether the trial court was deferring to the Probate Court regarding a resolution of the custody issue or ignoring the prior pending guardianship petition in the Probate Court.

which had been entered that same day, and the police required her to return Jordan to the custody of his parents. In reaction, Eleanor M. filed in the custody case, on August 24, 2015, an application seeking an emergency ex parte order of custody. The judgment file in the custody case that was signed by the court, *Emons*, *J.*, on March 4, 2016, reflects that on August 24, 2015, the court found that an immediate and present risk of physical danger or psychological harm to Jordan existed and that it was in the best interest of Jordan to award temporary custody to Eleanor M. The court further terminated all visitation by the defendant. The judgment file further states that "[t]hese orders were made permanent on October 27, 2015."

Also on August 24, 2015, Eleanor M., pursuant to § 46b-15 and as next friend of Jordan, filed applications for civil restraining orders against the defendant (restraining order case), Heather S. and Noel R., all of which were granted ex parte.[3] On September 4, 2015, a hearing was held addressing the August restraining orders; the court continued the matter to September 15, 2015, while the ex parte temporary restraining orders remained intact. Following the September 15, 2015 hearing, the court held that Eleanor M. had sustained her burden regarding the § 46b-15 restraining orders against Heather S., Noel R., and the defendant, and ordered them to be in effect for one year. The defendant filed a motion for articulation and a motion for reconsideration, both of which were denied by the court. This appeal followed. We stress that the only appeal is from the restraining order case. There is no appeal from the custody case.

I

The defendant first claims that the evidence was insufficient to support a finding that he presented "a

[3] The restraining orders as to Heather S. and Noel R. are not at issue in this appeal.

continuous threat of present physical pain or physical injury," as required by § 46b-15.[4] We agree.

"[W]e will not disturb a trial court's orders unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion . . . we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Internal quotation marks omitted.) *Kayla M.* v. *Greene*, 163 Conn. App. 493, 504, 136 A.3d 1 (2016).

Section 46b-15 (a) provides in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening,

[4] We first consider whether the record is adequate for review. "An adequate record usually includes either a memorandum of decision or a transcript signed by the trial judge. Practice Book § 64-1. Also, the appellant is responsible for providing such to this court. *Chase Manhattan Bank/City Trust* v. *AECO Elevator Co.*, 48 Conn. App. 605, 607, 710 A.2d 190 (1998); Practice Book § 61-10." *In re Francisco R.*, 111 Conn. App. 529, 531, 959 A.2d 1079 (2008). The defendant did not provide this court with a memorandum of decision or a signed transcript, but did provide an unsigned transcript. "On occasion, we will entertain appellate review of an unsigned transcript when it sufficiently states the court's findings and conclusions." (Internal quotation marks omitted.) Id. In the context of this case, we conclude that the transcript provides an adequate record for review of the narrow issue presented.

including, but not limited to, a pattern of threatening . . . by another family or household member may make an application to the Superior Court for relief under this section."[5]

A review of the evidence presented at the September 4 and September 15, 2015 hearings regarding the restraining order reveals that there was no evidence of a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening.[6] There was evidence that the defendant, along with others, came to the home of Eleanor M. on the night of August 21, 2015, with police officers, and took Jordan. The court's reasoning for granting the application for the restraining order is not clear, but evidence of the defendant's behavior on the night of August 21 is the only evidence in the September 4 and 15 transcripts upon which the court conceivably could have based its order. There was no evidence that there was violent or physically threatening conduct on the night of August 21, 2015, and there was no evidence that the defendant presented a threat of physical pain or injury to Jordan. "The plain language of § 46b-15 clearly requires a continuous threat of present physical pain or physical injury before a court can grant a domestic violence restraining order." *Krystyna W.* v. *Janusz W.*, 127 Conn. App. 586, 590, 14 A.3d 483 (2011). "[D]omestic violence restraining orders will not issue in the absence of the showing of a threat of violence, specifically a continuous threat of present physical pain or physical injury to the applicant." (Internal quotation marks omitted.) *Putman* v. *Kennedy*, 279

[5] General Statutes (Rev. to 2015) § 46b-15 was amended by Nos. 16-34 and 16-105 of the 2016 Public Acts. Those amendments only altered subsection (a) by requiring the court to provide certain information to persons applying for relief.

[6] The defendant also contends that the court appears to have based the restraining order on his lack of employment. Because we agree with the defendant's argument that the elements of the statute were not satisfied, we need not address this issue.

Conn. 162, 171, 900 A.2d 1256 (2006). "The legislature promulgated § 46b-15 to provide an expeditious means of relief for abuse victims. . . . It is not a statute to provide a remedy in every custody and visitation dispute, however urgent." (Citation omitted.) *Putman* v. *Kennedy*, 104 Conn. App. 20, 25–26, 932 A.2d 439 (2007). The defendant's behavior, although wrongfully and flagrantly in violation of the court's August 21, 2015 orders, and not to be condoned, does not satisfy the elements of § 46b-15. Accordingly, we conclude that the court improperly granted the restraining order against the defendant.

II

With respect to the result of the September 4 and September 15, 2015 hearings, the defendant argues that "the imposition of a restraining order was an improper means of determining custody." He argues that the court committed harmful error in removing custody of Jordan from his biological parents and placing custody with Jordan's aunt, Eleanor M. The defendant's arguments seem to be based on the September 15 hearing. The court, however, as it noted in its decision denying the defendant's motion for an articulation filed March 8, 2016, made no custody orders at that hearing.[7] The court noted at the outset of the September 4, 2015 hearing that it would hear the restraining order case first and then the custody case. At the conclusion of the September 15, 2015 hearing, the court stated: "I want the record to be clear that we have three restraining orders and a custody [case] as well." After addressing the restraining orders, the court then stated that, in the custody case, the defendant was seeking custody of Jordan, and "in the interest of the child and in the interest of both parties, I'm . . . going to have

[7] To the extent that the defendant is challenging the restraining order itself, the issue was resolved in the defendant's favor in part I of this opinion.

to begin a dialogue on evaluating both parties as to whether or not they are capable of parenting this child; one of them, both of them, both of them together, [or] either one, separately." The court noted that it would refer the matter to family relations for that purpose. A court date was set for September 29, and another court date later was scheduled to occur on October 27. It is unclear from the record what occurred in that respect following the September 29, 2015 hearing.[8] In its decision denying the motion for an articulation, the court indicated that there were difficulties regarding the parties' appearance at the hearings. Due to a lack of an adequate record, we are unable to review this claim; see Practice Book § 61-10; we also observe that there is no appeal in the custody case.[9]

The judgment granting the restraining order against the defendant is reversed and the case is remanded with direction to deny the application for a restraining order.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ELIAS V.* (AC 38487)

Alvord, Keller and Pellegrino, Js.

Syllabus

Convicted of sexual assault in the first degree, sexual assault in the second degree, sexual assault in the fourth degree and risk of injury to a child,

[8] The judgment file states that the orders were made permanent on October 27, 2015. No transcripts of further proceedings or court rulings explaining this aspect of the custody issue have been presented to us.

[9] We express no opinion as to any order regarding custody and visitation. A reasoned resolution of Jordan's situation cannot be reached in the context of this appeal.

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e. We therefore refer to the defendant as Elias V. and to the victims by their initials.

the defendant appealed. The defendant had subjected his daughter, E, to various forms of sexual abuse over a period of eight years. He frequently required E to stay home from high school, under the pretense of having to take care of the house, so that he could sexually abuse her. The defendant also subjected E and his daughter, K, to physical abuse, and exposed them to other forms of abuse that jeopardized their health and welfare. E thereafter told an investigator for the Department of Children and Families that the defendant had been sexually abusing her. The investigator and the victims' mother testified at trial for the state as constancy of accusation witnesses. On appeal, the defendant claimed, inter alia, that the trial court violated his federal constitutional rights to counsel and to due process by excusing a selected juror before trial without having first notified the defendant or his counsel. The juror had called the court during the week before trial commenced to state that she had been diagnosed with a medical condition and would not be able to participate. The defendant also claimed that the dismissal of the juror violated his rights under the state constitution (article first, § 19) to notice prior to the excusal of the juror and to voir dire the juror. He further claimed that the dismissal of the juror constituted plain error under the statute (§ 54-82h [c]) that governs the excusal of certain jurors because the court failed to articulate sufficient facts to support its conclusion that the juror was no longer able to perform her duties due to her medical condition. *Held*:

1. The defendant's unpreserved claims that the trial court violated his federal constitutional rights to counsel and to due process, and that he was entitled under article first, § 19, of the state constitution to notice prior to the excusal of the selected juror and to voir dire the juror did not merit review by this court: article first, § 19, which pertains to certain rights regarding juror selection, did not apply to the court's decision to excuse a selected juror, the decision to excuse the juror because of a medical condition was a straightforward judicial administrative action that did not amount to a trial-like confrontation between the state and the defendant, and the excusal of the juror did not implicate the defendant's right to a fair trial or his ability to defend himself at trial; moreover, contrary to the defendant's claim that the trial court committed plain error by excusing the juror, this court perceived no impropriety that resulted in manifest injustice, the trial court having articulated a proper basis for its decision to excuse the juror, and neither § 54-82h (c) nor case law interpreting that statute obligated the court to discuss the juror's medical issues on the record.
2. The defendant's claims pertaining to the constancy of accusation testimony by the investigator and the victims' mother, and the trial court's jury instruction as to that testimony, were not reviewable, the defendant having failed to preserve those claims at trial: the court did not commit plain error when it refrained from striking sua sponte the constancy of accusation testimony, as the defendant's counsel did not object to the

testimony, and the court was under no obligation to strike the testimony sua sponte; furthermore, the court did not erroneously omit the mother's name from its jury instruction on the use of constancy of accusation testimony, the defendant having failed to request that her name be included in the charge or to object to its omission; moreover, although the defendant conceded that he waived at trial any challenge to the constancy of accusation jury instruction, he failed to meet the requirements for consideration of his claim under the plain error doctrine, as there was no rule in the context of a constancy of accusation instruction that a failure to refer to all the evidence that the instruction could possibly encompass constituted plain error, the instruction adequately conveyed to the jury the limited permissible usage of the testimony by the investigator and the victims' mother, and the instruction was consistent with the constancy of accusation instruction on the Judicial Branch website and our Supreme Court's description in *State* v. *Troupe* (237 Conn. 284) of the permissible uses of constancy of accusation testimony.

3. This court declined to review the defendant's unpreserved claim that the prosecutor committed impropriety during his cross-examination of the defendant by suggesting that he had a motive to lie in order to avoid being labeled in prison as a sex offender who had abused his daughter: the defendant did not object during the cross-examination, his claim was evidentiary in nature, he cited no authority for the proposition that the prosecutor could not question him about his motive to lie, and the prosecutor's exploration of the defendant's motive to lie did not inject an extraneous matter into the trial; furthermore, the prosecutor's remarks during closing argument did not improperly appeal to the jurors' emotions and passions or encourage the jury to find the defendant guilty because he was a bad person, the only fact that the prosecutor lingered on was the physical abuse of K, which served as a basis for the criminality alleged in certain of the charges against the defendant, and the prosecutor's remark that the defendant had a motive to lie to avoid being labeled a sex offender underscored an inference that the jury could have drawn on its own.

Argued May 11—officially released September 20, 2016

Procedural History

Substitute information charging the defendant with five counts of the crime of risk of injury to a child, three counts of the crime of sexual assault in the first degree, and one count each of the crimes of sexual assault in the second degree and sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before

Suarez, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Katherine C. Essington, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Chris A. Pelosi*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Elias V., appeals from the judgment of conviction, rendered after a jury trial, of three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1); one count of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1); one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A); two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1); and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that (1) the court improperly excused a juror before trial without first notifying the defendant or his counsel; (2) the court committed plain error concerning the constancy of accusation testimony at trial; and (3) the prosecutor engaged in impropriety in his cross-examination of the defendant and in closing argument. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In 2003, the defendant began to sexually abuse his older daughter E.V., who was nine years old at the time. Over the next eight years, the defendant frequently subjected E.V. to various forms of sexual abuse, including forced vaginal penetration, attempted anal penetration, oral

sex, masturbation, and other sexual contact with her intimate parts.[1]

In addition to sexually abusing E.V., there was extensive testimony about the defendant regularly exposing E.V. and his younger daughter, K.V., to other forms of abuse that jeopardized their health and welfare. For example, the defendant was very possessive of E.V. and K.V., and he would inspect K.V. in the shower to ensure that she was a virgin, check E.V.'s body after school for hickeys, and dress both of the girls in boys clothing. He would also force E.V. and K.V. to consume alcohol. Finally, the defendant was prone to violent outbursts, and he would regularly physically abuse K.V. and occasionally physically abuse E.V. The defendant's violent, controlling, and, at times, paranoid behavior was often exacerbated by his use of crack cocaine.

The events that led to the defendant's arrest were set in motion by two reports, made by E.V.'s and K.V.'s schools, to the Department of Children and Families (department) in 2011. While E.V. was enrolled in high school, the defendant would frequently require E.V. to stay home under the pretense of having her take care of the house so that he could sexually abuse her. In the fall of 2010, E.V. confided in a teacher, with whom she had taken classes throughout her four years of high school, that she often missed school because her father insisted that she stay home "to take care of him, the house, and her little brother,"[2] not because she was ill, as she had previously indicated. The teacher then notified the principal, school social worker and the school resource officer about the potential truancy issue. Over the next few months, the school resource

[1] For example, the defendant's sexual abuse of E.V. began with his touching and rubbing her vagina over her clothing. Later, the defendant would force E.V. to perform oral sex or masturbate him while watching pornography or viewing pornographic magazines.

[2] E.V. and K.V.'s brother has a physical disability and is wheelchair-bound.

officer spoke to E.V.'s parents about her absenteeism in an attempt to resolve the issue. When E.V.'s absenteeism persisted, the school resource officer contacted the department on March 3, 2011.

That same day, K.V. arrived home late from school because the public bus she took home had broken down. When she arrived home, the defendant extensively beat her, leaving bruises on her face and body, because she was late and he did not believe her excuse. On March 4, 2011, despite the visible bruising, K.V. went to school.[3] At the urging of friends, K.V. went to the school counselor, who called the department. The department sent an investigator, Gloria Rodriguez, to interview K.V. about the potential physical abuse. Rodriguez was also provided with the report E.V.'s school had made about her absenteeism and potential educational neglect. After interviewing K.V. and her mother, M.V., Rodriguez suspected that E.V. was being sexually abused at home. When Rodriguez interviewed E.V., she directly asked her whether she was being sexually abused, and E.V. confirmed that she was being sexually abused by her father.

On February 3, 2014, a trial commenced on a ten count long form information, charging the defendant in eight counts for his sexual abuse of E.V. and in two counts for his sexual and nonsexual abuse of E.V. On February 10, 2014, the jury returned a guilty verdict on all counts. This appeal followed.

I

The defendant first claims on appeal that the court improperly excused a regular juror before trial without first notifying the defendant or his counsel. Because the defendant failed to preserve this claim for appeal,

[3] On other occasions when the defendant left visible marks on K.V., he insisted that she stay home from school until the marks were less apparent.

he seeks *Golding* review,[4] arguing that the court violated his state and federal constitutional rights by excusing a juror without first notifying the defendant or his counsel. Alternatively, the defendant seeks reversal under the plain error doctrine, arguing that the trial court failed to "articulate sufficient facts to support the conclusion that the juror was no longer able to perform her duties due to her diagnosis," as required by General Statutes § 54-82h (c). The state responds that both claims are unreviewable under *Golding* and do not warrant reversal under the plain error doctrine because the substitution of a regular juror for an alternate juror does not implicate a defendant's constitutional rights and the court complied with § 54-82h (c) when it dismissed the juror for good cause. We agree with the state.

A

We first address the defendant's claim that the court violated his state and federal constitutional rights when it excused the juror without first notifying the defendant or his counsel.[5] The defendant argues that he was entitled to notice prior to the excusal of the juror on the basis of the right to individual voir dire under article first, § 19, of the Connecticut constitution, as amended by article four of the amendments; the right to counsel under the sixth and fourteenth amendments to the United States constitution; and the due process right to be present at all critical stages of a prosecution under the fifth and fourteenth amendments to the United States constitution.[6]

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

[5] The record is unclear as to the exact date that the juror was excused. On February 3, 2014, the first day of trial, the court began the proceeding by informing counsel that "during the course of last week, one of the jurors called indicating that she had a—was diagnosed with a medical condition and she could not take part [in] this process. So, the court unilaterally excused her; so, we will need to pick an alternate to replace her."

[6] Although the defendant also asserts a due process violation under article first, § 8, of the Connecticut constitution, because he has not provided an

The defendant seeks *Golding* review. "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015).

We conclude that the defendant's constitutional claims are unreviewable because he has failed to allege claims of constitutional magnitude as required by the second prong of *Golding*.

1

The defendant argues that article first, § 19, of the Connecticut constitution, requires a court to notify a defendant when a selected juror indicates that she is no longer able to participate in the proceeding so that

independent analysis of his due process claim under the state constitution, we limit our consideration to the dictates of the federal constitution. See *State* v. *Arthur H.*, 288 Conn. 582, 602, 953 A.2d 630 (2008).

The defendant also argues that the court violated his sixth amendment right to a public trial by dismissing the juror outside the courtroom during a break in the proceedings. The record, however, reflects that there was neither a break in the proceedings nor a closure of the courtroom because the juror was excused by the court during the week before trial. Because we conclude that the court was not required to notify counsel before excusing the juror and because the court memorialized the circumstances surrounding the juror's excusal on the record, we reject the defendant's claim that his right to a public trial has been implicated.

defense counsel has an opportunity, if necessary, to voir dire the juror.[7] We disagree.

Article first, § 19, provides in pertinent part that "[t]he right to question each juror individually by counsel shall be inviolate." Article first, § 19, does not, however, vest parties with an absolute right to question prospective and selected jurors individually at any time. Instead, our Supreme Court has interpreted article first, § 19, as constitutionalizing only "certain rights . . . regarding the *selection* of individual jurors," namely, the right "to challenge jurors peremptorily" and the "right of the parties to have counsel conduct individual examinations of *prospective* jurors . . . ." (Emphasis added; internal quotation marks omitted.) *Rozbicki* v. *Huybrechts*, 218 Conn. 386, 391–93, 589 A.2d 363 (1991); see also *State* v. *Griffin*, 251 Conn. 671, 699, 741 A.2d 913 (1999) ("[t]he purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause" [internal quotation marks omitted]).

Here, the defendant challenges the court's decision to excuse a *selected* juror without first notifying him or counsel. Therefore, article first, § 19, is inapposite, and this claim does not merit *Golding* review.

2

The defendant also invokes his right to counsel under the sixth and fourteenth amendments to the United States constitution and his due process right to be present under the fifth and fourteenth amendments to the United States constitution to support his claim that he was entitled to notice prior to the juror's excusal.

[7] Although the defendant initially argued in his briefs before this court that he was entitled to a hearing and voir dire of the juror prior to the juror's excusal, at oral argument before this court, the defendant clarified that, at a minimum, his counsel needed to be notified in advance of the juror's potential excusal.

Because of the interrelated nature of these claims, we address them together.

"[T]he right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." (Internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 491, 964 A.2d 73 (2009). Whether a particular matter constitutes a critical stage depends not on the timing but on the nature of the matter.

"The cases have defined critical stages [for the right to counsel] as proceedings between an individual and agents of the State (whether 'formal or informal, in court or out,' . . .) that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary' "; (citation omitted) *Rothgery* v. *Gillespie County*, 554 U.S. 191, 212 n.16, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008); as well as proceedings in which "counsel's absence might derogate from the accused's right to a fair trial"; *United States* v. *Wade*, 388 U.S. 218, 226, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). In the context of the right to be present, "courts have evaluated the extent to which a fair and just hearing would be thwarted by [the defendant's] absence or whether his presence has a relation, reasonably substantial, to the [fullness] of his opportunity to defend against the charge" when determining whether a proceeding is a critical stage. (Internal quotation marks omitted.) *State* v. *Gilberto L.*, 292 Conn. 226, 237, 972 A.2d 205 (2009).

In this case, the court's decision to excuse the juror because of a medical diagnosis did not amount to a "trial-like" confrontation between the state and the defendant. Nor did it implicate the defendant's right to a fair trial; "the mechanisms for providing for and dismissing alternate jurors, and the circumstances under which they may be substituted for regular jurors,

do not implicate [state or federal] constitutional rights." *State* v. *Williams*, 231 Conn. 235, 244, 645 A.2d 999 (1994), overruled in part on other grounds by *State* v. *Murray*, 254 Conn. 472, 487, 757 A.2d 578 (2000) (en banc);[8] see also *State* v. *LaBrec*, 270 Conn. 548, 559, 854 A.2d 1 (2004). Finally, the discretionary decision to excuse the juror in this circumstance was a straightforward judicial administrative action not implicating the defendant's ability to defend himself later at trial.[9]

We conclude that the defendant's claims are unreviewable because the excusal of the juror in this case does not implicate the defendant's constitutional rights as required by the second prong of *Golding*.

B

The defendant also seeks reversal under the plain error doctrine, arguing that the court violated § 54-82h

[8] "Although we overruled *Williams* in part in *State* v. *Murray*, [supra, 254 Conn. 487], [w]e [did] not, however, overrule that part of *State* v. *Williams*, supra, 231 Conn. 243–44, wherein we concluded that the mechanisms for providing for and dismissing alternate jurors, and the circumstances under which they may be substituted for regular jurors . . . does not implicate constitutional rights and are thus for the legislature to decide." (Internal quotation marks omitted). *State* v. *LaBrec*, 270 Conn. 548, 558 n.12, 854 A.2d 1 (2004).

[9] The defendant's reliance on *State* v. *McNellis*, 15 Conn. App. 416, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988), for the proposition that the proceedings involving the substitution of an alternate juror for a regular juror constitutes a critical stage of the proceedings is misplaced. In *McNellis*, we stated that "[*t*]*he voir dire* of the jurors *concerning possible jury tampering* was a critical stage of the criminal proceeding" for the purposes of the defendant's right to be present, not that the decision to replace a regular juror with an alternate was in and of itself a critical stage of a criminal proceeding. (Emphasis added.) Id., 432.

As the state correctly notes, the processes for addressing allegations of potential juror impartiality, bias, or prejudice are also different in kind from those used to address illness. Those allegations squarely implicate a defendant's constitutional right to an impartial jury and, at times, require a court sua sponte to conduct a preliminary inquiry to assure itself that the defendant's rights are being preserved. See *State* v. *Brown*, 235 Conn. 502, 527–29, 668 A.2d 1288 (1995). Conversely, when a juror reports that he or she is no longer able to participate in a trial that has not commenced because of a recent medical diagnosis, the fairness and impartiality of the defendant's trial is not implicated.

(c) by making insufficient factual findings of good cause before excusing the juror.[10] The state responds that consideration of the defendant's claim under the plain error doctrine is inappropriate in this case because the decision to excuse a juror is committed to the sound discretion of the court, and the court in this case was within its discretion to grant the juror's request to be excused due to a medical condition. We agree with the state.

The plain error doctrine permits the court to "reverse or modify the decision of the trial court if it determines . . . that the decision is . . . erroneous in law. . . ." Practice Book § 60-5. It "is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy." *State* v. *Cobb*, 251 Conn. 285, 343 n.34, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). "A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *LaBrec*, supra, 270 Conn. 559.

In the present case, we perceive no impropriety that would result in manifest injustice. "Under settled principles, [a] court may excuse a regular juror if that juror, for any reason, becomes unable to perform his or her duty. General Statutes § 54-82h (c). The power to excuse a juror under this section is expressly premised on a finding of cause. . . . Whether in the circumstances just cause exists to excuse a juror is a matter

[10] In announcing the excusal of the juror, the court informed the parties that a juror had called and explained that she "was diagnosed with a medical condition and she could not take part [in] this process." Neither the state nor the defendant inquired further or raised an objection.

within the discretion of the . . . court." (Internal quotation marks omitted.) *State* v. *Apodaca*, 303 Conn. 378, 386, 33 A.3d 224 (2012).

"We have recognized that unavailability due to illness may constitute cause to excuse a juror," even if the medical condition will render the juror available for a short or indeterminable period. *State* v. *Gonzalez*, 315 Conn. 564, 583, 585, 109 A.3d 453 (2015); see, e.g., *State* v. *Apodaca*, supra, 303 Conn. 386–87 (trial court's decision to excuse juror who was ill overnight with flu and unable to confirm when she would return was not abuse of discretion). Here, the trial court articulated a proper basis for its decision to excuse the juror: the juror was diagnosed with a medical condition that prevented the juror from taking part in the trial.

The defendant nevertheless insists that the trial court was obligated to "state the diagnosis or medical condition of the juror on the record, describe her current physical condition, or detail what medical treatment or intervention was necessary." Neither the plain language of § 54-82h (c) nor our case law interpreting it[11] mandate an invasion of the juror's privacy interests in this manner.

From our careful review of the record, we conclude that the defendant has not met this stringent standard for reversal under the plain error doctrine concerning his unpreserved claim.

[11] The defendant cites *Apodaca* for the proposition that he was entitled to examine the juror on her medical condition. In *Apodaca*, on the morning of the fifth day of trial, a juror called the criminal case flow coordinator to report flu-like symptoms. *State* v. *Apodaca*, supra, 303 Conn. 383. The resulting discussion on the record about the juror's illness stemmed from the participants' need to resolve whether the juror should be excused or trial should be delayed. Id., 383–85. Nothing in the Supreme Court's resolution of *Apodaca* suggested that the trial court was required to report the details of the juror's illness on the record before excusing her; the court merely needed to articulate a proper basis for its decision. See id., 386–87.

II

We next address the defendant's claims that the court (1) sua sponte should have stricken testimony that exceeded the scope of the constancy of accusation doctrine, and (2) erroneously instructed the jury concerning the proper usage of constancy of accusation testimony.[12] Because the defendant failed to preserve these issues at trial, he now claims that they warrant reversal under the plain error doctrine. We conclude that both claims are unreviewable.

In sex crime cases, a person to whom a sexual assault victim has reported the assault may testify about the report, but this testimony is subject to certain restrictions. *State* v. *Troupe*, 237 Conn. 284, 290–91 n.7, 677 A.2d 917 (1996) (en banc); Conn. Code Evid. § 6-11 (c). First, the witness may testify only "with respect to the fact and timing of the victim's complaint" and the details regarding "the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator." *State* v. *Troupe*, supra, 304. Second, "such evidence is admissible only to corroborate the victim's testimony and not for substantive purposes." Id. With this legal framework in mind, we address each of the defendant's claims in turn.

A

The defendant first claims that the court sua sponte should have stricken the testimony by M.V. and Rodriguez about the types of sexual acts the defendant

[12] The defendant also urges this court to modify the constancy of accusation doctrine so that it does not apply to sexual assault cases involving minors and to limit, or overrule, *State* v. *Troupe*, 237 Conn. 284, 677 A.2d 917 (1996) (en banc), in its entirety. We decline to address these claims other than to note that "as an intermediate appellate body, we are not at liberty to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court." *DePietro* v. *Dept. of Public Safety*, 126 Conn. App. 414, 422 n.3, 11 A.3d 1149, cert. granted on other grounds, 300 Conn. 932, 17 A.3d 69 (2011) (appeal withdrawn June 26, 2012).

engaged in with E.V. because it went beyond the fact and timing of E.V.'s complaint.[13] The state responds that this claim cannot be reviewed because defense counsel never objected to this testimony, and the court was under no obligation to strike the evidence sua sponte. We agree with the state.

It is well settled that "when opposing counsel does not object to evidence, it is inappropriate for the trial court to assume the role of advocate and decide that the evidence should be stricken. . . . The court cannot determine if counsel has elected not to object to the evidence for strategy reasons. . . . Experienced litigators utilize the trial technique of not objecting to inadmissible evidence to avoid highlighting it in the minds of the jury. Such court involvement might interfere with defense counsel's tactical decision to avoid highlighting the testimony. When subsequent events reveal that it was an imprudent choice, however, the defendant is not entitled to turn the clock back and have [the appellate court] reverse the judgment because the trial court did not, sua sponte, strike the testimony and give the jury a cautionary instruction." (Citations omitted.) *State* v. *Wragg*, 61 Conn. App. 394, 399, 764 A.2d 216 (2001) (no plain error for the court to refrain from striking, sua sponte, the constancy of accusation testimony).

[13] On the second day of trial, and after E.V.'s testimony, M.V. testified that E.V. told her once that "dad told me that if I didn't put his penis in my mouth he was going to penetrate me." On the third day of trial, Rodriguez testified as follows about her initial interview with E.V.:

"[The Prosecutor]: . . . Did she give you an account of how she had been sexually assaulted by [the defendant]?

"[The Witness]: She disclosed vaginal and anal penetration. She disclosed oral sex that she was obligated to do to [the defendant], and she disclosed positions as sixty-nine.

"[The Prosecutor]: Okay. And did she disclose how long she had been getting sexually assaulted for?

"[The Witness]: She said that she has been sexually abused since she was seven, and she told me that between the age of nine and ten, that's when he—the penetration started."

We therefore conclude that it was not plain error for the court to refrain from sua sponte striking the constancy of accusation testimony of M.V. and Rodriguez.

B

The defendant next claims that the court's instruction on the constancy of accusation testimony was defective in two respects: (1) the court erroneously omitted M.V.'s name from the instruction and (2) the instruction was misleading concerning the permissible use of the constancy of accusation testimony. We disagree.

On February 6, 2014, the court conducted a charging conference in chambers at which it provided a copy of the draft jury instructions to both counsel and received their comments. On February 7, 2014, the court memorialized this conference on the record, discussing the changes that counsel requested. In pertinent part, defense counsel had requested a delay reporting instruction under the constancy of accusation instruction, and the court granted that request.[14] Notably, the

[14] The court instructed the jury concerning the constancy of accusation testimony as follows:

"The complainant testified here in court before you. You may use her testimony as evidence and proof of the facts asserted in that testimony, and give it the weight you find is reasonable.

"The state offered evidence of out-of-court statements made by the complainant to another person that the defendant sexually assaulted her. The person to whom the state alleges that complaint—that complainant made those statements to was Gloria Rodriguez.

"Under our law, the testimony of this witness was limited in scope to the fact and timing of the complainant's complaint, the time and place of the alleged sexual assault, and the identity of the alleged perpetrator.

"This evidence is to be considered by you only in determining the weight and credibility you will give the complainant's testimony as it pertains to all charges.

"This evidence of out-of-court statements by the complainant of a sexual assault against her by the defendant is not to be considered by you to prove the truth of the matter asserted in the out-of-court statement.

"In determining whether or not the out-of-court statements corroborate the complainant's testimony in court, you should consider all of the defendant's—I'm sorry—you should consider all of the circumstances under which

constancy of accusation charge referenced only Rodriguez' testimony about E.V.'s report of sexual abuse to her, not M.V.'s testimony about E.V.'s report of sexual abuse to her. The defendant did not request that M.V.'s name be included in the charge nor did he object to the omission.

As the defendant concedes, because defense counsel participated in a charging conference, did not submit a written request to charge the jury concerning M.V.'s testimony, and expressed satisfaction with the instruction, which referenced only the testimony of Rodriguez, he waived any challenge to the jury instruction at trial under *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011); see also *State* v. *Coleman*, 304 Conn. 161, 174–75, 37 A.3d 713 (2012) (recognizing that a defendant can expressly and implicitly waive a claim of instructional error). Consequently, the defendant asserts that both instructional error claims warrant consideration under the plain error doctrine.

As an initial matter, "[t]his court has adhered to the view that waiver thwarts a finding that plain error exists." *State* v. *Bialowas*, 160 Conn. App. 417, 430, 125 A.3d 642 (2015) (collecting cases). However, even if we were to assume, without deciding, that the defendant's waiver would not preclude him from seeking such relief; see *State* v. *Darryl W.*, 303 Conn. 353, 371–72 n.17, 33 A.3d 239 (2012) ("[w]e recognize that there appears to

they were made, and to whom, and whether the statements made to these persons were or were not consistent with [the] complainant's testimony in court.

"To the extent you find what she said outside the courtroom is consistent with her testimony in court, you may find her testimony in the court to be corroborated or supported with respect to the fact and timing of her complaint, the time and place of the alleged sexual assault, and the identity of the alleged perpetrator.

"You may consider any delay by the complaining witness in reporting the incidents in evaluating the weight and the credibility of the complaining witness' testimony."

be some tension in our appellate case law as to whether reversal on the basis of plain error could be available in cases where the alleged error is causally connected to the defendant's own behavior"); we conclude that the defendant cannot demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal.

The defendant first argues that the court erred by not including M.V.'s name in the jury instruction. To prevail, the defendant would have to demonstrate that a failure in an evidentiary instruction to refer to all of the evidence that the instruction could possibly encompass is plain error. There is, however, no such general rule. Nor is there such a rule in the constancy of accusation context in particular. See *State* v. *Troupe*, supra, 237 Conn. 305 (stating only that "the defendant is entitled to an instruction that any delay by the victim in reporting the incident is a matter for the jury to consider in evaluating the weight of the victim's testimony"); Conn. Code Evid. § 6-11 (c) (not requiring limiting instruction where there has been no request).

"It is well established in Connecticut . . . that the trial court generally is not obligated, sua sponte, to give a limiting instruction." *State* v. *Cator*, 256 Conn. 785, 801, 781 A.2d 285 (2001); see also *State* v. *Hill*, 307 Conn. 689, 705 n.12, 59 A.3d 196 (2013). "The failure by the trial court to give, sua sponte, an instruction that the defendant did not request, that is not of constitutional dimension and that is not mandated by statute or rule of practice is not such an obvious error that it will affect the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Eason*, 47 Conn. App. 117, 120, 703 A.2d 130 (1997), cert. denied, 243 Conn. 962, 705 A.2d 552 (1998). We conclude therefore that the defendant's first claim of instructional error fails to meet the stringent requirements of plain error review.

Next, the defendant argues that the jury instruction undoubtedly left the jury with the impression that Rodriguez' testimony about E.V.'s out-of-court report of sexual abuse could be used as substantive evidence of that abuse or to corroborate all of E.V.'s in-court testimony concerning all of the offenses, not just to corroborate the fact that E.V. reported the defendant's sexual abuse to Rodriguez. We disagree.

"The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error." (Internal quotation marks omitted.) *State* v. *Apodaca*, supra, 303 Conn. 390–91.

In this case, the court's instruction, when read in its entirety, adequately conveyed to the jury the limited permissible usage of the constancy of accusation testimony. The court began its charge by explaining the difference between E.V.'s in-court testimony about her abuse, which "[y]ou may use . . . as evidence and proof of the facts asserted," and Rodriguez' testimony about E.V.'s out-of-court report of abuse, the usage of which "was limited in scope to *the fact and timing of the complainant's complaint*, *the time and place of the alleged sexual assault*, and the *identity of the alleged perpetrator*." (Emphasis added.)

The court went on to instruct the jury that the constancy of accusation testimony "is to be considered by you only in determining the weight and credibility" of E.V.'s testimony, not "to prove the truth of the matter asserted in the out-of-court statement." Finally, toward the close of its charge, the court again instructed the jury concerning the limited permissible usage of this

evidence. The court explained that if the jury found that E.V.'s in-court and out-of-court statements about her abuse were consistent, the jury "may find her testimony in the court to be corroborated or supported with respect to *the fact and timing of her complaint*, *the time and place of the alleged sexual assault*, *and the identity of the alleged perpetrator*." (Emphasis added.)

Notably, the court's description of the permissible uses of the constancy of accusation testimony at the beginning and end of its charge was virtually identical to the Supreme Court's description of the permissible uses of constancy of accusation testimony in *Troupe*. See *State* v. *Troupe*, supra, 237 Conn. 304 (stating that a witness "may testify only with respect to *the fact and timing of the victim's complaint*" and that the details of the assault "must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, *the time and place of the attack* or *the identity of the alleged perpetrator*" [emphasis added]); see also Conn. Code Evid. § 6-11 (c) ("A person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made . . . . Any testimony by the witness about details of the assault shall be limited to those details necessary to associate the victim's allegations with the pending charge.").

Likewise, the court's instruction as a whole is virtually identical to the instruction provided on the Judicial Branch's website for constancy of accusation testimony. See Connecticut Criminal Jury Instructions (4th Ed. 2008) § 7.2-1 (Rev. to May 20, 2011), available at http://www.jud.ct.gov/ji/criminal/part7/7.2-1.htm (last visited September 9, 2016). While this fact is not determinative of the matter before this court, as the Judicial Branch website instructions are nonbinding, it is instructive; particularly, when the instruction comports with the explanation of the doctrine set forth in our

case law, as the instruction in this case did. See *State* v. *Coleman*, supra, 304 Conn. 176 (finding no plain error where "the instruction at issue is provided on the judicial branch's website" and accords with relevant case law).

Upon reviewing the constancy of accusation instruction given by the court in its entirety, therefore, a showing of plain error has not been made.

III

Finally, we turn to the defendant's claims of prosecutorial impropriety. Specifically, the defendant claims that he was denied a fair trial because the prosecutor (1) injected extraneous matters into the trial and (2) improperly appealed to the passions and emotions of the jury. We conclude that there was no impropriety.

We review claims of prosecutorial impropriety under a two step analytical process. "The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Citations omitted.) *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007). "The defendant bears the burden of satisfying both of these analytical steps." *State* v. *O'Brien-Veader*, 318 Conn. 514, 524, 122 A.3d 555 (2015).

A

The defendant first claims that the prosecutor injected extraneous matters into the trial by suggesting during his cross-examination of the defendant that the defendant was lying to avoid being labeled in prison as

a sex offender. The state responds that the defendant's claim is evidentiary in nature and therefore is not preserved. We agree with the state.

At trial, the defendant elected to testify on his own behalf. During his cross-examination of the defendant, the prosecutor, without objection, suggested that the defendant had a motive to lie to avoid being labeled in prison as a sex offender that sexually assaulted his daughter.[15]

"Although our Supreme Court has held that unpreserved claims of prosecutorial impropriety are to be reviewed under the [factors enunciated in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)], that rule does not pertain to mere evidentiary claims masquerading as constitutional violations." (Internal quotation marks omitted.) *State* v. *Alex B.*, 150 Conn. App. 584, 589, 90 A.3d 1078, cert. denied, 312 Conn. 924, 94 A.3d 1202 (2014); see also *State* v. *Rowe*, 279 Conn. 139, 151–52, 900 A.2d 1276 (2006) (declining to review a claim of prosecutorial impropriety that was evidentiary in nature). The defendant has failed to bring to our

[15] The following colloquy occurred during the prosecutor's cross-examination of the defendant:

"[The Prosecutor]: Isn't it ironic, though, you wanted her to go to school and you kept her home?

"[The Defendant]: Yeah.

"[The Prosecutor]: And you kept her home to sexually assault her, right?

"[The Defendant]: Never.

"[The Prosecutor]: Okay. Because the stakes are high here, right? You're on trial for sex assault crimes, correct?

"[The Defendant]: Yes.

"[The Prosecutor]: All right. You're incarcerated?

"[The Defendant]: Yes.

"[The Prosecutor]: Right. And you don't want to be labeled as a sex offender who sexually assaults his younger daughter, right?

"[The Defendant]: That didn't happen so, no, I don't want to.

"[The Prosecutor]: Right. And—and if you're labeled a sex offender in jail, that's not good, right?

"[The Defendant]: I suppose so."

attention any law suggesting that it is constitutionally improper for a prosecutor to cross-examine a criminal defendant about his motive to lie, just as he would any other witness.

It is well settled that "[a]n accused in taking the stand subjects himself to the same rules and is called on to submit to the same tests which could by law be applied to other witnesses." *State* v. *Palozie*, 165 Conn. 288, 298, 334 A.2d 468 (1973) (holding that the state was permitted to question the defendant concerning his use of a "strap" on his children during a time period not within the information because it was relevant on the issue of the credibility of the defendant). This includes an examination of the defendant's motive to lie. *State* v. *Leconte*, 320 Conn. 500, 510, 131 A.3d 1132 (2016) ("[a]s an appropriate and potentially vital function of cross-examination, exposure of a witness' motive, interest, bias or prejudice may not be unduly restricted" [internal quotation marks omitted]); *State* v. *Warholic*, 278 Conn. 354, 381, 897 A.2d 569 (2006) ("[q]uestions about a witness' motive are proper because they seek to elicit facts from which a jury can make credibility determinations"); *State* v. *Holliday*, 85 Conn. App. 242, 261, 856 A.2d 1041 ("[o]ur jurisprudence instructs that a prosecutor may comment on a witness' motivation to be truthful or to lie"), cert. denied, 271 Conn. 945, 861 A.2d 1178 (2004).

The defendant has not cited any authority for the proposition that a prosecutor cannot question a defendant about his motive to lie because it relates to the collateral consequences of conviction in the case. Here, the defendant was charged in eight counts with offenses relating to his sexual abuse of E.V. If convicted of even one of these multiple counts, the defendant would not only be a "sex offender," but a sex offender that sexually abused his daughter. Exploring the defendant's motive

to lie to avoid the well-known[16] stigmatizing effects of this classification did not inject an extraneous matter into the trial.

"[R]obing garden variety claims [of an evidentiary nature] in the majestic garb of constitutional claims does not make such claims constitutional in nature. . . . Putting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender." (Internal quotation marks omitted.) *State* v. *Ruffin*, 144 Conn. App. 387, 399, 71 A.3d 695 (2013), aff'd, 316 Conn. 20, 110 A.3d 1225 (2015). Here, the challenge to the cross-examination of the defendant by the prosecutor is evidentiary in nature and is unpreserved. Accordingly, it is not reviewable under *Williams*.

B

The defendant next alleges three acts of impropriety concerning the prosecutor's closing argument. First, the defendant claims that the prosecutor improperly suggested that "defendants in child sexual assault cases have an increased motive to lie for fear of being 'labeled' as a sex offender in jail." Second, the defendant argues that the prosecutor's remarks improperly appealed to the emotions and prejudices of the jurors by repeatedly

[16] See *Anthony A.* v. *Commissioner of Correction*, 159 Conn. App. 226, 240, 122 A.3d 730 ("We can hardly conceive of a state's action bearing more stigmatizing consequences than the labeling of a prison inmate as a sex offender. . . . One need only look to the increasingly popular Megan's laws, whereby states require sex offenders to register with law enforcement officials who are then authorized to release information about the sex offender to the public, to comprehend the stigmatizing consequences of being labeled a sex offender." [Internal quotation marks omitted.]), cert. granted on other grounds, 319 Conn. 934, 125 A.3d 208 (2015); accord *State* v. *Misiorski*, 250 Conn. 280, 295, 738 A.2d 595 (1999) ("[c]onstitutional privacy interests are implicated . . . because . . . [t]he damage to [citizens'] reputations resulting from [disclosure] stigmatizes them as currently dangerous sex offenders, can harm their earning capacities, and can cause them to be objects of derision in the community" [internal quotation marks omitted]).

calling the defendant a "sex offender." Finally, the defendant argues that the prosecutor improperly appealed to the emotions and prejudices of the jurors by encouraging them to find the defendant guilty because he was a "bad person" rather than on the basis of the evidence. We conclude that the prosecutor's remarks were not improper.

The following additional facts are necessary to our resolution of these claims. During his closing argument, the prosecutor explained to the jurors that the case required them to assess the credibility of all of the witnesses, and he reviewed the evidence that corroborated various witnesses' testimony. Toward the end of his closing argument, the prosecutor made the following remarks:

"But basically, for the sex assault, it comes down to E.V. and this defendant; so, you're going to have to compare their testimonies. Who is more credible? Okay?

"E.V.: Obedient. Never lied. Honor student. We saw the way she testified. God-fearing, as he said, as he put a knife—as she put a knife to her father where she almost had enough where she put a knife to his—his throat and said God won't forgive me if I did it. You have E.V. and that person.

"Person to person, who's always promised to change for years and years and years and never did. Similar to how he told E.V. after every time he penetrated her, I would stop. So, you have that person. You also have the person who would take the moneys—family's [social security disability] money for her son—for his son,[17] take the mom's employment money, take rent money, and spend it all on drugs.

[17] The defendant and M.V. received social security disability benefits for their son's physical disability. See footnote 2 of this opinion.

"Also, [you] have a person impairing them, a person who continually beat [K.V.] for years—approximately seven years with his fists, his hands, his boots; hit her about the face, arms, legs, ribs, and stomach. More or less a person who never had a job. More or less a person who, for some reason—and I submit to you the reason was to be alone with her so she could sexually assault her—so he could sexually assault her—would keep her home from school; a person who lied to housing; who left [M.V.] with a $7000 bill; and also, a person who will be labeled a sex offender. So, with that said, ladies and gentlemen, I ask you: Who has the motive there to tell the truth?" (Footnote added.)

Defense counsel then addressed the jury and stated that the evidence "should actually probably not be reviewed" as it related to the defendant's testimony concerning the risk of injury to a child offenses charged in counts nine and ten of the information. He argued that while the defendant admitted to using crack, taking his family's money, and "making his family's life hell," he was not admitting to sexually assaulting E.V. He urged the jury to focus on the credibility of the state's witnesses as it related to the sexual abuse offenses charged in counts one through eight of the information. In particular, he argued that E.V. had a motive to lie about being sexually abused by the defendant to protect herself and her sister from the defendant's physical abuse.[18]

[18] For example, defense counsel made the following closing argument concerning E.V.'s motive to lie:

"And there's K.V. being assaulted and going to school. Well, that's going [to] hustle things up. [The department] is involved. [The department] talks to K.V. [The department] thinks, right, we see the physical assault, but we're not liking the kind of looking down and away, not making direct contact, and that we think something else is up. Well, there was a lot that was up, even without thinking about whether [or] not there was sex. But that's what the social worker assumed; there must be sexual assault too.

"And to the extent the ideas had already begun [to take] the form of, we cannot stand to have dad around anymore, he needs to go, at that moment, when the social worker says to E.V. prompts a disclosure, the idea formed: This will do it. This will do the trick."

The prosecutor then began his rebuttal as follows: "Motivation, I mean, no father wants to admit he sexually assaulted his daughter between the ages of nine and sixteen. Let's face it, ladies and gentlemen, that's the motivation. You don't want to be labeled as a sex offender, okay?"

As the alleged impropriety occurred during closing argument, we set forth the applicable legal principles. "[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . [B]ecause closing arguments often have a rough and tumble quality about them, some leeway must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Nevertheless, [w]hile a prosecutor may argue the state's case forcefully, such argument must be fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom." (Citation omitted; internal quotation marks omitted.) *State* v. *Necaise*, 97 Conn. App. 214, 229–30, 904 A.2d 245, cert. denied, 280 Conn. 942, 912 A.2d 478 (2006).

At the end of his summation, defense counsel returned to that theme, arguing:

"The question is—the real question here, is, did he sexually assault E.V., and he told you he did not.

"So, right, [the prosecutor is] right. Did he believe E.V.? He's supposed to look at all the charges individually and consider them individually, but there's really no debate if you believe it. If you have some question about [E.V.'s] motivations for making these allegations, then that's what I'm trying to say, you know, I think she had pretty good motivations for making them; it's just a question of whether they're true. If that's the way you view the case, then I would respectfully request that you acquit [the defendant] of counts one through eight. Thank you."

1

We first examine whether the prosecutor improperly argued that the defendant had a motive to lie to avoid being labeled a sex offender. Again, "[i]t is not improper for a prosecutor to remark on the motives that a witness may have to lie." *State* v. *Thompson*, 266 Conn. 440, 466, 832 A.2d 626 (2003); see also *State* v. *Ancona*, 270 Conn. 568, 607, 854 A.2d 718 (2004) ("[i]t is permissible for a prosecutor to explain [in closing argument] that a witness either has or does not have a motive to lie"), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005). Nor is it improper for a prosecutor to suggest that the defendant, in particular, has a motive to lie so long as that motive is based on the "ascertainable motives of the witnesses" rather than the prosecutor's personal opinion. *State* v. *Stevenson*, 269 Conn. 563, 585, 849 A.2d 626 (2004); see also *State* v. *Fauci*, supra, 282 Conn. 39–40 ("in a case that essentially reduces to which of two conflicting stories is true, it may be reasonable to infer, and thus to argue, that one of the two sides is lying," particularly where the argument only "underscored an inference that the jury could have drawn entirely on its own, based on the evidence presented" [internal quotation marks omitted]).

In this case, the prosecutor's remark that the defendant had a motive to lie to avoid being labeled a sex offender simply underscored an inference that the jury could have readily drawn on its own in light of the charges and the evidence presented at trial. Accordingly, the remark was not improper.

2

Next, we examine whether the prosecutor improperly appealed to the emotions and passions of the jury "by attaching the inflammatory label of child sex offender to him" and by attempting to persuade the jury to find the defendant guilty because he was a "bad person,"

rather than on the evidence presented. We conclude that the prosecutor did not improperly appeal to the emotions and passions of the jury.

"We begin with the well established proposition that [a] prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal." (Internal quotation marks omitted.) *State* v. *Ceballos*, 266 Conn. 364, 394, 832 A.2d 14 (2003).

"We have held, however, that [i]t is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom. . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Internal quotation marks omitted.) *State* v. *Fauci*, supra, 282 Conn. 36. Similarly, "[t]he state's attorney should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 583–84.

Turning first to the prosecutor's use of the phrase "sex offender," we conclude that this remark was not improper. Contrary to what the defendant suggests, the prosecutor did not label the defendant as a "sex offender" during his remarks; instead, he argued that the defendant had a motive to lie to avoid being labeled a sex offender upon conviction, and that remark was a permissible commentary. See *State* v. *Stevenson*, supra,

269 Conn. 585 n.15 (The prosecutor remarked that "[t]he defendant has everything to gain if he lies on the stand. After all, it is he [who will] be punished in this case if he is found guilty" was permissible commentary on the defendant's motive to lie).

Next, the defendant argues that by reviewing the evidence that he took the family's money for drugs, physically abused K.V., had an insubstantial employment history and lied to housing authorities, the prosecutor encouraged the jury to find the defendant guilty of the sex offenses because he was a bad person, rather than on the evidence presented. The state responds that the prosecutor was not attempting to inflame the passions of the jury, but rather the prosecutor was permissibly recalling the undisputed evidence presented at trial about the defendant's character to assist the jurors' assessment of the defendant's credibility. We agree with the state.

Again, the critical issue relative to the claimed impropriety is whether the disputed remarks encouraged the jury to find the defendant guilty on the basis of emotion, rather than on a rational appraisal of the trial evidence, not simply whether the remarks might have painted a negative portrait of the defendant's character. Here, the prosecutor never suggested to the jury that because the evidence showed that the defendant was a bad person, he must have sexually assaulted his daughter. Instead, and just prior to the disputed remarks, the prosecutor acknowledged that the sexual assault charges boiled down to a credibility assessment of E.V. and the defendant. The prosecutor then proceeded to review, in a straightforward manner, the undisputed evidence presented at trial concerning both E.V.'s and the defendant's character. See *State* v. *Camacho*, 282 Conn. 328, 377, 924 A.2d 99 ("[a]s a general matter a prosecutor may use any evidence properly admitted at trial"), cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007).

Notably, the disputed remarks were based not only on the testimony of the state's witnesses, but also the defendant's own admissions at trial. During his testimony, the defendant admitted that he would take his wife's income and his son's disability benefits to purchase not only cocaine but also to purchase pornography and alcohol for himself.[19] The defendant acknowledged that during the time in question he worked only part-time and was eventually fired due to his poorperformance. The defendant admitted that he lied on multiple occasions to the housing authority

[19] For example, on cross-examination, the prosecutor, without objection, engaged in the following colloquy with the defendant:

"[The Prosecutor]: You took all her money, right, from [your wife's] job?

"[The Defendant]: Yes.

"[The Prosecutor]: Did she say anything then?

"[The Defendant]: She didn't say anything.

"[The Prosecutor]: Do you know why?

"[The Defendant]: No.

"[The Prosecutor]: She just said, here's my check, or did you steal it?

"[The Defendant]: I only asked for it.

"[The Prosecutor]: And explain that. How did you ask for it?

"[The Defendant]: If she got a few dollars I can—can have.

"[The Prosecutor]: When you say a few dollars, what do you mean?

"[The Defendant]: Forty, $50.

"[The Prosecutor]: And she wasn't making any money, right?

"[The Defendant]: Not much, no.

"[The Prosecutor]: You took your son's [social security disability] check, right?

"[The Defendant]: On occasions, yes.

"[The Prosecutor]: Why did you take that?

"[The Defendant]: To drug myself.

"[The Prosecutor]: And didn't your ex-wife say, why you taking all this money?

"[The Defendant]: Yes.

"[The Prosecutor]: What did you say to her?

"[The Defendant]: I said I—you high, you need the money. I never answered that, I just need it.

"[The Prosecutor]: You—you never answered it. I don't under—can you repeat that?

"[The Defendant]: I say, I never answer when I wanted the money, I just say and you don't need it. You don't think, you know, you just want to keep getting high."

about the family's income to secure rent at a reduced rate under Section 8, and he testified that, on one occasion, when M.V. disclosed to the housing authority their actual income, the family was charged approximately $7000 for unpaid rent.[20] Finally, the defendant testified extensively not only about the fact that he continuously physically abused K.V., but also the manner in which he assaulted her.[21]

Compared to other prosecutorial remarks our Supreme Court has found to be improper, the prosecu-

[20] E.V. and K.V. testified that the arrearage was $8000, while the defendant on cross-examination agreed with the prosecutor that the arrearage was $7000.

[21] For example, on cross-examination, the prosecutor, without objection, engaged in the following colloquy with the defendant:

"[The Prosecutor]: Okay. Does discipline mean hitting [K.V.] physically?

"[The Defendant]: Not supposed to, but yes. That's what I was doing.

"[The Prosecutor]: Okay. And tell us how you hit her that day?

"[The Defendant]: To be honest, I don't—I don't remember. I know hurt her with my hand. Every part of the body, I don't remember?

"[The Prosecutor]: You don't remember?

"[The Defendant]: I don't remember which part I hit her with.

"[The Prosecutor]: Okay. How many—

"[The Defendant]: But I know I did it.

"[The Prosecutor]: Let me finish my question. How many times did you hit her in the body that day?

"[The Defendant]: Multiple times.

"[The Prosecutor]: Multiple times?

"[The Defendant]: Yes.

"[The Prosecutor]: In the head?

"[The Defendant]: Yes.

"[The Prosecutor]: You clapped her ears.

"[The Defendant]: Yes.

"[The Prosecutor]: You punched her.

"[The Defendant]: I punched her, yes.

"[The Prosecutor]: You kicked her.

"[The Defendant]: I don't remember that.

"[The Prosecutor]: You had boots, right?

"[The Defendant]: I wasn't home.

"[The Prosecutor]: You weren't home?

"[The Defendant]: I wasn't home.

"[The Prosecutor]: Okay. Were you wearing boots?

"[The Defendant]: Sneakers.

"[The Prosecutor]: Sneakers?

"[The Defendant]: Yes, sir.

"[The Prosecutor]: Do you own boots?

"[The Defendant]: What's that?
"[The Prosecutor]: Do you own boots?
"[The Defendant]: Yes.
"[The Prosecutor]: They have steel toe on them?
"[The Defendant]: No.
"[The Prosecutor]: Okay. And then you also pretended that you were going to throw her down the stairs, right, but you didn't?
"[The Defendant]: Did I push her?
"[The Prosecutor]: You were going to but then you held back, right?
"[The Defendant]: Yes.
"[The Prosecutor]: Was she crying?
"[The Defendant]: Yes.
"[The Prosecutor]: Screaming?
"[The Defendant]: Yes.
"[The Prosecutor]: What was she saying?
"[The Defendant]: Stop.
"[The Prosecutor]: And you're beating her so hard she was [huddled] on the ground, correct?
"[The Defendant]: That happen when I stop.
"[The Prosecutor]: That happened, but she lost her breath; she couldn't breathe at one point.
"[The Defendant]: I cannot tell.
"[The Prosecutor]: You cannot tell? You were on crack that day too?
"[The Defendant]: Yes.
"[The Prosecutor]: Okay. What time is this at?
"[The Defendant]: The afternoon.
"[The Prosecutor]: How much—how much crack did you smoke at that time?
"[The Defendant]: No idea.
"[The Prosecutor]: Okay. And this is not the first time you beat her, right?
"[The Defendant]: No.
"[The Prosecutor]: You beat her on Wethersfield Avenue.
"[The Defendant]: Yes.
"[The Prosecutor]: You beat her on New Donald Street.
"[The Defendant]: Yes.
"[The Prosecutor]: You beat her on Barbour Street.
"[The Defendant]: Yes.
"[The Prosecutor]: Continuously, correct?
"[The Defendant]: Yes.
"[The Prosecutor]: Okay. Kicking?
"[The Defendant]: Yes.
"[The Prosecutor]: Fist?
"[The Defendant]: I never used fist.
"[The Prosecutor]: Oh, you never used your fist. You use your hand?
"[The Defendant]: Open hand.
"[The Prosecutor]: Is it possibly—is it possible that when you swung at her it might have hit her with [your] fist?
"[The Defendant]: It couldn't be because I used my open hand.
"[The Prosecutor]: Oh, Okay. Did you kick.
"[The Defendant]: On occasions, yes.

tor's remarks in cataloguing the evidence in this case were of a dispassionate nature.[22] The prosecutor did not employ any crude phrases or inflammatory language. The only fact he lingered on was the physical abuse of K.V., which served as a basis for the criminality charged in counts nine and ten of the information.[23]

We conclude therefore that the prosecutor did not improperly appeal to the emotions and passions of the jury during closing argument.[24]

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN DOE *v.* TOWN OF WEST HARTFORD ET AL. (AC 37672)

Beach, Mullins and Mihalakos, Js.

Syllabus

The plaintiff appealed to this court from the summary judgment rendered by the trial court on the ground that the plaintiff's causes of action were

"[The Prosecutor]: In the stomach?
"[The Defendant]: Possible.
"[The Prosecutor]: In the ribs?
"[The Defendant]: Yes.
"[The Prosecutor]: In the head?
"[The Defendant]: Yes."

[22] See *State* v. *Oehman*, 212 Conn. 325, 333, 562 A.2d 493 (1989) (prosecutor characterized the defendant as a " 'liar,' " " 'coward,' " and a " 'spoiled killer with a gun' " that " 'has no principles' "); *State* v. *Williams*, supra, 204 Conn. 546–47 (prosecutor called defendant, inter alia, " 'child-beater,' 'baby-beater' and 'infant-thrasher,' " "a 'liar,' 'drunken drug user, convicted felon, child beater,' 'stupid,' 'savage child beater,' 'drunken bum,' 'evil man,' " and referred to principal defense witness as " 'liar,' " " 'stupid,' " an " 'evil woman,' and an 'evil, terrible woman' "); *State* v. *Couture*, 194 Conn. 530, 561, 482 A.2d 300 (1984) (prosecutor, reading from a prepared text, denounced the defendants as " 'murderous fiends,' 'rats,' 'utterly merciless killers,' and 'inhumane, unfeeling and reprehensible creatures' "), cert. denied, 469 U.S. 1192, 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985).

[23] Both counts charged the defendant with risk of injury to a child by exposing E.V., *inter alia*, to his physical abuse of K.V.

[24] Having concluded that the defendant's claims do not constitute prosecutorial impropriety, we need not address the factors set forth in *State* v.

time barred. The plaintiff alleged various incidents of wrongful conduct on the part of the defendants between May 22 and June 8, 2007. A state marshal, G, served the defendants on June 9, 2010, and, subsequently, the defendants' filed motions for summary judgment on the ground that the causes of action were time barred under the relevant statutes (§§ 52-577, 52-584, and 52-571c [c]) of limitations because the action had been commenced more than three years from the date of the acts complained of. The plaintiff objected to the motions for summary judgment, claiming that the action was timely under the statute (§ 52-593a) providing that a cause of action shall not be lost if process is delivered to a marshal within the limitations period and the marshal serves it within thirty days. The plaintiff filed an affidavit by his former attorney, S, affirming that G had picked up process at S's office on May 20, 2010, thereby saving the causes of action under § 52-593a. The defendants moved to strike S's affidavit on the ground that it was not based on his personal knowledge, and attached a copy of S's deposition testimony which indicated, inter alia, that he did not personally observe G pick up the process. The trial court struck S's affidavit in part and rendered summary judgment on the ground that the plaintiff had failed to establish that process had been delivered to G prior to the running of the statutes of limitations. On appeal, the plaintiff claimed that the trial court improperly rendered summary judgment despite the existence of issues of material fact regarding whether process was delivered timely to G, and that the trial court had improperly denied his motion to disqualify the judge who rendered summary judgment on the ground of judicial bias. *Held*:

1. The trial court improperly rendered summary judgment, as S's deposition testimony sufficiently raised a genuine issue of material fact as to whether G received process on May 20, 2010, thereby saving the plaintiff's causes of action under § 52-593a: S's deposition testimony created a reasonable inference that G picked up process at S's office on the date in question, as S testified that his office exclusively used G for service of process in 2010, that in an urgent matter his office staff would call G to personally pick up process and they would leave the process on a specific counter for G, and that, in this case, S remembered not seeing the process on the counter after his office manager had contacted G to pick it up; furthermore, S also testified that his memory surrounding these events was very clear because, due to the fact that the statute of limitations was so close, he had been paying attention to the dates, and, moreover, he had confirmed the pickup with his office manager and with G.
2. Notwithstanding the defendants' claim to the contrary, G's failure to comply with the requirements of § 52-593a (b) by not endorsing the date that process was delivered to him on the return did not preclude

Williams, supra, 204 Conn. 540, to determine whether the defendant was deprived of his right to a fair trial as a result of prosecutorial impropriety.

application of the savings statute, as this court previously had concluded that § 52-593a (b) is directory rather than mandatory and that the failure of the marshal to include the date on the return is not a fatal defect.

3. The trial court properly denied the plaintiff's motion to disqualify the judge who rendered summary judgment on the ground of judicial bias: the plaintiff failed to show that the judge's testimony before the Judiciary Committee demonstrated a bias in favor of police, as the language from the judge's testimony that the plaintiff relied on was not an accurate representation of the judge's full answer regarding the truthfulness of police officers when they are testifying under oath; furthermore, there was no evidence to support the assumption made by the plaintiff's attorney that there had been a previous attorney-client or master-servant relationship between one of the defendants' attorneys and the judge.

Argued May 10—officially released September 20, 2016

Procedural History

Action to recover damages for, inter alia, the alleged violation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Hartford, Complex Litigation Docket, where the court, *Bright*, *J.*, granted the motion for permission to withdraw the appearance filed by A. Paul Spinella; thereafter, the plaintiff withdrew the action as to the defendant Jeffrey Rose et al.; subsequently, the court, *Sheridan*, *J.*, denied the motions to strike the affidavit of John R. Griffin filed by the named defendant et al.; thereafter, the court, *Sheridan*, *J.*, granted in part the motions to strike the affidavit of A. Paul Spinella filed by the named defendant et al.; subsequently, the court, *Sheridan*, *J.*, granted the motions for summary judgment filed by the named defendant et al. and rendered judgment thereon; thereafter, the court, *Dubay*, *J.*, denied the plaintiff's motion to disqualify the judicial authority; subsequently, the court, *Sheridan*, *J.*, denied the plaintiff's motion to reargue, and the plaintiff appealed to this court; thereafter, the court, *Dubay*, *J.*, issued an articulation of its decision; subsequently, the court, *Sheridan*, *J.*, issued an articulation of its decision. *Reversed in part; further proceedings.*

Kenneth J. Krayeske, with whom was *Brendan Mahoney*, for the appellant (plaintiff).

Patrick D. Allen, with whom, on the brief, was *Scott M. Karsten*, for the appellees (named defendant et al.).

Laura Pascale Zaino, with whom, on the brief, were *Richard C. Tynan*, *Evan M. O'Hara* and *Logan A. Forsey*, for the appellees (defendant Dale J. Wallington et al.).

Michael R. McPherson, for the appellees (defendant Hartford Hospital et al.).

Opinion

MULLINS, J. The plaintiff, John Doe,[1] appeals from the summary judgment rendered by the trial court, *Sheridan, J.*, after determining that the plaintiff's causes of action were time barred and were not saved by General Statutes § 52-593a.[2] The plaintiff also appeals from the

[1] The plaintiff was granted permission to proceed under a pseudonym due to the nature of the allegations in the complaint.

[2] General Statutes § 52-593a provides: "(a) Except in the case of an appeal from an administrative agency governed by section 4-183, a cause or right of action shall not be lost because of the passage of the time limited by law within which the action may be brought, if the process to be served is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery.

"(b) In any such case, the officer making service shall endorse under oath on such officer's return the date of delivery of the process to such officer for service in accordance with this section."

In this particular case, a critical problem is presented because the marshal's return is silent as to when service of process was received from the plaintiff, and, thus, it fails to comply with the provisions set forth in § 52-593a (b). See also General Statutes § 6-32 (a) ("Each state marshal shall receive each process directed to such marshal when tendered, execute it promptly and make true return thereof; and shall, without any fee, give receipts when demanded for all civil process delivered to such marshal to be served, specifying the names of the parties, the date of the writ, the time of delivery and the sum or thing in demand. If any state marshal does not duly and promptly execute and return any such process or makes a false or illegal return thereof, such marshal shall be liable to pay double the amount of all damages to the party aggrieved.").

decision of the court, *Dubay, J.*, denying his motion to disqualify Judge Sheridan. The defendants are: the town of West Hartford and certain members of its police department in their official and individual capacities, namely, James Strillacci, chief of police, Detective Donald Melanson, Officer Gino Giansanti, Officer Kimberly Sullivan, Officer Sean Walmsley, Sergeant John Silano, and Detective Michael Camillieri (collectively, town defendants); Dale J. Wallington, M.D., and Resilience Health Care, LLC (collectively, medical defendants); and Hartford Hospital, the Institute of Living, Radhika Mehendru, M.D., Carl Washburn, M.D., and Theodore Mucha, M.D. (collectively, hospital defendants).[3]

On appeal, the plaintiff claims that the court improperly rendered summary judgment despite the existence of issues of material fact regarding whether process was delivered to the marshal prior to the expiration of the various statutes of limitations for his causes of action, and that the court improperly denied the plaintiff's motion for disqualification of Judge Sheridan on the ground of judicial bias.[4] We agree that the court

[3] In his complaint, the plaintiff also had named Sergeant Jeffrey Rose as a defendant (in both his official and individual capacity) and Mary Commisso, a psychologist. Both Rose and Commisso, however, were removed as defendants prior to the rendering of summary judgment and are not parties to this appeal.

Each collective group of defendants, namely, the town defendants, the medical defendants, and the hospital defendants, separately are represented by their own attorneys. On appeal, the town defendants and the hospital defendants have joined in and adopted the portions of the medical defendants' appellate brief specifically addressed to the issues raised by the plaintiff.

[4] The town defendants raise in their brief as an alternative ground for affirmance a claim that the failure to comply with § 52-593a (b) is fatal in this case. Although this claim was not contained in the town defendants' preliminary statement of the issues and alternative grounds for affirmance, the plaintiff has addressed this claim in his reply brief. Because this matter presents a pure issue of law, we will consider this claim in part II of this opinion. The remaining defendants filed preliminary statements of the issues with multiple alternative grounds for affirmance, which they briefed. The plaintiff, although addressing these alternative grounds in his reply brief,

improperly rendered summary judgment, and, accordingly, we reverse in part and affirm in part the judgment of the trial court.[5]

Many of the underlying facts and the complicated procedural history of this case are not relevant to the issues on appeal. Accordingly, we omit them and set forth only the facts and history necessary for our consideration of the issues presented. The plaintiff alleged various wrongful conduct on the part of the defendants that he claims occurred between May 22, 2007, and June 8, 2007. He commenced this action by summons and complaint, executed on May 19, 2010. According to the marshal's return, which was signed by state Marshal John R. Griffin, the defendants all were served on June 9, 2010. Beginning on September 23, 2013, more than three years after this action was commenced, the town defendants, the medical defendants, and the hospital defendants each filed a motion for summary judgment claiming, inter alia, that the plaintiff's causes of action were time barred.[6] In response, the plaintiff contended

argues, nonetheless, that these alternative grounds should not be reviewed for the first time on appeal. We agree with the plaintiff and decline to exercise our discretion to address the additional alternative grounds on appeal. See *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 219, 928 A.2d 586 (2007) (when trial court has not ruled on all grounds raised in motion for summary judgment, Appellate Court has discretion to consider alternative grounds for affirmance), aff'd, 289 Conn. 57, 956 A.2d 579 (2008); see also *Skuzinski* v. *Bouchard Fuels, Inc.*, 240 Conn. 694, 703, 694 A.2d 788 (1997) (when trial court does not rule on merits of alternative grounds, we retain discretion to consider those grounds on appeal).

[5] The plaintiff also claimed that the court abused its discretion in denying his motion for reargument on the basis of newly discovered evidence related to the timeliness of the delivery of process to the marshal. Because we agree with the plaintiff's first claim and reverse the judgment granting the defendants' motions for summary judgment, his second claim, regarding the court's denial of his motion to reargue his opposition to those motions, need not be considered.

[6] We note that the medical defendants and the hospital defendants have filed neither an answer to the plaintiff's complaint nor specially pleaded a statute of limitations defense in this case. See Practice Book § 10-50 ("No facts may be proved under either a general or special denial except such

that Griffin had picked up process on May 20, 2010, at the office of Attorney A. Paul Spinella, his attorney at the time he commenced this action, thereby saving the late service pursuant to § 52-593a. See footnote 2 of this opinion. In three separate memoranda, the court, *Sheridan*, *J.*, granted the defendants' motions for summary judgment on the issue of the statutes of limitations, concluding that there was no genuine issue of material fact as to whether Griffin had received process prior to the running of the statutes of limitations, and that the defendants were entitled to judgment as a matter of law.

Thereafter, the plaintiff filed a motion to reargue and reconsider, claiming, in part, that he had newly discovered evidence in the form of e-mails that would further help to establish that Spinella's office gave process to Griffin on May 20, 2010. The court denied the plaintiff's motion.

The plaintiff also filed a motion to recuse and disqualify Judge Sheridan on the basis of alleged judicial bias, which was heard by Judge Dubay. Following the hearing, Judge Dubay denied that motion. The plaintiff subsequently filed a motion requesting that Judge Dubay articulate the basis for his denial of the motion to disqualify, which he granted. This appeal followed.[7] Additional facts will be set forth as necessary.

as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. Thus . . . *the statute of limitations . . . must be specially pleaded* . . . ." [Emphasis added.]) The plaintiff has not raised this as an issue in this case. Accordingly, we do not consider its import, if any.

[7] The plaintiff also filed a six page motion for articulation, requesting that Judge Sheridan further articulate the basis of his granting the defendants' motions for summary judgment, as well as the denial of the plaintiff's motion for reargument. Judge Sheridan issued an articulation in response.

I

The plaintiff first claims that the trial court improperly rendered summary judgment despite the existence of issues of material fact regarding whether process was delivered to Griffin, the marshal, prior to the expiration of the statutes of limitations. He also claims that the court improperly struck Spinella's affidavit. The plaintiff argues that the defendants never established that the process was not picked up by Griffin prior to the expiration of the statutes of limitations. He further argues that the court improperly weighed the evidence, made credibility determinations, and shifted the burden of proof to him, despite there being no evidence from the movants as to when process was received by Griffin, and then held him to a higher burden of proof than was appropriate for purposes of opposing summary judgment motions. The plaintiff additionally argues that the only burden he had when opposing summary judgment was to demonstrate an issue of material fact as to whether Griffin received process prior to May 22, 2010; he contends that he certainly met that burden but that the court, improperly, required him to *prove* that process had been delivered, and it failed to view the evidence in the light most favorable to the nonmoving party. We agree that there exists a genuine issue of material fact regarding the date that process was delivered to the marshal.

The following additional facts inform our review. In September and October, 2013, the town defendants and the hospital defendants each filed a motion for summary judgment on grounds that included the expiration of the applicable statute of limitations, both citing General Statutes § 52-577.[8] The hospital defendants also cited

[8] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

General Statutes § 52-584,[9] and the town defendants also cited General Statutes § 52-571c (c).[10]

In response to these motions for summary judgment, the plaintiff submitted memoranda in opposition in which he claimed, inter alia, that his causes of action were saved through the application of § 52-593a, and he included the affidavit of Griffin, who attested in relevant part that "process to be served [in this] case was delivered to [him] on May 20, 2010." In response, in February, 2014, the town defendants and the hospital defendants filed motions to strike Griffin's affidavit on the ground that it was not based on personal knowledge. In particular, they claimed that Griffin had testified during his deposition that he had no recollection of the

[9] General Statutes § 52-584 provides: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed."

The hospital defendants contended that a two year statute of limitations, pursuant to § 52-584, was applicable to count forty-three of the plaintiff's complaint, in which the plaintiff had alleged a violation of the patient's bill of rights pursuant to General Statutes § 17a-540 et seq. The plaintiff argued that the three year statute of limitations pursuant to § 52-577 applied to this count. For purposes of the summary judgment motion, the court assumed, without deciding, that the three year statute of limitations was applicable. For purposes of this appeal, we do the same.

[10] General Statutes § 52-571c provides: "(a) Any person injured in person or property as a result of an act that constitutes a violation of section 53a-181j, 53a-181k or 53a-181*l* may bring a civil action against the person who committed such act to recover damages for such injury.

"(b) In any civil action brought under this section in which the plaintiff prevails, the court shall award treble damages and may, in its discretion, award equitable relief and a reasonable attorney's fee.

"(c) No action shall be brought under this section but within three years from the date of the act complained of."

specific date upon which he had received process in this case and that he had signed the affidavit because Spinella's office asked him to sign it. The town defendants and the hospital defendants attached copies of Griffin's deposition to their motions to strike.

On March 11, 2014, the plaintiff filed an opposition to the defendants' motions to strike the Griffin affidavit, and he also included an affidavit from Spinella. In an order dated April 21, 2014, the court granted the motions to strike Griffin's affidavit, but, upon the request of the plaintiff, permitted him to submit the affidavit of Spinella.[11] The court also gave the defendants sixty days to depose Spinella regarding the facts and circumstances set forth in his affidavit.

On July 9, 2014, the hospital defendants filed a motion, entitled "Motion to Strike Affidavit of A. Paul Spinella and Supplemental Memorandum in Support of Motion for Summary Judgment." They sought to strike Spinella's affidavit on the grounds that the affidavit was not based on personal knowledge and that it contained hearsay. Among the documents submitted in support of the motion to strike was Spinella's certified deposition.

On July 17, 2014, the town defendants filed a similar supplemental motion for summary judgment and

[11] Spinella's affidavit provided:

"1. My name is Paul Spinella and I am over the age of eighteen. I know and understand the importance of an oath. I made the following statements under oath.

"2. I represented the [p]laintiff in this matter at the time the lawsuit was initially filed.

"3. I was acutely aware of the statute of limitations in this matter.

"4. On May 19, 2010, I executed the summons with attached complaint, initiating this lawsuit.

"5. My law office used the services of [S]tate Marshal John Griffin exclusively for all service of processes. Our practice was for him [to] come to pick up all documents for service at my office.

"6. The summons and complaint in this matter was personally retrieved from my office by Marshal Griffin on May 20, 2010."

motion to strike, which specifically incorporated the July 9, 2014 motion of the hospital defendants. They also contended that Griffin's failure to endorse on his return of service the date he received process in this case was fatal.[12] See footnote 2 of this opinion. The plaintiff filed an opposition to these motions, attaching Spinella's affidavit and portions of his deposition. The hospital defendants and the town defendants each filed a reply. On September 12, 2014, the court rendered a decision striking in part Spinella's affidavit on the ground that it was not based on personal knowledge because Spinella did not witness, firsthand, the marshal pick up the process.

On September 25, 2014, the medical defendants filed a motion for permission to file a supplemental motion for summary judgment, alleging that, in light of the court's recent rulings on the other defendants' motions to strike, the plaintiff's causes of action against them also were barred by § 52-577.[13] On September 30, 2014, the court granted permission to the medical defendants.

Eight days later, on October 8, 2014, the court, in three separate memoranda of decision, rendered summary judgment on behalf of all defendants. Specifically, the court rendered summary judgment on the ground that the plaintiff had failed to establish that process had been delivered to Griffin prior to the running of the applicable statutes of limitations in this case.[14]

The plaintiff claims that the court improperly struck Spinella's affidavit and that it improperly rendered summary judgment despite the existence of issues of material fact regarding whether process was delivered to

[12] The trial court did not decide this issue.

[13] The medical defendants had filed their original motion for summary judgment on August 8, 2013, on various grounds not including the running of the statute of limitations.

[14] It does not appear that the plaintiff had an opportunity to respond to the medical defendants' supplemental motion for summary judgment before the court rendered judgment.

Griffin prior to the expiration of the statutes of limitations. We agree that the court improperly rendered judgment on the basis that there was no genuine issue of material fact as to whether Spinella delivered process to Griffin prior to the expiration of the applicable three year statutes of limitations.

"The principles that govern our review of a trial court's ruling on a motion for summary judgment are well established. 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. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . .

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist. . . . The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . Once the moving party has met its burden [of production] . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t [is] incumbent [on] 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. . . .

"On appeal, the reviewing 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. . . . [R]eview of the trial court's decision to grant [a party's] motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, 302 Conn. 408, 421–22, 28 A.3d 302 (2011), cert. denied, 567 U.S. 924, 132 S. Ct. 2773, 183 L. Ed. 2d 653 (2012).

"Summary judgment is appropriate on statute of limitations grounds when the material facts concerning the statute of limitations [are] not in dispute . . . ." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 313, 77 A.3d 726 (2013). "The question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo." (Internal quotation marks omitted.) *Targonski* v. *Clebowicz*, 142 Conn. App. 97, 106, 63 A.3d 1001 (2013). "A plaintiff relying upon a saving statute [to defeat a statute of limitations defense] must demonstrate compliance with its provisions." (Internal quotation marks omitted.) *Gianetti* v. *Connecticut Newspapers Publishing Co.*, 136 Conn. App. 67, 74, 44 A.3d 191, cert. denied, 307 Conn. 923, 55 A.3d 567 (2012).

Here, the plaintiff argues that this case is not barred by any statute of limitations because process was given to Griffin timely pursuant to § 52-593a and that the documents available to the court when considering the defendants' motions for summary judgment established, at the very least, a genuine issue of material fact on this topic, which is all he was required to establish.

"Section 52-593a . . . extends the period of time for the serving officer to make the delivery. Process must still be received by the serving officer on time. In other words, the plaintiff must get the process to the serving

officer within the period allowed by the statute. . . . All that § 52-593a requires . . . is that the process be personally delivered [to the marshal]. It does not require that the delivery be made by the plaintiff, his attorney, or any particular individual. The person making the delivery has no statutory role to perform respecting the delivery. He is neither required nor permitted to endorse his doings on the return. In addition, the statute does not detail the manner of making delivery. The word deliver includes a handing over for the purpose of taking even though both acts do not occur simultaneously. . . . The fact that the extension statute becomes operative only where the process has been delivered before the running of the statute of limitations, and the fact that the serving officer is required to attest to the date of delivery suggest that the purpose of the statute is to ensure that the process is received on time by the officer." (Footnotes omitted; internal quotation marks omitted.) Id., 73–74. "A plaintiff relying upon a 'saving statute' must demonstrate compliance with its provisions. . . . [If] the plaintiff fail[s] to establish a genuine issue of material fact as to his compliance with the provisions of § 52-593a, the court properly render[s] summary judgment . . . ." (Citation omitted.) Id., 74.

In this case, all parties agree that the defendants were served on June 9, 2010, and that this date was, at a minimum, one day beyond the applicable statutes of limitations. The question we are called upon to answer in this instance is whether the court properly ruled that the evidence submitted in support of, or in opposition to, the motions for summary judgment failed to demonstrate that there existed a genuine issue of material fact as to whether Griffin received process on May 20, 2010. We conclude that, even without the consideration of Griffin's or Spinella's affidavit, there existed evidence in the form of Spinella's deposition testimony to demonstrate the existence of a genuine issue of material fact

as to the date process was delivered to Griffin. Accordingly, we conclude that the court improperly rendered summary judgment on the ground that the plaintiff had failed to demonstrate the existence of such a genuine issue.

During his deposition, which was before the court when it ruled on the various motions for summary judgment, Spinella was question by Attorney Michael R. McPherson, counsel for the hospital defendants, and testified in relevant part as follows:

"Q. Now, I've marked what looks to be your affidavit as defendants' exhibit three. . . . Now, is that your affidavit and your signature?

"A. Looks like it.

"Q. Now, it says in the affidavit that you used Marshal Griffin exclusively for service of process in 2010, is that correct?

"A. To the best of my memory, yes.

"Q. Now, in May of 2010, who had the responsibility at your firm to ensure that the marshal received the process for service?

"A. Bonnie St. Onge, to the best of my memory.

"Q. Now, who is Bonnie St. Onge?

"A. My office manager at that time. . . .

"Q. Does Bonnie St. Onge work for your firm still?

"A. No. . . . She's deceased. . . .

"Q. Now, back in May of 2010, can you describe the typical process at your firm as to how, once a complaint was drafted and a summons filled out, those papers were delivered to the marshal . . . .

"A. Well, it depended on the urgency of it. If it was really urgent, he would be called and asked to personally come and get it so we wouldn't have to wait on the mail.

"Q. And who would make the call typically in May of 2010 to the marshal to come pick it up?

"A. Bonnie.

"Q. Now, was it ever your practice to personally hand the process to the marshal when he came to your office, or did you leave that to Bonnie?

"A. We'd leave it on the end of the counter. But he would come in and talk to the staff; he wouldn't just grab it. And it would be handed over to him.

"Q. When you say you'd leave it on the counter, was that counter like a receptionist's desk?

"A. Yes. When you come in my office, there's a long counter, and it's like a wall with a shelf on it. And at the end of that, that would be for pickup.

"Q. Now, did someone sit at that desk or counter area in your office back in May of 2010?

"A. Yes. There were two—Bonnie's office was right there. And I also had a secretary that sat there.

"Q. And what was the name of your secretary who sat right there in May of 2010?

"A. It would have been Bonnie Kiniry.

"Q. Now, I'm trying to picture this in my mind. I've never been to your office, so I apologize. There is a counter that is right when you walk into your office?

"A. Uh-huh.

"Q. And did Bonnie Kiniry sit right behind that counter?

"A. She [sat] near to it. And Bonnie St. Onge [had] an open door that open[ed] right up on the counter.

"Q. Did you typically keep a written record of when the marshal picked up the process in your cases in 2010?

"A. No.

* * *

"Q. Now, on defendants' exhibit three, which is your affidavit, paragraph 6 reads: 'The summons and complaint in the matter was personally retrieved from my office by Marshal Griffin on May 20, 2010.' Do you have an independent specific recollection of Marshal Griffin taking delivery of the process in this case?

"A. Well, if you're asking me if I, personally, handed it over to him, I did not. But you have to understand the circumstances that surrounded this. I had an enormously demanding client, and there was a lot of concern about the statute of limitations, and there were some revisions that had been made in the complaint at the last minute. And so we were, you know, very anxious to get it in his hands. And, for that reason, we—I didn't contact him personally. I believe that it was Bonnie St. Onge that I asked to do that. It was put on the end of the counter. And I asked to be told, to confirm that he had picked this up, and there was a confirmation made. And I remember going down there, and the complaint was never there. So it was further confirmation that it had been picked up. You know, this was special circumstances with this complaint because of the statute and a client, like I said, that was very demanding. So that's why it sticks out in my mind.

"Q. Okay. I just want to break that down a little bit. So you did not hand the process to Marshal Griffin for delivery in this case?

"A. No.

"Q. You did not contact Marshal Griffin personally about picking up process?

"A. I believe that I did talk to him on the phone beforehand.

"Q. Okay.

"A. Because, not only did it have to be picked up, but it was going to be a difficult service. And, in point of fact, after it was picked up, I talked to him again—I talked to him personally. I don't know how many times, about the service itself, you know, confirmed that he had picked it up beforehand, but also to talk about the service because there was an issue about getting personal service here. And so that, you know, was another cause for communication with him.

"Q. So just if I could back up a little bit, did you witness Marshal Griffin pick up the process from your office?

"A. Personally?

"Q. Yes.

"A. No.

"Q. Do you have any written or electronic record indicating that Marshal Griffin took delivery of the process on a date certain?

"A. No, but I had an oral confirmation from my staff.

"Q. And when you say you had oral confirmation from your office staff, who told you that the marshal had picked up the process?

"A. I believe it was Bonnie St. Onge.

"Q. So the basis for your statement that Marshal Griffin picked up the process on May 20, 2010, is what Bonnie St. Onge told you that he did.

"A. Yes. To the best of my memory, it was somebody from my staff. To the best of my memory, it was Bonnie St. Onge. What I remember is just getting the confirmation because it was a concern, and then not seeing the complaint at the end of the counter when I did go down there.

"Q. What is your understanding of when the statute of limitations was going to expire in this case?

"A. I don't know. Sometime shortly after the marshal picked up the writ.

"Q. But you don't know the exact date?

"A. I'd have to review something. It was, you know, a day or so afterwards, shortly afterwards.

"Q. . . . Do you recall how close the statute of limitations was about to expire in [other] particular cases?

"A. No, but it wasn't the only issue here about the statute expiring. Like I said, I had an enormously demanding client, which had revved up this whole issue. That, and having to revise the complaint at the last minute, those are all extraordinary circumstances that, you know, I can't remember ever dealing with to this extent in any other case that I've had.

"Q. And when you say you had an enormously demanding client, what do you mean?

"A. Well, I'd rather not get into that . . . .

"Q. So, it's your testimony Attorney Spinella that roughly four years later, when you signed this affidavit, you have a specific recollection of what occurred on May 20, 2010?

"A. Because of the client and the case, yes. Everything about the case is pretty clear to me.

"Q. You remember May 20, 2010, precisely?

"A. Well, it isn't so much the date that I know, [it is] that it was directly before the statute was going to expire. And you know, that's why it sticks out in my mind.

"Q. But you attested that Marshal Griffin took delivery of the process on a specific day.

"A. Right.

"Q. And I'm asking you, you didn't hand it to him, you didn't contact him personally, you didn't witness him take it. You were told by your staff member that he had picked it up. And I'd like to know the basis for your affidavit or your statement that it was specifically May 20, 2010.

"A. Yes, I believe that it was the day before the statute was going to expire.

"Q. And you have no record of Marshal Griffin, no written documentary evidence of when Marshal Griffin came?

"A. No. Had I known I was going to be deposed in this case, I would have kept a written record.

"Q. So other than the oral confirmation that you received from Bonnie St. Onge, the basis of that statement is you coming down and seeing the process gone from the countertop?

"A. That and having it orally confirmed with the marshal after he picked it up that he had indeed picked it up on the date that I said.

"Q. So your testimony is that marshal—you spoke to Marshal Griffin after he picked it up, and he told you that he had picked it up on May 20?

"A. Yes. I got it before the statute expired. And we went on to talk about how he was going to get service.

"Q. Now, you know that Marshal Griffin has been deposed in this case?

"A. I've been told that, yes.

"Q. Marshal Griffin never testified—I took his deposition in February, and Marshal Griffin never testified to any conversation that he had with you in which he confirmed May 20. In fact, I'll represent to you [that] he said the first time he ever heard or saw that date is when he came to your office to sign his affidavit that your office prepared . . . . And it's your testimony that Marshal Griffin spoke to you on the phone in 2010 and confirmed that he took delivery of it on May 20, 2010.

"A. Yes. Did he tell you about all the trouble he had with the service and how that, all by itself, was an occasion for us to talk more than once? And why is it so hard to believe—and you yourself know that there was an issue about the service and what was represented at the hospital. Why is it so hard to believe that he talked to me about that, and, in the course of that, there was a confirmation that he did indeed pick up the complaint as I just said? I mean, it's only natural to talk about that. In addition to that—

"Q. Attorney Spinella, I'm not asking you whether it's difficult to believe that you would speak to Marshal Griffin at all. I'm asking you that—Marshal Griffin—no, he did not tell me about the difficulties he had with service.

"A. There you go. . . .

"Q. So putting aside the conversations that you had with Marshal Griffin about the difficulties of service,

I'm talking specifically the day on which he took delivery. Why would the day on which he took delivery be a subject of conversation with you during those time frames? How would that have any relationship to the difficulty of serving someone in hand or abode or with their office manager?

"A. Because it was the day before the statute expired. It comes in a package. Here's a gentleman that's concerned about doing a proper service. First issue is to confirm that he got this before the statute expired, which he confirmed. Then we went on to the next natural topic of conversation—the difficulty posed by your clients in getting personal service. So we talked about both these things. It's only natural."

In deciding a motion for summary judgment, "[i]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Byrne* v. *Burke*, 112 Conn. App. 262, 268, 962 A.2d 825, cert. denied, 290 Conn. 923, 966 A.2d 235 (2009).

In the present case, even if we assume without deciding that the court properly struck Spinella's affidavit, the court had before it his deposition testimony, which sufficiently raises a genuine issue of material fact as to whether Griffin received process on May 20, 2010. Spinella testified that when there was an urgency in the time for delivery of process to the marshal, he or someone in his office would telephone the marshal and ask him to pick up the process at their office. He also testified that in 2010, he exclusively used Griffin for service of process. He stated that the practice of the office was to leave the process at the end of the counter, where it readily could be given to the marshal when

he arrived to pick it up. Spinella also testified that on May 20, 2010, process was left for Griffin, and that, later, the complaint was no longer on the counter, thereby confirming for him that it had been picked up. We conclude that this in and of itself was enough to create a reasonable inference, if believed, that Griffin picked up process at Spinella's office on May 20, 2010. Spinella also stated that his staff gave him oral confirmation that Griffin had picked up the process.[15]

But, in addition to this testimony, Spinella also testified that his memory surrounding these events was very clear because they were so close to the running of the statutes of limitations for the plaintiff's causes of action that he was paying close attention to the dates and to making sure that process was delivered to Griffin timely. Spinella testified that, the day after Griffin picked up the process, he telephoned Griffin to go over some possible problems that might be encountered with service in this case, and that Griffin confirmed, during that phone conversation, that he had picked up the process the day before, on May 20, 2010. See footnote 15 of this opinion. This testimony, if believed, establishes that process was delivered to Griffin on May 20, 2010, before the running of the statute of limitations.

A review of the evidence submitted either in support of or in opposition to the defendants' motions for summary judgment demonstrates the existence of a genuine issue of material fact as to whether process was delivered to Griffin on May 20, 2010, thereby saving the plaintiff's causes of action through the application of § 52-593a. Accordingly, the court improperly rendered summary judgment on this ground.

[15] Although this may be considered inadmissible hearsay (barring any exception), it was the defendants who submitted Spinella's deposition and no objection was made on hearsay grounds.

II

The town defendants raise in their brief as an alternative ground for affirmance a claim that "under the circumstances of this case, the plaintiff's failure to comply with § 52-593a (b) is fatal." They argue that "where a marshal's return is silent as to the date of delivery of process, there is a fatal failure to comply with the requirement of § 52-593a (b), and the saving statute is unavailable." (Internal quotation marks omitted.) We disagree.

The proper interpretation of § 52-593a (b) is a question of statutory construction over which our review is plenary. See *Dorry* v. *Garden*, 313 Conn. 516, 525, 98 A.3d 55 (2014). "That review is guided by well established principles of statutory interpretation . . . . As with all issues of statutory interpretation, we look first to the language of the statute. . . . In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended. . . . Furthermore, [i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Citations omitted; internal quotation marks omitted.) Id.

Section 52-593a (b) provides: "In any such case, the officer making service shall endorse under oath on such officer's return the date of delivery of the process to such officer for service in accordance with this section." In interpreting the language of § 52-593a (b), however, we do not write on a clean slate, but are bound by our previous judicial interpretations of the language and the purpose of the statute. See *Dorry* v. *Garden*, supra, 313 Conn. 526.

In *Dickerson* v. *Pincus*, 154 Conn. App. 146, 153–55, 105 A.3d 338 (2014), we discussed whether § 52-593a was mandatory or directory, and we concluded that it was directory. "The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words. . . .

"The essence of the thing to be accomplished in § 52-593a is to allow an action to be brought even though process is served after the expiration of the limitations period, when process is delivered to the marshal within the limitations period and the marshal serves process within thirty days of delivery. [Section] 52-593a is a remedial provision that allows the salvage of an [action] that otherwise may be lost due to the passage of time. . . . [R]emedial statutes must be afforded a liberal construction in favor of those whom the legislature intended to benefit. . . . Our preference is to avoid a termination of proceedings due to mere technical imperfection." (Citations omitted; internal quotation marks omitted.) Id., 153–54.

Specifically as to subsection (b) of § 52-593a, we opined: "[S]ubsection (b) of § 52-593a does not address the essence of the thing to be done, which . . . [is] delivery to the marshal within the period of limitations; rather, it provides the manner in which compliance with subsection (a) of § 52-593a is supposed to be shown." Id., 154.[16] "The marshal's failure to comply with the

[16] "A comparison between the facts of this case and those of *Gianetti* v. *Connecticut Newspapers Publishing Co.*, [supra] 136 Conn. App. 67 . . . is instructive. In *Gianetti*, there was no evidence that the marshal had

requirements of subsection (b) of § 52-593a does not preclude the application of the savings statute . . . . [T]he provisions of subsection (b) are directory rather than mandatory, and the failure of the marshal to include the date of delivery in the return is not a fatal jurisdictional defect depriving the plaintiff of his day in court." Id., 153.

Because this court already has concluded that § 52-593a (b) is directory, rather than mandatory, and that the failure of the marshal to include the date on the return is not a fatal defect, this claim merits no further discussion. "It is axiomatic that [a] decision of [an appellate court] is a controlling precedent until overruled or qualified. . . . [S]tare decisis . . . serve[s] the cause of stability and certainty in the law—a condition indispensable to any well-ordered system of jurisprudence . . . ." (Internal quotation marks omitted.) *State* v. *Jahsim T.*, 165 Conn. App. 534, 545, 139 A.3d 816 (2016); see also see also *Burns* v. *Adler*, 158 Conn. App. 766, 792, 120 A.3d 555 (previous decision of Appellate Court binding "until it is overruled either by our Supreme Court or by an en banc panel of this court"), cert. granted on other grounds, 319 Conn. 931, 125 A.3d 205, 206 (2015).

III

The plaintiff next claims that trial court improperly denied his motion to disqualify Judge Sheridan. He

received the process within the prescribed period; id., 72; in those circumstances, the failure of the marshal to include the date of delivery in the return of process was fatal. Id., 74. This court mentioned the duty of the marshal to comply with the requirements of § 52-593a (b) and that the plaintiff had not shown the marshal's compliance with subsection (b). Id., 72. The court went on, however, to discuss in some detail whether proof of mailing the process to the marshal constituted delivery for the purpose of the saving statute. Id., 73. Such discussion would have been entirely immaterial had the only dispositive question been the marshal's compliance with § 52-593a (b). The court in *Gianetti* further noted that because no amended return or affidavit had been filed, it did not have to decide whether

argues that he had two grounds on which he sought to disqualify the judge. First, he claims that Judge Sheridan's statements before the Judiciary Committee[17] during his confirmation hearing to become a judge of the Superior Court demonstrated a bias in favor of police officers. Second, he claims that when Judge Sheridan was the town attorney for the town of Manchester for approximately five months during 2010, Attorney Scott M. Karsten, who is one of the attorneys on the defendants' side in the present case, represented Manchester in a case involving, inter alia, Manchester police officers, thus creating a relationship that could be characterized as that of "attorney-client under the Rules of

an amended return or affidavit would have sufficed to cure the defect. Id., 74." *Dickerson* v. *Pincus*, supra, 154 Conn. App. 155 n.8.

[17] The plaintiff contends that "Judge Sheridan should have disqualified himself because his statement before the legislature that 'I don't believe police officers perjure themselves' would cause an objective observer to reasonably question Judge Sheridan's impartiality." A review of the Judiciary Committee's public hearing on the confirmation of Judge Sheridan reveals the following relevant colloquy:

"Rep. [Minnie] Gonzalez: Okay. . . . When you have a case, and, let's say the police officers that are involved—police officers are involved and they were to testify. Do you believe—do you always believe that police officers, and prosecutors also, they all tell the truth to the judge? Do you really believe that?

"David M. Sheridan: I don't believe police officers perjure themselves. I just—if it happens, I would imagine it's exceedingly rare, but I think police officers, I believe, you know, [I have been] examining witnesses in the courts of this state for twenty-five years, and witnesses can get up there and testify, and they truly believe they're telling the truth. They truly believe they're being honest under oath, but what they're saying is not true, the absolute truth, and I believe police officers are subject to all of the frailties of human beings that we—regular lay witnesses testify incorrectly . . . . We ask that routinely to jurors when we panel jurors. You know, a police officer is going to testify in this case, would you be more inclined to believe the testimony of a police officer and, you know, I could probably count [on] one hand the times that people have said they would believe a police officer no matter what. . . . So I think most people have that concept of, you know, there's not reason to necessarily believe a police officer. His testimony has to still stack up and still add up. It has to still make sense." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 15, 2010 Sess., pp. 4769–70.

Professional Conduct," or as that of master-servant. The plaintiff claims that his motion should have been granted because Judge Sheridan was disqualified from further action in this case on the basis of canon 2 of the Code of Judicial Conduct, Rule 2.11.[18] The defendants

[18] Canon 2 of the Code of Judicial Conduct, rule 2.11 provides: "(a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances:

"(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

"(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

"(A) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

"(B) acting as a lawyer in the proceeding;

"(C) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

"(D) likely to be a material witness in the proceeding.

"(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

"(4) The judge has made a public statement, other than in a court proceeding, judicial decision, or opinion that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

"(5) The judge:

"(A) served as a lawyer in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

"(B) served in governmental employment and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; or

"(C) was a material witness concerning the matter.

"(b) A judge shall keep informed about the judge's personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

"(c) A judge subject to disqualification under this Rule, other than for bias or prejudice under subsection (a) (1), may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification, provided that the judge shall disclose on the record the basis of such disqualification. If, following the disclosure,

argue that this claim was waived because the plaintiff did not file his motion for disqualification until October 28, 2014, twenty days after the motions for summary judgment were granted on October 8, 2014, and, in the alternative, that the court properly denied the motion because there neither was evidence of bias nor of an attorney-client or master-servant relationship between Judge Sheridan and Attorney Karsten. We conclude that the court properly denied the plaintiff's motion to disqualify Judge Sheridan.

"A trial court's ruling on a motion for disqualification is reviewed for abuse of discretion. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"Pursuant to our rules of practice; see Practice Book § 1-22; a judge should disqualify himself from acting in

the parties and lawyers agree, either in writing or on the record before another judge, that the judge should not be disqualified, the judge may participate in the proceeding.

"(d) Notwithstanding the foregoing, a judge may contribute to a client security fund maintained under the auspices of the court, and such contribution will not require that the judge disqualify himself or herself from service on such a client security fund committee or from participation in a lawyer disciplinary proceeding or in any matter concerning restitution or subrogation relating to such a client security fund.

"(e) A judge is not automatically disqualified from sitting on a proceeding merely because a lawyer or party to the proceeding has filed a lawsuit against the judge or filed a complaint against the judge with the judicial review council. When the judge becomes aware that such a lawsuit or complaint has been filed against him or her, the judge shall, on the record, disclose that fact to the lawyers and parties to the proceeding before such judge and shall thereafter proceed in accordance with Practice Book Section 1-22 (b).

"(f) The fact that the judge was represented or defended by the attorney general in a lawsuit that arises out of the judge's judicial duties shall not be the sole basis for recusal by the judge in lawsuits where the attorney general appears."

a matter if it is required by rule 2.11 of the Code of Judicial Conduct, which provides in relevant part that [a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned . . . . In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . and that they are able to put aside personal impressions regarding a party . . . the burden rests with the party urging disqualification to show that it is warranted." (Citations omitted; internal quotation marks omitted.) *Stefanoni* v. *Darien Little League, Inc.*, 160 Conn. App. 457, 464–65, 124 A.3d 999 (2015).

After a hearing before the court, *Dubay, J.*, on the plaintiff's motion to disqualify Judge Sheridan, Judge Dubay specifically ruled: "The motion is denied for the following reasons, inter alia:

"1. The 'pull quote' of Judge Sheridan's testimony before the Judiciary Committee, upon which the plaintiff's first ground for requesting relief entirely relies, is not, in fact, a fair characterization of Judge Sheridan's testimony regarding perjury in general and police officers as witnesses in particular.

"2. Further, the basis of Judge Sheridan's order granting summary judgment did not in any way involve the testimony of police officers.

"3. The second ground advanced by the plaintiff in support of his motion, that, at some time in the past, there was a four or five month cocounsel relationship between Judge Sheridan and Attorney Karsten [that] mandates recusal, has no basis in fact. Counsel for the plaintiff conceded at argument that there is no evidence to support his claims in that regard, and, rather, he 'assumed' the allegations in his certificate of good faith dated October 28, 2014."

After reviewing the record, including the plaintiff's motion and its attachments, as well as the transcript of the hearing before Judge Dubay, we agree with Judge Dubay that the quoted language relied on by the plaintiff of Judge Sheridan's testimony before the Judiciary Committee is not an accurate representation of Judge Sheridan's full answer regarding the truthfulness of police officers when they are testifying under oath. See footnote 17 of this opinion. We conclude, therefore, that the plaintiff failed to show that Judge Sheridan's testimony demonstrated bias in favor of police.

Additionally, we agree with Judge Dubay that the plaintiff's attorney conceded during the hearing on the plaintiff's motion that he merely had "assumed" the allegations in his certificate of good faith that there had been an attorney-client or a master-servant relationship between Attorney Karsten and Judge Sheridan for an approximate five month period during 2010.[19] Indeed,

[19] The plaintiff's attorney specifically told the court during the hearing on the plaintiff's motion to disqualify Judge Sheridan: "I drafted the motion based on what I read the [Manchester] town code to be and what I assumed Judge Sheridan and Attorney Karsten's relationship would have been had the town code been followed. I did not know [the Connecticut Interlocal Risk Management Agency (CIRMA)] was involved in that. I don't think I could have done a bill of discovery or any discovery on this matter at that point. So, I had to—once I had the fact in my hand that Attorney Karsten represented . . . Manchester and then Attorney Sheridan was the town attorney for Manchester, those are the inferences that I had to draw based on the town code . . . . I'll acknowledge that I have since been disabused of certain of those notions by Attorney Karsten's affidavit, but I don't for a moment think that it was wrong to draft the motion the way in which I did."

there simply is no evidence to support this assumption. Accordingly, we conclude that the court properly denied the plaintiff's motion to disqualify Judge Sheridan.

The judgment is affirmed as to the plaintiff's motion for disqualification; the summary judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

Attorney Karsten's affidavit provided in relevant part:

"5. . . . I was counsel for several defendant Manchester police officers and the [t]own of Manchester in certain litigation [by a plaintiff known as Morales] . . . . I represented these defendants through the conclusion of the action in June, 2012.

"6. I was selected and retained for this representation exclusively by CIRMA . . . which was and is the municipal insurance company for many cities and towns in Connecticut, including Manchester.

"7. Throughout the period of my involvement in the Morales case, I and my law firm submitted all invoices for legal services rendered directly to CIRMA, which duly approved and paid them. . . .

"10. Based on my thirty plus years of experience in representing municipal entities in cases such as Morales, it is entirely customary for insurance defense counsel to exclusively handle the litigation of which they are retained, with minimal or no involvement of a town attorney absent a conflict of some unusual development.

"11. During the five months of [then Attorney] Sheridan's service as Manchester Town Attorney, I believe I had no interactions with him whatsoever—not in person, on the phone, via e-mail, or other correspondence—regarding the Morales case or any other matter.

"12. At no time did Town Attorney Sheridan ever direct, review, approve, or, in any way, supervise my work on behalf of the Manchester defendants in the Morales case . . . .

"14. There is no factual basis whatsoever for the claims to the contrary set forth in [the] [p]laintiff's [m]otion."

STATE OF CONNECTICUT *v.* ERICK L.*
(AC 36948)

Gruendel, Alvord and Prescott, Js.**

Syllabus

Convicted of sexual assault in the fourth degree and risk of injury to a child, the defendant appealed to this court. He claimed, inter alia, that the trial court violated his rights to confrontation and to present a defense when it ruled that the rape shield statute (§ 54-86f) prohibited him from introducing certain evidence of the minor victim's sexual relationship with her boyfriend. The defendant began sexually abusing the victim when she was about ten years old. When the victim was twelve years old, she told her grandmother that the defendant had been sexually abusing her. About one month before the victim told her grandmother, the defendant found certain letters that the victim's boyfriend had written to the victim that pertained to a sexual relationship between them. The defendant thereafter grounded the victim and prohibited her from seeing her boyfriend. After her grounding, the victim and the defendant argued often. The defendant sought to admit into evidence the letters and testimony from the victim about her sexual relationship with her boyfriend to rebut an inference that her allegations against the defendant must have been true because a child her age otherwise would lack the sexual knowledge that was necessary to make up the allegations. The defendant also sought to use the evidence to show that the victim had a motive to falsely accuse him in retaliation for his having ended her sexual relationship with the boyfriend. The trial court denied the defendant's motions to admit the evidence, ruling that he could elicit evidence that the letters had caused an argument, but that he was prohibited under § 54-86f from introducing evidence about the sexual nature of the victim's relationship with her boyfriend. *Held*:

1. The trial court did not abuse its discretion by denying the defendant's motions to admit into evidence certain testimony from the victim and certain letters to her from her boyfriend that pertained to their sexual relationship: although the proffered evidence was material, as it pertained to the victim's motive to accuse the defendant, and was relevant under § 54-86f in that each factual link in the chain of evidence that connected it to the elements of the crimes tended to support the next

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

factual link, the trial court's exclusion of the evidence did not violate the defendant's rights to confrontation and to present a defense; the trial court did not entirely prevent the defendant from developing before the jury his theory that the victim falsely accused him of sexually abusing her in retaliation for his having taken away certain of her privileges, including her friendship with her boyfriend, but, rather, allowed him to present evidence of that punishment and its effects on the victim, and precluded him from introducing evidence only to the extent that it revealed that the victim and her boyfriend were sexually active.

2. This court could not conclude that the trial court abused its discretion by seating a juror whom the defendant claimed had stated during voir dire that children were less likely to lie than adults: the juror stated that he would not necessarily believe a teenager over an adult, but would evaluate the witnesses' credibility individually on the basis of their demeanor, that he would have to hear both sides during the defendant's trial to understand what had happened, and that he understood that he could consider only the testimony and exhibits at trial, and would limit his deliberations to the evidence presented; moreover, although the juror previously had reported an incident in which a child told him that a neighbor was doing things that were out of the ordinary, the juror stated that he would treat that incident as though it did not exist.

Argued February 3—officially released September 20, 2016

Procedural History

Substitute information charging the defendant with three counts each of the crimes of sexual assault in the fourth degree and risk of injury to a child, and with the crime of attempt to commit sexual assault in the first degree, brought to the Superior Court in the judicial district of Waterbury, where the court, *Cremins*, *J.*, denied the defendant's motions to admit certain evidence; thereafter, the matter was tried to the jury; verdict of guilty of two counts each of sexual assault in the fourth degree and risk of injury to a child; subsequently, the court, *Agati*, *J.*, rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Adele V. Patterson, senior assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's

attorney, and *Elena Palermo*, assistant state's attorney, for the appellee (state).

Opinion

GRUENDEL, J. The defendant, Erick L., appeals from the judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[1] On appeal, the defendant raises two claims: (1) the trial court violated his rights under the sixth amendment to confront the witnesses against him and to present a defense by holding that the rape shield statute, General Statutes § 54-86f, prohibited him from introducing evidence of the sexual nature of the victim's prior relationship with her boyfriend; and (2) the court violated the defendant's right to trial by an impartial jury under the sixth amendment when it seated a juror who believed that children were less likely to lie than adults. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts after the conclusion of the evidence. The victim was born in 1997; the defendant was born in 1984. In 2004, the victim's mother met and began dating the defendant. He eventually moved in with the victim's mother, and they lived together at various addresses between then and 2010. Initially, the victim got along well with the defendant, but, beginning in 2007, he began touching the victim inappropriately. One day, in the kitchen of the apartment where they were then living, he grabbed the victim's buttocks. The victim told

[1] The jury found the defendant not guilty of three other charges: (1) a third charge of sexual assault in the fourth degree; (2) a third charge of risk of injury to a child; and (3) a charge of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (2).

her mother about the incident, and her mother asked the defendant if this was true. The defendant denied it, and the victim's mother did not pursue the matter further. The defendant confronted the victim once she was alone in her room and angrily demanded to know why she was lying to her mother. Although the victim knew that what the defendant had done was wrong, she felt as if her mother did not believe her, and so she later told her mother that maybe she had "take[n] it the wrong way."

The family moved to a new apartment at the end of 2008. A few months after the move, the defendant resumed touching the victim inappropriately. The abuse escalated, with the defendant touching the victim's buttocks, breasts, and vagina. He forced the victim to touch his penis, on one occasion ejaculating on her hand. He told the victim that one day he was going to rape her. At the time, the victim was eleven years old.

The victim began cutting her legs with her fingernails and taking pills to cope with the abuse. She grew sullen and would lash out at people. Although the victim had a good relationship with her mother, she did not discuss the abuse with her mother because her mother had not believed her the first time, and she did not think her mother would believe her the second time. Eventually, in November, 2009, the victim—then twelve years old—told her boyfriend that the defendant was touching her. Her boyfriend told his mother, who did not do anything. Her boyfriend also stopped asking the defendant for rides home when he visited the victim, so that the victim would not have to be alone with the defendant on the ride back.

Finally, in January, 2010, the victim told her grandmother about the defendant touching her. She had called her grandmother because she was angry at the defendant for taking a space heater out of her room during the winter while the apartment's heating system

was broken. She testified that at the time she was frustrated and angry, and had been holding those emotions inside for almost one year. During the phone call to her grandmother, "[i]t just all came out," and she told her grandmother about how the defendant had been touching her. The grandmother drove over and picked the victim up the next day, and the victim's cousin had her write down in a notebook what the defendant had done to her. The grandmother then called the victim's mother over to talk about it with several other family members and friends there for support. They called the police. The defendant moved out that day. He was later arrested and charged with one count of attempt to commit sexual assault in the first degree, as well as multiple counts of sexual assault in the fourth degree and risk of injury to a child.

A jury found the defendant guilty of two counts of sexual assault in the fourth degree and two counts of risk of injury to a child. The jury found him not guilty of one count of attempted sexual assault in the first degree, one count of sexual assault in the fourth degree, and one count of risk of injury to a child. The court imposed a sentence of fifteen years incarceration, suspended after ten years of mandatory minimum time,[2] with ten years of probation. This appeal followed.

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts . . . of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . and [if] the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

We note that although § 53-21 has been amended several times since the events at issue here, those amendments are not relevant to this appeal. For convenience, we refer to the current revision of § 53-21 as codified in the 2016 supplement to the General Statutes.

Here, the court imposed consecutive five year mandatory minimum sentences on the conviction of two counts of risk of injury to a child. See *State* v. *Polanco*, 301 Conn. 716, 723, 22 A.3d 1238 (2011) ("[t]he determination

I

The defendant's first claim is that the court violated his rights under the sixth amendment to confront the witnesses against him and to present a defense when, pursuant to the rape shield statute, § 54-86f, it excluded evidence of the sexual nature of the victim's prior relationship with her boyfriend. We disagree.

A

Before trial, the state moved to exclude any evidence of the victim's prior sexual conduct, pursuant to § 54-86f.[3] The defendant, however, moved to admit evidence that the victim was having sex with her boyfriend before she brought sexual abuse allegations against the defendant, on the ground that such evidence was admissible under the fourth exception to § 54-86f because it was "otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. . . ." General Statutes § 54-86f (4).

When the court decided these two motions in limine at a pretrial hearing, the court had before it only the factual representations and arguments made by the parties at that hearing. As for the defendant, defense counsel represented the following to the court at that hearing. Shortly before the victim's sexual abuse allegations, the defendant had found a series of letters that the victim's boyfriend had written to her. In the letters, the victim's boyfriend talked about losing his virginity with the victim, her concern that she might be pregnant,

whether to impose concurrent or consecutive sentences is a matter within the sound discretion of the trial court" [internal quotation marks omitted]).

[3] General Statutes § 54-86f provides in relevant part: "In any prosecution for sexual assault under sections 53a-70, 53a-70a, and 53a-71 to 53a-73a, inclusive, no evidence of the sexual conduct of the victim may be admissible unless such evidence [meets one of four exceptions] . . . ."

and their desire to be together forever. When the defendant found the letters, he confronted the victim and spoke with her mother. As a result, the victim was grounded and forbidden from seeing her boyfriend again, which ultimately led to their separation. Defense counsel further represented that the victim's relationship with the defendant deteriorated after her grounding, with the two arguing often, until one month later when she called her grandmother and falsely accused the defendant of sexual abuse so that the Department of Children and Families would remove him from the home. Defense counsel submitted the letters at issue to the court after the hearing.

The defense argued that evidence of the sexual nature of the victim's relationship with her boyfriend was material on two distinct grounds: (1) to rebut an inference that the victim's allegations must be true because a child her age otherwise would lack the sexual knowledge necessary to make up the allegations; and (2) to show that the victim had a strong motive to falsely accuse the defendant as retaliation against him for ending her sexual relationship with her boyfriend.

As to the sexual knowledge ground, the defense argued that, if the state submitted evidence conforming to its allegations that the victim accused the defendant of making her "hold his penis and go up and down on his penis," until the point of "ejaculation," and of asking her, "are you going to suck my penis," then the jury would naturally question where the victim learned how sex works such that she would be able to make allegations accurately describing sexual mechanics. The defense argued that, because the victim was only twelve years old when she first reported the defendant's sexual abuse, a jury would naturally presume that she had no ordinary sources of sexual knowledge, and so the only way she would know enough to describe sex was if she had learned about it from the defendant's sexual abuse.

The defense argued that evidence of an alternative source of sexual knowledge—i.e., the victim's sexual relationship with her boyfriend—was necessary to rebut that presumption.

As to the motive ground, the defense argued that, in presenting the jury with the defense theory that the victim accused the defendant of sexually abusing her in retaliation for his grounding her and ending her relationship with her boyfriend, the sexual nature of that relationship was relevant to the "emotional state of the parties" and explained why the victim became "so angry her emotions rose to the point" of falsely accusing the defendant of sexual abuse.

The state opposed the defendant's motion, arguing that (1) a jury would not presume that someone the victim's age was sexually naive, especially given that "[c]hildren at an early age are taught . . . what's a good touch and what's a bad touch," so there was no need to rebut such a presumption with evidence of an alternative source of sexual knowledge, and (2) the defendant could submit evidence that he punished the victim and ended her relationship with her boyfriend shortly before she made the allegations against him, suggesting a possible motive, but whether the victim was having sex with her boyfriend was immaterial. The state did not dispute that the letters showed that the victim and her boyfriend were sexually active.

The court granted the state's motion to exclude the evidence and denied the defendant's motions to admit it. The court ruled that the defendant could "say there was an issue, it was a very substantial issue, you know, that I'm going to allow, but not the specifics of what it was. You can't go there." When the defendant asked for further clarity the next day, the court replied: "Let me see if I can make this absolutely clear. There is to be no questioning, no inquiry based on my ruling

yesterday with respect to any relationship—specific relationship between [the boyfriend] and the [victim]. I want that to be absolutely clearly understood, and—is that clear? Is there any—any question about that area? Because if there is, I'd like to hear it now. . . .

"You can't go into any area where an inference of a sexual relationship between [the boyfriend] and the [victim] could be inferred by the jury. I'm cautioning you, don't go there. . . . If you want to say there were letters . . . and the content of those letters caused an argument, that's fine, but nothing about what the content is. . . . I don't know how much clearer I can make this."

B

We begin with the standard of review. "This court has consistently recognized that it will set aside an evidentiary ruling only when there has been a clear abuse of discretion. . . . The trial court has wide discretion in determining the relevancy of evidence and the scope of cross-examination and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . *State* v. *Santos*, 318 Conn. 412, 423, 121 A.3d 697 (2015). Generally, a trial court abuses its discretion when the court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . *State* v. *O'Brien-Veader*, 318 Conn. 514, 555, 122 A.3d 555 (2015). When this court reviews a decision of the trial court for abuse of discretion, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable. . . . *State*

v. *Cancel*, 275 Conn. 1, 18, 878 A.2d 1103 (2005). Accordingly, the abuse of discretion standard reflects the context specific nature of evidentiary rulings, which are made in the heat of battle by the trial judge, who is in a unique position to [observe] the context in which particular evidentiary issues arise and who is therefore in the best position to weigh the potential benefits and harms accompanying the admission of particular evidence. . . . *State* v. *Collins*, 299 Conn. 567, 593 n.24, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011)." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 831–32, 135 A.3d 1 (2016) (*Espinosa*, *J.*, concurring); see also id., 823 (reviewing for abuse of discretion defendant's sixth amendment claims that he was denied right to confrontation and right to present defense); *State* v. *Cecil J.*, 291 Conn. 813, 819 n.7, 970 A.2d 710 (2009) ("[w]e review the trial court's decision to [exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion" [internal quotation marks omitted]).

"Prosecutions for sexual assault are governed by special rules of evidence, including § 54-86f. That statute was enacted specifically to bar or limit the use of prior sexual conduct of an alleged victim of a sexual assault because it is such highly prejudicial material. . . . In enacting § 54-86f, the legislature intended to [protect] the victim's sexual privacy and [shield the victim] from undue harassment, [encourage] reports of sexual assault, and [enable] the victim to testify in court with less fear of embarrassment. . . . Other policies promoted by the law include avoiding prejudice to the victim, jury confusion and waste of time on collateral matters. . . .

"Thus, to determine whether the [sexual conduct] evidence [at issue] was properly excluded, we must begin our analysis with the relevant language of the rape

shield statute." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, supra, 320 Conn. 798. The rape shield statute generally bars evidence of a victim's prior sexual conduct, subject to four exceptions, only the fourth of which is at issue here. Section 54-86f provides in relevant part: "In any prosecution for sexual assault . . . no evidence of the sexual conduct of the victim may be admissible unless such evidence is . . . (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights . . . [and] the probative value of the evidence outweighs its prejudicial effect on the victim . . . ."

Our Supreme Court has interpreted this language to require that a defendant show that the proffered evidence is (1) material, (2) relevant, and (3) *so* relevant and *so* material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. See *State* v. *Wright*, supra, 320 Conn. 812–23.[4] Here, the proffered evidence was a series of letters, and presumably related cross-examination, that would have revealed the sexual nature of the victim's relationship with her boyfriend. We address each of the three requirements in turn.

1

First, we conclude that the proffered evidence was material, but only on the theory that it spoke to the

[4] Our Supreme Court has held that the requirement that the probative value of the evidence must outweigh its prejudice to the victim is superfluous when a defendant proceeds under subdivision (4) because a victim's rights under a state statute can never outweigh a defendant's rights under the federal constitution. See *State* v. *Wright*, supra, 320 Conn. 823 n.20 ("evidence cannot be excluded as more prejudicial to the victim than probative when that exclusion has already been determined to violate the defendant's constitutional rights" [internal quotation marks omitted]); see also U.S. Const., art. VI, cl. 2 ("[t]his Constitution . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

victim's motive, not on the theory that it rebutted a presumption of sexual naivete. "[E]vidence is material when it has an influence, effect, or bearing on a fact in dispute at trial." Id., 810. Materiality is often contrasted with relevance. The classic distinction between materiality and relevance is that (1) materiality pertains to whether the evidence tends to prove a *fact* that *bears on an element of or defense to* the action, and (2) relevance pertains to whether the *evidence* actually *tends to prove* that fact. See Conn. Code Evid. § 4-1, commentary; C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) §§ 4.1 through 4.1.4, pp. 153–55. In a strict sense, then, evidence is relevant to facts, and facts are material to legal elements. See Conn. Code Evid. § 4-1, commentary. In a more general sense, evidence is "material" if it is offered to prove facts that are themselves material, either directly or indirectly, to a legal element. See *State* v. *Wright*, supra, 320 Conn. 810; C. Tait & E. Prescott, supra, § 4.1.3, p. 154.

Here, the defendant offered two theories as to why the evidence was material. First, he argued that the sexual nature of the victim's relationship with her boyfriend would rebut an inference that the defendant must have sexually abused the victim because a child her age otherwise would lack the sexual knowledge necessary to make such allegations, and, thus, was material to whether the defendant sexually abused the victim. Second, he argued that the sexual nature of the victim's relationship with her boyfriend gave her a stronger motive to falsely accuse the defendant as payback for his role in ending it, which was material to whether her allegations of sexual abuse were true. We address each theory in turn.

As to the sexual knowledge theory of materiality, the defendant argues that the sexual nature of the victim's relationship with her boyfriend was material to whether the defendant sexually abused the victim, insofar as it

rebutted an inference that he must have sexually abused her because otherwise a child of the victim's age presumably would lack the sexual knowledge necessary to fabricate such allegations. This theory of materiality is essentially defensive and responds to the presumption that a child of the victim's age would have no source of sexual knowledge other than the abuse alleged. The seminal case on this issue is *State* v. *Rolon*, 257 Conn. 156, 158–59, 167 n.19, 777 A.2d 604 (2001), in which a trial court excluded evidence that a different relative had sexually abused a six year old victim before the victim disclosed that the defendant abused her, and our Supreme Court held that this violated the defendant's constitutional rights. According to the court, the six year old victim in *Rolon* exhibited sexualized "behavior indicative of sexual abuse" and "highly age-inappropriate sexual knowledge," which a jury would "inevitably conclude . . . [came] from [the] *defendant* having committed such acts," if the defendant were not given the chance to rebut that presumption with evidence of an alternative source of the victim's sexual knowledge. (Emphasis in original; internal quotation marks omitted.) Id., 185.

Although, in *Rolon*, evidence of the six year old victim's prior sexual abuse may have been necessary to rebut the "jury's natural presumption of [the] child victim's sexual naivete"; id., 184 n.29; we cannot conclude that a similar rebuttal was required here. In the present case, the victim was twelve years old when she first came forward, and she was sixteen years old when she testified before the jury at trial.[5] The sexual knowledge

[5] See *State* v. *Oliver*, 158 Ariz. 22, 31, 760 P.2d 1071 (1988) ("[g]iven the age of the [twelve and thirteen year old] victims and the rather unexplicit nature of their testimony, we find it unlikely that a jury would infer that the victims could only describe the molestation because [the defendant] had, in fact, molested them"); but see *People* v. *Ruiz*, 71 App. Div. 2d 569, 570, 418 N.Y.S.2d 402 (1979) (seemingly accepting argument that evidence of twelve year old victim's prior sexual conduct was admissible to show alternative source of sexual knowledge).

displayed in her allegations against the defendant was not unusual and was consistent with what middle schoolers and high schoolers are commonly taught about sex.[6] We, thus, cannot conclude that the jury naturally would have presumed that the victim had no source of sexual knowledge other than the defendant's abuse, such that evidence rebutting that presumption with an alternative source of sexual knowledge was material. Cf. *State* v. *Talton*, 197 Conn. 280, 285–86, 497 A.2d 35 (1985) (where state never contended that baby born roughly nine months after sexual assault was defendant's child, evidence rebutting defendant's paternity was irrelevant). The court properly rejected the defendant's sexual knowledge theory of admissibility.[7]

As to the motive theory of materiality, the defendant argues that the sexual nature of the victim's relationship with her boyfriend was material to the issue of whether the defendant sexually abused the victim because it established a stronger motive for the victim to falsely accuse the defendant. According to the defendant, the victim's motive was her desire to get back at him for ending her relationship with her boyfriend, so the closeness of that relationship would affect the strength of

[6] We note that the evidence presented at trial, although obviously not available to the court when it ruled on the motions in limine, bore out the court's conclusion that evidence of the victim's sexual relationship with her boyfriend as an alternative source of the victim's sexual knowledge was immaterial. At trial, the state never argued that the victim displayed a degree of sexual knowledge that was unusual for her age, or that the defendant was its only possible source. Indeed, the state's expert witness testified, albeit for a different purpose, that children begin to acquire sexual knowledge naturally from a young age, and are taught about sex in school beginning around fourth or fifth grade. Here, the victim first accused the defendant of sexually abusing her when she was twelve years old in seventh grade, and she was sixteen years old at trial.

[7] Evidence must meet all three of the rape shield statute's requirements to be admissible. *State* v. *Wright*, supra, 320 Conn. 815. Thus, our conclusion that the victim's sexual knowledge was not material dispenses with the need to analyze whether the defendant's sexual knowledge theory of admissibility would satisfy the remaining two requirements.

her motive, and the strength of her motive would affect the credibility of her allegations.

Because the victim was a fact witness to the acts of sexual abuse alleged, her credibility was material to whether the defendant in fact "subject[ed] [the victim] to sexual contact" or "ha[d] contact with the intimate parts [of the victim] . . . in a sexual and indecent manner likely to impair the health or morals of such child," which were required elements of the crimes charged. See General Statutes §§ 53a-73a (a) (1) (A) and 53-21 (a) (2). Thus, to the extent that the defendant offered evidence of the sexual nature of the victim's relationship with her boyfriend to prove that she had a strong motive to falsely accuse the defendant as retaliation for ending that relationship, the evidence was material for purposes of the rape shield statute.[8]

2

We next conclude that the proffered evidence was relevant. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof

[8] See, e.g., *Davis* v. *Alaska*, 415 U.S. 308, 316–17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (Witness credibility may be challenged "by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." [Citation omitted; internal quotation marks omitted.]).

of the latter." (Internal quotation marks omitted.) *State* v. *Wright*, supra, 320 Conn. 812. Similarly, the Code of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. "[E]vidence need not exclude all other possibilities [to be relevant]; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . [T]he fact that evidence is susceptible of different explanations or would support various inferences does not affect its admissibility, although it obviously bears upon its weight." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 29, 807 A.2d 955 (2002).

Here, the proffered evidence—i.e., the letters and the victim's testimony—is relevant if each factual link in the chain connecting that evidence to the legal elements of the crime tends to support the next factual link, even to a slight degree. See id. Here, the defendant argues that (1) the letters and the victim's testimony would establish that she and her boyfriend had *sexual intercourse*; (2) which was relevant to whether the defendant broke off a *particularly close relationship* between the victim and her boyfriend; (3) which was relevant to whether the victim had a *strong motive* to seek revenge against the defendant; (4) which was relevant to the victim's *credibility*; (5) which was relevant to whether the victim's testimony that *the defendant sexually abused her* was true. We conclude that each factual link does tend to support the next, at least to a slight degree. On the first link, the state does not dispute that the letters showed that the victim and her boyfriend were sexually active. On the second and third links, our Supreme Court previously has held that, for purposes of evidentiary relevance, "a sexual relationship differs

substantially from a nonsexual one in the level of emotional intensity and potential animus resulting from its termination." *State* v. *Cortes*, 276 Conn. 241, 256, 885 A.2d 153 (2005). On the fourth and fifth links, the United States Supreme Court has held that the "ulterior motives of [a] witness . . . [are] always relevant as discrediting the witness and affecting the weight of [her] testimony." (Internal quotation marks omitted.) *Davis* v. *Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Accordingly, the proffered evidence is relevant for purposes of the rape shield statute.

3

Although evidence of the sexual nature of the victim's relationship with her boyfriend was both material and relevant to prove the strength of the victim's motive to falsely accuse the defendant, we conclude that it was not *so* material and *so* relevant that its exclusion violated the defendant's constitutional rights.

"It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. The sixth amendment provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . . A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . . Furthermore, the sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . .

"In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so

that it may decide where the truth lies. . . . It guarantees the right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense. . . .

"The right of confrontation is the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . .

"Impeachment of a witness for motive, bias and interest may also be accomplished by the introduction of extrinsic evidence. . . . The same rule that applies to the right to cross-examine applies with respect to extrinsic evidence to show motive, bias and interest; proof of the main facts is a matter of right, but the extent of the proof of details lies in the court's discretion. . . . The right of confrontation is preserved if defense counsel is permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . .

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment. . . .

"These sixth amendment rights, although substantial, do not suspend the rules of evidence . . . . A court

is not required to admit all evidence presented by a defendant; nor is a court required to allow a defendant to engage in unrestricted cross-examination. . . . Instead, [a] defendant is . . . bound by the rules of evidence in presenting a defense . . . . Nevertheless, exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights . . . . Thus, [i]f the proffered evidence is not relevant [or constitutes inadmissible hearsay], the defendant's right[s] to confrontation [and to present a defense are] not affected, and the evidence was properly excluded. . . . The defendant's right to confront witnesses against him is not absolute, but must bow to other legitimate interests in the criminal trial process. . . . Such interests are implicit in a trial court's accepted right, indeed, duty, to exclude irrelevant evidence . . . .

"There are special considerations in sexual assault prosecutions that trial courts must keep in mind when ruling on the admissibility of evidence, such as shielding an alleged victim from embarrassing or harassing questions regarding his or her prior sexual conduct. . . . Although the state's interests in limiting the admissibility of this type of evidence are substantial, they cannot by themselves outweigh [a] defendant's competing constitutional interests. . . . As we previously have observed, evidentiary rules cannot be applied mechanistically to deprive a defendant of his constitutional rights. . . .

"We must remember that [t]he determination of whether the state's interests in excluding evidence must yield to those interests of the defendant is determined by the facts and circumstances of the particular case. . . . In every criminal case, the defendant has an important interest in being permitted to introduce evidence relevant to his defense. Evidence is not rendered inadmissible because it is not conclusive. All that is

required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial or merely cumulative. . . . Whenever the rape shield statute's preclusion of prior sexual conduct is invoked, a question of relevancy arises. If the evidence is probative, the statute's protection yields to constitutional rights that assure a full and fair defense. . . . If the defendant's offer of proof is . . . more probative to the defense than prejudicial to the victim, it must be deemed admissible at trial. . . . When the trial court excludes defense evidence that provides the defendant with a basis for cross-examination of the state's witnesses, [despite what might be considered a sufficient offer of proof] such exclusion may give rise to a claim of denial of the right[s] to confrontation and to present a defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, supra, 320 Conn. 816–20.

"In determining whether a defendant's right of cross-examination has been unduly restricted, we consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) *State* v. *Mark R.*, 300 Conn. 590, 610, 17 A.3d 1 (2011).

At the outset, we note that the defendant relies heavily on *State* v. *Cortes*, supra, 276 Conn. 256, for the proposition that excluding evidence of the sexual nature of a victim's relationship with her boyfriend was error where the closeness of that relationship spoke to her motive to fabricate the allegations. The court in *Cortes* held that such evidence was relevant, and so excluding it was *evidentiary* error.[9] Id., 253. The court

[9] In holding that the sexual conduct evidence was admissible, the court in *Cortes* noted that the rape shield statute did not bar its admission because the defendant was not charged with a sex crime. *State* v. *Cortes*, supra, 276 Conn. 256.

was silent on whether it rose to the level of *constitutional* error. Id. Here, we agree with the defendant that the sexual conduct evidence was relevant, largely on the authority of *Cortes*, but that begs the question of whether it was also so critical that its exclusion violated the defendant's constitutional rights.

We thus turn to an examination of our sixth amendment jurisprudence. On the one hand, convictions have been reversed where a defendant was entirely prevented from putting the defense theory of the case before the jury, either (1) because the defense was barred from asking about it, or (2) because the defense was allowed to ask but was barred from introducing any evidence to support it. Two cases from the United States Supreme Court are illustrative.

In *Olden* v. *Kentucky*, 488 U.S. 227, 229–30, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988), the defendant's theory of the case was that the victim's lover caught her exiting the defendant's car after a night at a bar, and that the victim claimed he had kidnapped and raped her to cover up her infidelity. The trial court entirely precluded the defendant from asking about the victim's relationship with her lover, and a jury found the defendant guilty. Id., 230. On appeal, the United States Supreme Court reversed the judgment of conviction, holding that the trial court had violated the defendant's sixth amendment rights by excluding all evidence that the victim and her lover were in a relationship, effectively removing the defendant's theory of the case from the jury's consideration.[10] Id., 233.

[10] See also *State* v. *Shaw*, 312 Conn. 85, 114–15, 90 A.3d 936 (2014) ("if the jurors heard and believed the defendant's testimony regarding [the victim having sex with her brother], they also might have believed that [the victim and her mother] were motivated to fabricate the alleged assault for the purpose of removing the defendant from the household and covering up [the siblings'] allegedly inappropriate behavior"); *State* v. *Adorno*, 121 Conn. App. 534, 541, 996 A.2d 746 (error to preclude entirely evidence of victim's sexual relationship with boyfriend where "theory of defense [was] that the victim feared that her urinary tract infection was the result of sexual activity

In *Davis* v. *Alaska*, supra, 415 U.S. 310–11, the defendant was charged with stealing a safe from a bar, and the only witness who identified the defendant was the teenage boy in whose yard the safe was found. At the time, the teenage boy was on probation for a prior burglary. The defense theory of the case was that the boy falsely accused the defendant either to deflect suspicion away from himself, or to appease the police, given his precarious status as a probationer. At trial, the defendant was allowed to ask the boy if he was afraid the police might suspect him of stealing the safe, but was forbidden from introducing evidence that the boy was on probation after being adjudicated a juvenile delinquent for the prior burglary. Id., 311–13. "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness," and, indeed, the jury found the defendant guilty. Id., 318. On appeal, the United States Supreme Court reversed the judgment of conviction, holding that the trial court violated the defendant's sixth amendment rights by excluding all evidentiary support for the defendant's theory of the case.[11] Id.

and that she falsely accused the defendant so that her sexual relationship with her boyfriend would not be discovered"), cert. denied, 297 Conn. 929, 998 A.2d 1196 (2010); *State* v. *Horrocks*, 57 Conn. App. 32, 39, 747 A.2d 25 ("the preclusion of any cross-examination of the victim concerning her relationship with [the state's investigating detective] improperly prohibited inquiry into a legitimate area of relevant concern"), cert. denied, 253 Conn. 908, 753 A.2d 941 (2000).

[11] See also *State* v. *Wright*, supra, 320 Conn. 821 (trial court violated defendant's sixth amendment rights where "the excluded testimony was the only evidence the defense presented to support its theory of the case"); *State* v. *Colton*, 227 Conn. 231, 241–46, 630 A.2d 577 (1993) (trial court violated defendant's sixth amendment rights when, although it allowed him to ask state's primary witness if she was prostituting herself for drugs and needed reward money from defendant's conviction to fund her habit, it forbade defendant from introducing evidence to that effect when witness flatly denied it).

On the other hand, convictions have been affirmed where the defense theory of the case either (1) was sufficiently before the jury, or (2) was so far-fetched that excluding it did not infringe the defendant's constitutional rights. Two cases from our Supreme Court are illustrative.

In *State* v. *Crespo*, 303 Conn. 589, 591, 600 n.13, 35 A.3d 243 (2012), the defendant was charged with violently raping his girlfriend, who testified that she had wished to remain a virgin until marriage. The defendant's theory of the case was that the victim had consented; he thus sought to undermine the victim's credibility by showing that she was deceptive, and had a motive to lie in that she was having sex with and became engaged to another man while she was dating the defendant. Id., 596, 601. At trial, the court permitted the defense to ask the victim about her financial support from and engagement to the other man, but forbade the defense from asking if they had a sexual relationship. Id., 601. On appeal, our Supreme Court affirmed the judgment of conviction, holding that evidence of the sexual nature of the victim's relationship with the other man may well have been relevant to undermine the victim's credibility and to rebut her claim of virginity, but that it was not so relevant that its exclusion violated the defendant's constitutional rights.[12] Id., 611–12.

[12] We note that the holding in *Crespo* is complicated by the defendant's failure to state precisely his theory of relevance at trial in that case. See *State* v. *Crespo*, supra, 303 Conn. 614. For a cleaner holding, albeit outside the context of the rape shield statute, see *State* v. *Mark R.*, supra, 300 Conn. 607–608, 611–13, 615, in which the trial court excluded some but allowed into evidence other aspects of the defense theory of the case—that the child victim falsely accused her father of sexually abusing her either (1) to redirect her mother's attention to her after her mother began devoting her time to the victim's newly adopted siblings; or (2) at her mother's urging so that she could divorce the victim's father—and our Supreme Court affirmed the defendant's conviction on the ground that, even assuming the excluded evidence was relevant, it was not so relevant that its exclusion violated his constitutional rights.

In *State* v. *Kulmac*, 230 Conn. 43, 49–50, 644 A.2d 887 (1994), the defendant, who was an uncle figure to the two child victims, was charged with repeatedly sexually abusing them over the course of several years. The defense theory of the case was that the victims either (1) confused the defendant with various other men who had sexually abused them, or (2) falsely implicated the defendant to protect their actual assailants from prosecution. Id., 51, 55–56. The trial court excluded evidence of the victims' prior sexual abuse by the other men and the defendant was convicted. Id., 45, 51–52. On appeal, our Supreme Court affirmed the judgment of conviction, deferring to the trial court's finding that the two victims did not appear confused as to the identity of their assailant and holding that the record did not bear out the defendant's motive argument because the two victims had already reported their other assailants to the police, resulting in their conviction. Id., 55–56.

Here, although the defendant's motive argument was not so beyond the pale that its wholesale exclusion would have been appropriate, the defendant was not prevented entirely from developing his theory of the case before the jury—to wit, that the victim falsely accused him in retaliation for his taking away her privileges, including her friendship with the boy she was dating. The court's ruling allowed the defendant to present evidence of every aspect of that punishment and its effect, including what privileges the victim lost, how much time she spent with her boyfriend before she was grounded, her reaction to being grounded, her reaction to being told she could no longer see her boyfriend, and her reaction to their breakup.[13] He was precluded from introducing further evidence only to the extent that it revealed that the victim and her boyfriend were sexually active. On this record, we cannot conclude

[13] We note that, at trial, the defendant in fact elicited such testimony.

that the exclusion of the sexual conduct evidence violated the defendant's sixth amendment rights. See *State* v. *Mark R.*, supra, 300 Conn. 611 ("[c]onsistent with these principles, we have rejected confrontation challenges in child abuse cases where the trial court permitted at least some inquiry into the witness' possible motives for untruthfulness"). The court did not abuse its discretion by excluding such evidence under § 54-86f (4).

II

The defendant's second claim is that the court violated his right to trial by an impartial jury under the sixth amendment to the United States constitution[14] when it seated juror D.W., who ultimately became the jury foreperson.[15] The defendant argues that D.W. could not be fair and impartial for three reasons: (1) D.W. believed that children were less likely to lie than adults; (2) he had personal experience believing a child abuse victim; and (3) he publicly opined on the central issue of the case during voir dire. By contrast, the state argues that the court did not abuse its discretion in seating D.W. because D.W. said that he would follow the court's instructions and that he would put his past experience aside when considering the evidence against the defendant.

[14] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." That right is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution, which also independently requires jury impartiality. *Morgan* v. *Illinois*, 504 U.S. 719, 726, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992); *Ristaino* v. *Ross*, 424 U.S. 589, 595 n.6, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976).

[15] The defendant also argues in his brief that the seating of D.W. violated article first, § 8, of the Connecticut constitution. He has provided no independent analysis of the state constitution, as required under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), and so we limit our review to the federal constitution. See *State* v. *Dixon*, 318 Conn. 495, 497–98 n.2, 122 A.3d 542 (2015).

The following additional facts and procedural history are relevant to this claim. After six regular jurors and three alternates had been selected, but before trial began, the court informed the parties that they had lost two jurors. One of the alternate jurors was excused with a doctor's note due to back issues, and one of the regular jurors was unable to attend because his child had caught pneumonia. Accordingly, the court decided to select one additional alternate before trial began and then to select, from the three alternates, the replacement sixth regular juror.

Because the state and the defendant already had exercised all eight of their peremptory challenges, the court gave them each one extra peremptory challenge for this final round of jury selection. The defendant exercised his peremptory challenge on the first prospective juror interviewed. The second prospective juror interviewed was D.W. During voir dire, D.W. said that he was a welder from Naugatuck who lived with his fiancée and their two year old daughter. He had the following exchange with the prosecutor:

"Q. There may be some testimony from a child or a teenager in this case. Do you have any feelings about the credibility of children or teen—teenagers?

"A. Versus the age of who's testifying?

"Q. Yeah.

"A. No.

"Q. Okay. Do you think teen—do you think children generally tell the—excuse me. Do you think children generally tell the truth?

"A. Most of the time, yes.

"Q. Okay. How about teenagers?

"A. Here and there, yes.

"Q. Here and there, yes?

"A. Well, it depends because some kids don't tell the truth, some kids do.

"Q. Do you think teenagers tend to not tell the truth?

"A. A little more than the others, yeah, because they're older and they know things right from wrong versus a child.

"Q. Okay. So, if a teenager were to testify in this case and an adult were to—just hypothetically—and an adult were to testify in this case, do you think you would tend to believe the adult over the teenager?

"A. No.

"Q. Say hypothetical, teenager says X, adult says Y, totally different. Who would you tend to believe?

"A. The teenager.

"Q. Why?

"A. Because teenagers are younger and they don't know everything. They—they don't know certain things as opposed to an adult.

"Q. Okay.

"A. They're more to tell the truth sometimes than an adult does.

"Q. If the court were to instruct you that in assessing the credibility of any witness—child, teenager, adult—you—age can't play a factor in the sense of, if—that age isn't a determining factor in assessing credibility, would you follow that—

"A. No.

"Q. —instruction?

"A. What do you mean?

"Q. In—for example, if the court were to say, just be—age shouldn't be a factor in your assessment of the testimony of a person, whether it be a child or an adult, would you follow that instruction?

"A. Yes.

"Q. Okay. And the reason I'm—I'm asking is, there may be testimony from adults, there may be testimony from teenagers, there may be testimony from younger children. So, how would you assess a witness' credibility? If a witness testified, how would you—how would you figure out if that person was telling the truth?

"A. Their body language.

"Q. Anything else?

"A. No.

"Q. Okay. So, if the court said age can't play a factor, you'll take that out of the equation?

"A. Yes."

Later, defense counsel and D.W. had the following exchange:

"Q. Some people feel that no child would ever make these accusations unless they were true. How do you feel about that? Do you agree with that?

"A. I agree with that.

"Q. Okay. Tell us a little bit about that.

"A. Well, 2005, a neighbor on my—in my neighborhood, my girlfriend at the time, her children—her daughter played with one of the neighbor's kids.

"Q. Um hmm.

"A. And her daughter came to me and said that this person was doing things that were out of the ordinary, and I brought it to the mother's attention and then it

was waved away by the police department and not caring because there was no proof, but then a month later there was a problem with another person, and now that person's not there anymore because they did something wrong. But when I spoke about it, and I believe the child because most of the time children don't make things up.

"Q. Okay. So, at this time, right there, [the defendant], His Honor indicated that at this time he is presumed innocent. Do you think that given your past experience you would have difficulty—

"A. No, because everybody gets a fair chance.

"Q. And so at this time you have no problem presuming—

"A. No.

"Q. —him innocent?

"A. No.

"Q. However, you do feel that children would never lie about an—

"A. I didn't say children would never lie.

"Q. Oh, I'm sorry. I apologize. Could you—

"A. I didn't say they wouldn't lie. I just said that they usually tell the truth because they—some don't—some don't know right from wrong.

"Q. Do you think it makes a difference whether it's a younger child or a teenager, close to being a teenager? Does it make a difference?

"A. Somewhat of a difference, but not really because they're children still and they haven't reached to the mature level to understand right from wrong.

"Q. What would you consider a teenager?

"A. I would consider a teenager fifteen and up.

"Q. And so anybody below that age?

"A. Is still a child.

"Q. Is still a child. And you think that for the most part they would never accuse anybody unless it was true?

"A. Unless it was true.

"Q. Do you think that it would be difficult in this case not to lean for the prosecution?

"A. No. It would be equal because you have to hear both sides to understand what's going on.

"Q. And it wouldn't be difficult for you to put aside your belief that children most likely will not—

"A. Children lie, but also children don't lie, so you have to put to the side that there's a right and a wrong, and that child's going to either tell the truth or it's going to lie and then, once again, it's a person's body language.

"Q. Yeah. So, if you were chosen as a juror and you had a person—you had a child on the one hand, somebody under fifteen, and somebody who is an adult and they have contradictory stories, would you tend to believe the child over the adult?

"A. Maybe, maybe not. It depends. I don't know. I'm not put in that position—that predicament yet so I don't know.

"Q. So, you would—you would want to listen to what they have to say?

"A. I would want to understand what's going on before I make that decision, yeah."

Finally, the court asked D.W. several questions on the same topic:

"[Q.] Okay. Probably the most important rule is that the jury evaluates all the witnesses, and it's required without exception to treat all those witnesses equally. It doesn't matter their gender, it doesn't matter their age, it doesn't matter what their title is, it doesn't matter if they're police officers, it doesn't matter if they're—it doesn't matter. You've got to treat every single witness by the same standard. So, the question is: Can you follow that rule?

"[A.] Yes, sir.

"[Q.] Okay. Now, we talked about—answered that. Just let me check my notes here. Give me a second. So, again, let me just give you an analogy, just—just to—I don't want to belabor this, but it's a real important point. The process here, you have to think of as a blank canvas. You're an artist, so the canvas is blank. The—the attorneys paint the picture—

"[A.] Um hmm.

"[Q.] —with the witnesses, with the exhibits, so that's the only thing you can consider. Anything from outside is not relevant.

"[A.] It doesn't exist.

"[Q.] It's just—right. It doesn't exist. That's a good way to put it. It's just what's presented to you here by treating all the witnesses by the same standard. So, can you—can you do that?

"[A.] Yes, sir."

When the juror left the room, the state said that it found D.W. acceptable. Defense counsel challenged him for cause, arguing that D.W. had said that he had personal experience believing a child abuse victim and that he thought children more credible. The court denied the challenge for cause, noting that D.W. ultimately said that he would have to evaluate children's credibility

on an individual basis.[16] The court seated D.W. as an alternate, the clerk randomly chose D.W. from the three alternates to be a regular juror, and D.W. was elected to be the jury foreperson at the end of trial.

We begin with the standard of review. "The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. . . . We agree with the defendant that the enactment of article first, § 19, of the Connecticut constitution, as amended, reflects the abiding belief of our citizenry that an impartial and fairly chosen jury is the cornerstone of our criminal justice system. . . . We have held that if a potential juror has such a fixed and settled opinion in a case that he cannot judge impartially the guilt of the defendant, he should not be selected to sit on the panel. . . .

"The trial court is vested with wide discretion in determining the competency of jurors to serve, and that judgment will not be disturbed absent a showing of an abuse of discretion. . . . On appeal, the defendant bears the burden of showing that the rulings of the trial court resulted in a jury that could not judge his guilt impartially." (Citations omitted; internal quotation marks omitted.) *State* v. *Tucker*, 226 Conn. 618, 630–31, 629 A.2d 1067 (1993). Accordingly, we review the defendant's claim for an abuse of discretion. Id., 630.

On this record, we cannot conclude that the court abused its discretion in denying the defendant's challenge for cause to juror D.W. The defendant argues that D.W. could not be fair and impartial for three reasons: (1) D.W. believed that children were less likely to lie

[16] Because the defendant had no remaining peremptory challenges when the court denied his challenge of D.W. for cause, this issue is preserved for appellate review. See *State* v. *Kelly*, 256 Conn. 23, 32 n.8, 770 A.2d 908 (2001) (defendant must exhaust peremptory challenges before claiming error in trial court's denial of challenge for cause).

than adults; (2) he had personal experience believing a child abuse victim; and (3) he publicly opined on the central issue of the case during voir dire.

As to the first reason, which is D.W.'s tendency to believe children, although D.W. did say that children generally tell the truth, he also noted that "some kids don't tell the truth, some kids do," and that if a teenager and an adult both testified in a case, he would *not* necessarily believe the teenager over the adult. Rather, D.W. said that he would evaluate the witnesses' credibility individually, on the basis of their demeanor. He reiterated that position when defense counsel questioned him on it. When the court instructed D.W. that "it doesn't matter their age . . . [y]ou've got to treat every single witness by the same standard," and asked D.W. if he would follow that rule, he replied that he would.[17]

As to the second reason, which is D.W.'s prior experience, although D.W. did say that, eight years ago, his former girlfriend's daughter told him that a neighbor was "doing things that were out of the ordinary" and that the neighbor was "not there anymore because they did something wrong." D.W. was also adamant that "everybody gets a fair chance" and that he would "have to hear both sides to understand what's going on" in the defendant's case. When the court explained that D.W. could consider only the testimony and exhibits at trial, not any outside experiences, D.W. said that he understood and would treat his prior experience as

[17] We further note that, contrary to the suggestion of the trial court, a juror *may* properly consider a witness' age as one factor affecting credibility. See, e.g., *State* v. *Ceballos*, 266 Conn. 364, 422, 832 A.2d 14 (2003) ("court instructed the jury . . . that it was solely responsible for assessing the credibility of [the child witness], and that it could consider her age"); *State* v. *Aponte*, 249 Conn. 735, 751, 738 A.2d 117 (1999) (child witness' age relevant to credibility); *State* v. *Angell*, 237 Conn. 321, 331 n.11, 677 A.2d 912 (1996) ("reference to a witness' age or maturity level in [the court's] general instruction on credibility . . . may be appropriate in certain circumstances").

though "[i]t doesn't exist." When the court asked D.W. if he could limit his deliberations to the evidence presented at trial, D.W. replied that he would.

As to the third reason, for the reasons previously discussed, we disagree that D.W. expressed "a fixed and settled opinion"; *State* v. *Tucker*, supra, 226 Conn. 630; on the central issue of the case, i.e., the victim's credibility versus that of the defendant. To the contrary, D.W. repeatedly said that he would have to hear the evidence and evaluate witnesses on an individual basis.

In sum, after some initial confusion, D.W. told both attorneys and the court that he would not believe child witnesses merely on the basis of their age; that he would put aside his prior experiences; and that he would need to judge each witness individually. We conclude that the court reasonably could have determined that D.W. would be impartial, and so the court did not abuse its discretion when it denied the defendant's challenge for cause.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT H.*
(AC 36742)
(AC 37544)

Lavine, Sheldon and Flynn, Js.

Syllabus

Convicted of two counts of the crime of risk of injury to a child arising out of two separate acts of masturbation in the presence of the minor victim, the defendant appealed to this court. The defendant claimed that the evidence was insufficient to support his conviction as to one of the

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

counts because the only evidence of the second incident was two statements that he made to the police, which were admitted without objection at trial. The victim had testified at trial concerning only one such incident. The defendant claimed that the common-law corpus delicti rule, or corroboration rule, precluded his confession from being used as the only evidence of the second incident because there was no substantial independent evidence tending to establish the trustworthiness of that confession. *Held* that the defendant could not prevail on his unpreserved claim that his confession constituted insufficient evidence for the jury to conclude that he had masturbated in the presence of the victim on more than one occasion, as the defendant did not challenge the admissibility of his confession under the corpus delicti rule at trial, and that rule is solely a rule of admissibility and did not implicate the sufficiency of the state's evidence; moreover, the evidence admitted at trial, which included the defendant's confessions, provided a sufficient basis for the jury to conclude that he was guilty beyond a reasonable doubt of both risk of injury to a child counts, as the jury was free to credit his confession over the victim's testimony that she remembered him masturbating in her presence on only one occasion.

(*One judge dissenting*)

Argued November 17, 2015—officially released September 20, 2016

Procedural History

Substitute information, in the first case, charging the defendant with three counts of the crime of risk of injury to a child and two counts of the crime of sexual assault in the first degree, and information, in the second case, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Hartford, where the first case was tried to the jury before *Suarez*, *J.*; verdict of guilty of two counts of risk of injury to a child; thereafter, defendant was presented to the court in the second case on a plea of guilty; judgments of guilty in accordance with the verdict and the plea, from which the defendant filed separate appeals with this court, which consolidated the appeals. *Affirmed.*

Glenn W. Falk, assigned counsel, for the appellant (defendant).

Lisa Herskowitz, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *John F. Fahey*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Robert H., appeals from his conviction on one of two charges of risk of injury to, or impairing morals of a child in violation of General Statutes § 53-21 (a) (1),[1] of which he was found guilty after a jury trial. The defendant claims that there was insufficient evidence to support the jury's guilty verdict on the second of those two charges. Following the jury verdict, the defendant admitted that he had violated his probation in violation of General Statutes § 53a-32. Thereafter, the court sentenced the defendant on all three charges to a total effective sentence of twenty years incarceration.

The two charges of risk of injury of which the defendant was convicted were based upon separate acts of masturbation in the presence of a minor child, S.W. The defendant argues that the only evidence presented at trial to support the jury's finding that he had masturbated in S.W.'s presence on more than one occasion were two statements he made to police, which were admitted into evidence against him without objection at trial. The defendant now claims that such evidence was insufficient to support his conviction on a second charge of risk of injury because, under the corpus delicti rule, also referred to as the corroboration rule, there was not substantial independent evidence tending to establish the trustworthiness of his confession to a sec-

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ."

ond act of masturbation in the presence of S.W. The state argues that the defendant's claim is unreviewable because the corroboration rule is a rule of evidence governing the admissibility of oral and written statements, and the defendant never challenged the admissibility of his statements at trial. Because this court recently held, in *State* v. *Leniart*, 166 Conn. App. 142, 152–53, 140 A.3d 1026 (2016), that the corroboration rule is solely a rule of admissibility, we agree with the state that the defendant cannot raise his unpreserved claim as part of his claim of insufficient evidence. Accordingly, it is not necessary for us to decide whether there was substantial independent evidence tending to establish the trustworthiness of the defendant's confession, and we will consider his unobjected-to statements in the light most favorable to the state in evaluating his current claim of evidentiary insufficiency. We conclude that the defendant's statements that he masturbated in the presence of S.W. "at least twice" provided a sufficient evidentiary basis for the jury reasonably to conclude that he was guilty beyond a reasonable doubt of both counts of risk of injury of which he was convicted.

The following facts are relevant to this appeal. On September 3, 2013, the defendant was charged in a long form information with the following offenses: (1) sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2);[2] (2) sexual assault in the first degree in violation of § 53a-70 (a) (1);[3] (3) injury or risk

[2] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

[3] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . ."

of injury to, or impairing morals of a child in violation of § 53-21 (a) (2);[4] (4) injury or risk of injury to, or impairing morals of a child in violation of § 53a-21 (a) (1); and (5) injury or risk of injury to, or impairing morals of a child in violation of § 53a-21 (a) (1).

At the defendant's jury trial in September 2013, S.W. testified as follows. When she was ten or eleven years old, the defendant, who was then her mother's boyfriend, would spend time at the home she lived in with her mother. In that time frame, two specific incidents occurred between her and the defendant. In one, she was lying in her bed when the defendant entered her bedroom, took his penis out, and started masturbating. He then ejaculated on her bed. After he had ejaculated on her bed, he wet a cloth and attempted to wipe his semen off the bed. In the second incident described by S.W., which occurred after the first incident, the defendant penetrated her either vaginally or anally with his penis while he and she were in the kitchen. Although S.W. testified that something "unusual" had occurred between her and the defendant on more than one occasion, she also testified that the defendant had only masturbated in her room on one occasion[5] and that the two

[4] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

[5] S.W. testified as follows:

"[The Prosecutor]: Okay, now you said multiple things happened between [the defendant] and you. Could you tell the ladies and gentleman of the jury what happened between [the defendant] and you?

"[S.W.]: Let me understand, like both of them, or just one?

"[The Prosecutor]: Well, let's start with one. Do you remember when exactly that happened?

"[S.W.]: Not exactly, but I know like what happened.

"[The Prosecutor]: Okay, could you tell the ladies and gentleman of the jury?

"[S.W.]: Once I was in my room, you know those—I was watching TV or something, and then my mom—I forgot where she was at, and then he just came over and just—just—it was nasty.

specific incidents to which she testified were the only such incidents that had occurred between them.[6]

The defendant did not testify at trial. However, the state introduced into evidence a portion of a DVD recording of the defendant's interview with police and his sworn, written statement to the officer who interviewed him. In his sworn statement, the defendant admitted that he had masturbated in the presence of S.W. in her bedroom "at least twice." He averred, more particularly, as follows: "I was lying in [S.W.'s mother's] bed and could see [S.W.] in her bedroom, lying in her bed with her hands inside her pants. She was masturbating. She knew that I could see her but it was like she wanted me to see her. After watching her masturbate for about fifteen minutes I went into [S.W.'s] room. I stood about two or three feet away from her bed and, with my clothes on, pulled my penis out and started to

"[The Prosecutor]: What did he do?

"[S.W.]: In—he took the penis out, and just started masturbating.

"[The Prosecutor]: Okay, now at the time when you were ten or eleven in fifth grade, did you know what he was doing?

"[S.W.]: No, not at all.

"[The Prosecutor]: Did something happen while he was masturbating?

"[S.W.]: Yes.

"[The Prosecutor]: What happened?

"[S.W.]: He comed on my bed.

"[The Prosecutor]: Okay, and did any hit you?

"[S.W.]: Uh-uh. . . .

"[The Prosecutor]: Did there come a point where anything similar to that happened?

"[S.W.]: Yes. . . .

"[The Prosecutor]: Okay, did there come a point where anything similar to that happened—

"[S.W.]: Yes.

"[The Prosecutor]: —where he did in your room another time?

"[S.W.]: No."

[6] S.W. also testified as follows:

"[The Prosecutor]: All right now you've talked about two separate incidents that you recall specifically. In the time that [the defendant] had contact with you, or that you knew him, did any other things like that ever happen?

"[S.W.]: No.

"[The Prosecutor]: Okay, those were the only two things you recall?

"[S.W.]: Yes."

masturbate myself. She seemed like she was happy with me doing that. I ejaculated in her general direction but not on top of her. I don't know if she came or not. This same thing happened at least twice, where I masturbated in front of her in her room and this [is] probably how my semen got on her bed or clothes. I never penetrated her with my penis or anything else. I think she might have touched my penis on one of those times right after I ejaculated, which might explain any of my semen in her pants.'' The defendant's sworn statement and the DVD recording of his police interview were both admitted into evidence without objection by the defendant.[7]

The defendant moved for a judgment of acquittal after the close of the prosecution's case-in-chief, at the close of all the evidence, and again at his sentencing. He claimed on each occasion that there was no evidence to support a finding of two incidents of masturbation in S.W.'s presence because S.W. had testified to only one such incident, and thus the state assertedly could not establish that S.W. was harmed or affected by the alleged second incident if she was not even aware that it had occurred.[8] The state responded by noting that the risk of injury counts did not require that the child actually be aware of what the defendant was doing, only that the defendant's conduct was of such a nature that it was likely to impair the health or morals of a

[7] Prior to trial, the court denied the defendant's August 5, 2013 motion to suppress all of his statements on the ground that the police had failed to inform him of his *Miranda* rights. See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). On appeal, the defendant does not claim that the court improperly denied his motion to suppress.

[8] The only time that the corroboration rule was mentioned at trial was by the state. It argued, in responding to the defendant's claims that S.W. had testified to only one act of the defendant masturbating in her presence, that DNA extracted from semen found on S.W.'s bedspread, which was consistent with the defendant's DNA sample, corroborated at least one act of masturbatory conduct, and thus satisfied the corpus delicti rule.

minor. The court denied each of the defendant's motions for judgment of acquittal, ruling that there was sufficient evidence for the jury to find that incidents of masturbation in S.W.'s presence had occurred on more than one occasion.

In the state's closing argument, it explained that the sexual assault alleged in counts one and two referred to the incident that S.W. claimed to have occurred in the kitchen, and that the charge of risk of injury alleged in count three was based upon that same alleged incident. The state further explained that the risk of injury charges set forth in counts four and five were based upon the two incidents in which the defendant allegedly had masturbated in the presence of S.W. The state specifically noted that the defendant had confessed to masturbating in the presence of S.W. at least twice. In the defendant's closing argument, defense counsel suggested that S.W.'s story had changed each time she told it, and again argued that she could not have been affected by a second masturbation incident if she only recalled one such incident.

After deliberating for approximately two and one-half hours, the jury returned verdicts of not guilty on the first three counts, relating to the alleged sexual assault in the kitchen, and guilty on counts four and five, relating to the two alleged incidents of masturbation in S.W.'s bedroom.

While the jury was deliberating, the court heard additional evidence on the charge of violation of probation under § 53a-32. On October 29, 2013, after the jury returned its guilty verdict on two counts of risk of injury, the defendant admitted to that charge on the basis of that verdict. Thereafter, on January 21, 2014, the court sentenced the defendant to ten years incarceration on each charge of risk of injury, to run concurrently with one another, and ten years incarceration on the charge

of violation of probation, to run consecutively to his concurrent risk of injury sentences, for a total effective sentence of twenty years incarceration.

The defendant appeals, requesting that we vacate his conviction on one charge of risk of injury and remand this case for resentencing on the remaining charge of risk of injury and the charge of violation of probation. The defendant claims that there was insufficient evidence to support a guilty verdict on two counts of risk of injury because the only evidence to support the finding that he had masturbated in the presence of S.W. on more than one occasion were his oral and written statements to the police. He argues that allowing his conviction on a second count of risk of injury to stand based solely upon his bare extrajudicial confessions would violate the corroboration rule. The state first argues that the defendant's claim is unreviewable because he failed to object to the admission of his statements at trial. If the claim is reviewable at all, the state argues, it must fail because there was sufficient evidence to corroborate the defendant's admission to a second act of masturbation in S.W.'s presence.

"The standard of review employed in a sufficiency of the evidence claim is well settled. [W]e apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . [W]e do not sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether

the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict of guilt beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Miles*, 97 Conn. App. 236, 240, 903 A.2d 675 (2006).

"The corpus delicti rule, which is often also referred to as the corroboration rule, exists to protect against conviction of offenses that have not, in fact, occurred, in other words, to prevent errors in convictions based solely upon untrue confessions to nonexistent crimes. *State* v. *Arnold*, 201 Conn. 276, 287, 514 A.2d 330 (1986). An early version of Connecticut's corroboration rule was extensively discussed in *State* v. *Doucette*, 147 Conn. 95, 98–100, 157 A.2d 487 (1959), overruled in part by *State* v. *Tillman*, 152 Conn. 15, 20, 202 A.2d 494 (1964). The court in *Doucette* described the rule as follows: [T]he *corpus delicti* [that is, that the crime charged has been committed by someone] cannot be established by the extra-judicial confession of the defendant unsupported by corroborative evidence. . . .

"The Connecticut rule . . . is that, although the confession is evidence tending to prove both the fact that the crime [charged] was committed [by someone, that is, the corpus delicti] and the defendant's agency therein, it is not sufficient of itself to prove the former, and, without evidence [from another source] of facts also tending to prove the corpus delicti, it is not enough to warrant a conviction; and that there must be such extrinsic corroborative evidence as will, when taken in connection with the confession, establish the corpus delicti in the mind of the trier beyond a reasonable doubt. . . . The independent evidence must tend to establish that the crime charged has been committed and must be material and substantial, but need not be such as would establish the corpus delicti beyond a reasonable doubt apart from the confession. . . .

Properly this [extrinsic] evidence should be introduced and the court satisfied of its substantial character and sufficiency to render the confession admissible, before the latter is allowed in evidence. *State* v. *LaLouche*, [116 Conn. 691, 695, 166 A. 252 (1933)]. . . . *State* v. *Doucette*, supra, 147 Conn. 98–100." (Emphasis in original; internal quotation marks omitted.) *State* v. *Leniart*, supra, 166 Conn. App. 152–53.

The current version of the rule, set forth in *Opper* v. *United States*, 348 U.S. 84, 93, 75 S. Ct. 158, 99 L. Ed. 101 (1954), and followed by our Supreme Court in *State* v. *Harris*, 215 Conn. 189, 192–97, 575 A.2d 223 (1990), and *State* v. *Hafford*, 252 Conn. 274, 746 A.2d 150, cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000), states that "the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is [only] necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the [defendant's] statement." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Harris*, supra, 193–94.

In *State* v. *Leniart*, supra, 166 Conn. App. 142, this court considered whether the corroboration rule is a "substantive rule of criminal law, i.e., an implicit element of the state's case for which there must be sufficient evidence"; id., 158; or "an evidentiary rule that must be raised by objecting to the admission of the defendant's confessions at trial . . . ." Id. After conducting a thorough review of the history of the rule's evolution in Connecticut, the court in *Leniart* concluded "that Connecticut's corroboration rule is a rule of admissibility to be decided by the court. A defendant who fails to challenge the admissibility of the defendant's confession at trial is not entitled to raise the corroboration rule on appeal because (1) the evidentiary claim is not of constitutional magnitude and, thus,

cannot meet *Golding*'s[9] second prong; see *State* v. *Uretek*, *Inc.* [207 Conn. 706, 713, 543 A.2d 709 (1988)]; and (2) the rule does not implicate the sufficiency of the state's evidence." *State* v. *Leniart*, supra, 168.

In the present case, the defendant never claimed at trial, and does not claim on appeal, that the admission into evidence of his confessions violated the corroboration rule. Accordingly, we must consider his statements as probative evidence of the facts admitted therein in evaluating his sufficiency of the evidence claim.[10] See

[9] See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

[10] We respectfully disagree with the dissent that it was necessary for the state to present "corroborative evidence of injury to the victim" in order to introduce and rely upon the defendant's confession as substantive evidence of his guilt on a second charge of risk of injury based upon a second alleged instance of masturbation in S.W.'s presence. First, evidence tending to prove such an injury, if an injury is required for the crime charged, is evidence of the corpus delicti, which the *Hafford* and *Leniart* cases hold to be unnecessary. Here, moreover, the crime at issue—risk of injury to, or impairing morals of a child—is not a crime resulting in injury or loss. *State* v. *Eastwood*, 83 Conn. App. 452, 476, 850 A.2d 234 (2004) ("Lack of an actual injury to . . . the . . . morals of the victim is irrelevant . . . actual injury is not an element of the offense. . . . [T]he creation of a prohibited situation is sufficient."). Accordingly, this case does not raise the same concerns as our dissenting colleague noted in *Leniart*, in which he cited the following footnote in *Hafford*: "We note, however, that proving the trustworthiness of a defendant's confession to a crime resulting in injury or loss often will require evidence of that injury or loss. For example, a confession to a homicide likely would not be trustworthy without evidence of the victim's death." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 166 Conn. App. 229 (*Flynn*, *J.*, dissenting in part, concurring in part, and concurring in the result). Hence, the absence of such directly corroborative evidence of a second act of masturbation by the defendant in the presence of S.W. would not require exclusion of his confession as evidence that he committed that act.

Here, in fact, there is substantial evidence tending to corroborate the trustworthiness of the defendant's statements admitting to having masturbated in S.W.'s presence at least twice. First, the admission of such conduct was sworn to before a police officer, who also videotaped his statement with his knowledge and consent. Such a statement could not have been more obviously against the defendant's penal interest, which is a well-recognized index of its trustworthiness. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. *United States* v. *Harris*, 403 U.S. 573, 583, 91 S. Ct. 2075,

id., 168–69. When we consider the defendant's statements in the light most favorable to upholding his challenged conviction, we conclude that there was sufficient evidence to support his conviction of a second count of risk of injury. The defendant admitted that he masturbated in the presence of S.W. on at least two occasions. Moreover, his admission included the facts that S.W. watched him masturbating, and even touched his penis on one occasion. The jury was free to credit this testimony over the testimony of S.W., who testified that she remembered him masturbating in her presence on only one occasion. The defendant's statements, therefore, provided sufficient evidence for the jury to conclude that, on two separate occasions, he masturbated in the presence of S.W., and thereby engaged in an act "likely to impair the health or morals" of a child in violation of § 53-21 (a) (1). We thus conclude that the jury reasonably could have concluded that the defendant was guilty beyond a reasonable doubt of two

29 L. Ed. 2d 723 (1971) ("[a]dmissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search"). Secondly, critical portions of the defendant's statements—particularly those concerning one alleged incident of masturbation in S.W.'s presence that she recalled—were fully corroborated by her detailed trial testimony. Corroboration of the defendant's admission as to one act, detailing its time frame, its location and its essential descriptive details, surely lends credibility to the defendant's admission that he committed a similar act a second time, in the same location, in the same general manner and for the same illicit purpose. Thirdly, the defendant's admitted conduct in S.W.'s presence on at least one occasion was strongly corroborated by physical evidence establishing the presence of the defendant's DNA in a semen sample removed for forensic analysis from S.W.'s stained bedspread. See footnote 8 of this opinion.

Against this background, had the admissibility of the confession been challenged at trial under the corroboration rule, that challenge would surely have failed. Even if S.W.'s trial testimony and the state's forensic evidence only furnished direct corroboration of the corpus delicti of one crime of risk of injury based upon the defendant's admitted masturbation in S.W.'s presence in her bedroom, such partial corroboration of his entire statement, under circumstances where he was clearly acting against his own penal interest, undoubtedly tended to produce a confidence in the truth of the other part of the confession.

counts of risk of injury in violation of § 53-21 (a) (1). See *State* v. *Miles*, supra, 97 Conn. App. 240.

The judgment is affirmed.

In this opinion LAVINE, J., concurred.

FLYNN, J., dissenting. After a jury trial, the defendant was found not guilty of two counts of sexual assault in the first degree, in violation of General Statutes § 53a-70 (a) (2) and (a) (1), respectively, and not guilty as to one count of injury or risk of injury to, or impairing morals of a child, in violation of General Statutes § 53-21 (a) (2), which the information charged had resulted from contact with the intimate parts of a child. The defendant was convicted of two additional charges of risk of injury, in violation of § 53-21 (a) (1), alleging in each that "the defendant did an act likely to impair the health or morals of a child under sixteen," for which the charging documents did not allege specific facts identifying the acts constituting the violation.

Despite the generality of both the information and the judge's charge as to the conduct constituting risk of injury, it is clear from the prosecutor's summation to the jury that the state claimed that the defendant had violated § 53-21 (a) (1) by two separate acts of masturbation in front of the victim.

The issue to be decided on appeal is whether the defendant, Robert H., upon the evidence, could be convicted of one count of the crime of risk of injury to a child in violation of § 53-21 (a) (1),[1] which he does not

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ."

contest on appeal, or two such counts based solely on his extrajudicial confession.

The defendant's brief framed the issue as follows: "Was there sufficient evidence for the defendant to be convicted of and sentenced for a second count of risk of injury, and to be sentenced for violation of probation based on two such counts?"[2] He specifically states that there was no independent evidence of commission of a second offense of risk of injury in violation of § 53-21 (a) (1), apart from his confession.[3]

While I respect the opinion of the majority in this matter, I dissent for some of the same reasons I gave in *State* v. *Leniart*, 166 Conn. App. 142, 228, 140 A.3d 1026 (2016) (*Flynn*, *J.*, dissenting in part, concurring in part, and concurring in the result). I concurred in part in *Leniart* because I agreed with the result reached and with the majority that there was sufficient independent evidence that the defendant intentionally caused the death of the victim, corroborating the extrajudicial confessions of the defendant, and thus by sufficient evidence establishing the necessary elements of the crime of murder in violation of General Statutes § 53a-54a (a). Id., 231–32. I dissented in part because I did not agree that the corpus delicti rule was merely evidentiary in that murder case. I dissented, first, because that holding "was unnecessary" in a case where both the majority and I agreed that there was independent evidence of the death of the victim, a necessary element of the crime of murder. Id., 232. My second reason for dissenting was that requiring such independent circumstantial evidence was sound where there was a scintilla

[2] On appeal, the defendant does not challenge the admissibility of his confession, but only whether it could suffice to be the only evidentiary basis on which his conviction rested.

[3] The defendant's confession was made without an attorney present following a four hour long interrogation. Moreover, the police indicated to the defendant that they had certain physical evidence, which they did not in fact have. That was a deception.

of evidence, from people who knew the victim, that she had been seen alive after her disappearance. Id. Additionally, I noted that the *Leniart* majority seemed to give no weight to our Supreme Court's opinion in *State* v. *Hafford*, 252 Conn. 274, 317 n.23, 746 A.2d 150 (2000), that proving the trustworthiness of a defendant's confession to a crime resulting in injury or loss often will require evidence of that injury or loss,[4] and that conviction for a homicide would require some evidence of death. Id., 234–35. Finally, I expressed the opinion that where the corpus delicti rule was invoked in a challenge to evidentiary sufficiency, it is not simply a rule of evidence, but of a hybrid nature. It is a hybrid where independent corroboration establishing its trustworthiness is lacking because the due process clause of our federal constitution requires that all necessary elements of the crime charged be proved beyond a reasonable doubt. As such, it is like other evidentiary rules, in that it interplays with constitutional requirements.[5]

At least one commentator has observed that "[t]here is insufficient justification for treating the [corpus delicti] rule as one related to admissibility of [a] defendant's admissions. The requirement should be only one

[4] The majority reads *Hafford*'s terms "injury or loss" more narrowly than I. The loss is the conduct that the statute proscribes. In this case it is "[doing] any act likely to impair the health or morals of any . . . child [under sixteen] . . . ." General Statutes § 53-21 (a) (1). This is consistent with our Supreme Court's reasoning in *State* v. *Arnold*, 201 Conn. 276, 287, 514 A.2d 330 (1986), that the purpose of prohibiting convictions based on a defendant's uncorroborated confession is "to protect against conviction of offenses that have not, in fact, occurred, in other words, to prevent errors in convictions based solely upon untrue confessions to nonexistent crimes."

[5] See, for example, the sixth amendment to the United States constitution, which provides the right of confrontation and the right to cross examine. U.S. Const., amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"). That constitutional requirement informs the law of evidence with respect to the rule regarding admission of hearsay and its exceptions.

of evidence sufficiency . . . [T]he rule should be one to be applied by . . . appellate courts . . . .'' 1 C. McCormick, Evidence (7th Ed. 2013) § 148, p. 817.

Thus, in *Leniart*, I disagreed that a claim of evidentiary insufficiency of a conviction based on a confession made outside of court is not reviewable on appeal unless a defendant preserves the issue by objecting to the admission of his confession. I continue to hold the view that such a claim is reviewable based on our Supreme Court's decision in *State* v. *Adams*, 225 Conn. 270, 623 A.2d 42 (1993). There, our Supreme Court followed the ruling of the United States Supreme Court in *Jackson* v. *Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), in holding that ''any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right'' and is entitled to review as it does with ''any properly preserved claim.'' *State* v. *Adams*, supra, 276 n.3.

The majority here seems to premise its conclusion on the idea that if evidence is admitted without objection, there can be no challenge as to its sufficiency. I disagree. The failure to object to evidence does not end the matter. There can be a case, such as this, where there is no objection to evidence of an extrajudicial confession, but the defendant moves for acquittal as the defendant did, and when it is denied, appeals on the basis that no rational jury could have found the second count proved beyond a reasonable doubt.[6] See *Jackson* v. *Virginia*, supra, 443 U.S. 307; *State* v. *Adams*, supra, 225 Conn. 270. Practice Book § 42-40 expressly provides that a defendant may do so as it states in relevant part: ''After the close of the prosecution's case in chief or at the close of all the evidence, upon motion of the defendant

[6] I did not in *Leniart*, nor do I in this appeal, opine that admissibility of the confession can be contested for the first time on appeal. The defendant does not do so either.

or upon its own motion, the judicial authority shall order the entry of a judgment of acquittal as to any principal offense charged and as to any lesser included offense for which the evidence would not reasonably permit a finding of guilty." The question then is whether all of the evidence, whether objected to or not, given the most favorable inference that the law requires to sustain the verdict, permits a rational jury to find all of the elements proved beyond a reasonable doubt.

I, thus, conclude that the defendant's claims are reviewable, and that because the victim testified to the occurrence of but one incident of the defendant's performance of an act of risking injury to the victim and, therefore, corroborated only one such offense, the evidence was insufficient to permit a jury to reasonably and rationally convict the defendant of a second such offense.

The defendant's conduct in the commission of the one count of commission of an act of masturbation in the presence of the victim, which he does not contest on appeal, is reprehensible. However, that should not foreclose his ability to contest the evidentiary sufficiency of a second count of that crime. The United States Supreme Court has held that: "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. . . . Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." (Citation omitted.) *Jackson* v. *Virginia*, supra, 443 U.S. 323–24. Furthermore, it is essential "of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Id., 316. Moreover, "the critical inquiry

on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Citation omitted; emphasis in original.) Id., 318–19.

Here, the record is devoid of any evidence of the occurrence of a second incident, where the defendant masturbated in front of the victim, other than the defendant's extrajudicial confession. Nothing in the record supports the trustworthiness of that confession's admission to a second incident. I therefore disagree with the majority that "there is substantial evidence tending to corroborate the trustworthiness of [that] statement . . . ." The majority notes that "critical portions of the defendant's statements . . . were fully corroborated by [the victim's] detailed trial testimony." Respectfully, I not only disagree that the defendant's extrajudicial confession to a second offense was fully corroborated; I disagree that it was corroborated at all. The victim did not expressly testify to another instance of the defendant masturbating in front of her. The victim was asked if she recalled "anything unusual happening" between her and the defendant, to which she testified that she did. She was then asked whether "it happen[ed] on one occasion or more than one occasion," and she responded that it happened on "[m]ore than one" occasion. The victim's response of "more than one" followed the query of whether "anything unusual" had happened between her and the defendant; however, the prosecutor never specified what "unusual" conduct to which he was referring. Additionally, when the victim later

was asked what happened between her and the defendant, she responded by asking: "Let me understand, like both of them, or just one?" When she was then prompted to "start with one," she testified to an occasion when the defendant masturbated in front of her. The victim was then asked whether "anything similar to that happened" and although she responded by saying yes, she responded "no" to the follow up question "where he did in your room another time?" The victim went on to testify about other facts relating to the charges of sexual assault for which the jury found the defendant not guilty,[7] but did not testify to a second occurrence of the defendant masturbating in her presence. A confession to be reliable cannot be self-corroborating. When the state charged the defendant in each separate count of violation of § 53-21 (a) (1) that the defendant "did an act," it took on the burden of proving beyond a reasonable doubt that two such "acts" of self-abuse in the child's presence had occurred, not just one. I would hold that an extrajudicial confession to a second incident of indecent conduct toward a minor, unsupported by any corroborative evidence of injury, or risk of injury, to the victim, and where the minor victim in the case testifies only to the happening of *one* such incident, is not sufficient to permit a rational fact finder to find a second conviction for the same criminal offense of risk of injury beyond a reasonable doubt.[8] I would reverse the defendant's conviction as to the second count of risk of injury for the reason that the evidence would not reasonably permit a finding of guilty,

[7] The defendant was also found not guilty on a third count of risk of injury regarding "the defendant [having] contact with the intimate parts of a child under sixteen years of age . . . in a sexual and indecent manner likely to impair the health and morals of such child."

[8] The victim, a child aged ten or eleven when this second alleged incident occurred, was able to personally testify in court, at thirteen years old, in the presence of the accused and did not need to offer videotaped testimony outside the defendant's presence as permitted by *State* v. *Jarzbek*, 210 Conn. 396, 554 A.2d 1094 (1989).

and remand with direction to grant the defendant's motion for acquittal as to that count.

Accordingly, I respectfully dissent.

JENNIFER HELMEDACH *v.* COMMISSIONER OF CORRECTION
(AC 38026)

Lavine, Prescott and Mihalakos, Js.

Syllabus

The petitioner, who had been convicted, following a jury trial, of the crimes of felony murder, robbery in the first degree and conspiracy to commit robbery in the third degree, and had been sentenced to a term of incarceration of thirty-five years, sought a writ of habeas corpus, claiming that her trial counsel rendered ineffective assistance by failing to timely and meaningfully inform her of the state's plea offer of ten years incarceration. Trial counsel had been informed of the offer by the state on the morning prior to when the petitioner was scheduled to testify. Because trial counsel had spent the entire weekend preparing the petitioner for testifying and was concerned that relaying the information about the offer to her before she testified would negatively impact her testimony, he had asked the prosecutor if he could convey the offer to the petitioner after she testified, and the prosecutor agreed. When the petitioner was informed of the offer after she testified, she expressed a desire to accept it, but the prosecutor informed trial counsel that the offer was withdrawn. The habeas court rendered judgment granting the habeas petition, concluding that counsel was deficient in failing to relay the plea offer in a timely manner. Thereafter, the court granted the petition for certification to appeal filed by the respondent, the Commissioner of Correction, and the respondent appealed to this court. *Held* that the habeas court properly granted the habeas petition and determined that trial counsel provided ineffective assistance, that court having properly determined that his failure to relay the favorable plea offer to the petitioner in a timely manner before it was withdrawn fell below an objective standard of reasonableness required by attorneys under the state and federal constitutions: the respondent's claim to the contrary notwithstanding, trial counsel's decision to delay informing the petitioner about the plea offer was not within the realm of strategic decisions that an attorney is allowed to make, nor did it involve a matter of trial strategy, as trial counsel had an obligation to promptly inform the petitioner of the plea offer, which required him to communicate the offer without delay; furthermore, certain decisions regarding the exercise of basic

trial rights, such as whether to plead guilty or to testify, are of such moment that they cannot be made for a defendant by a surrogate, a defense counsel who violates the duty to communicate timely to the accused a formal plea offer from the prosecution fails to render effective assistance, and trial counsel's actions here prevented the petitioner from properly exercising her constitutional right to plead guilty and to make a fully informed decision as to whether to testify on her own behalf; moreover, even if trial counsel's decision to delay communicating the plea offer could be considered a matter of trial strategy, it was not reasonable under the circumstances, especially given the history of the plea negotiations in this case, that trial counsel was made aware by a fellow attorney that his decision to delay informing the petitioner might not be a reasonable course of action, and that trial counsel withheld the information to protect the petitioner's fragile emotional state and did not explain how that would affect his trial strategy.

Argued April 18—officially released September 27, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to this court. *Affirmed.*

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Adrienne Maciulewski*, assistant state's attorney, for the appellant (respondent).

Conrad Ost Seifert, assigned counsel, for the appellee (petitioner).

Opinion

PRESCOTT, J. The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court in favor of the petitioner, Jennifer Helmedach, granting her petition for a writ of habeas corpus.[1] On appeal, the respondent claims that the habeas court

[1] The habeas court granted the respondent's petition for certification to appeal from the judgment.

improperly concluded that the petitioner's trial counsel provided ineffective assistance of counsel by failing to inform the petitioner of a plea offer until after she had testified at the underlying criminal trial. Having thoroughly reviewed the record prior to oral argument,[2] we concluded after oral argument that the habeas court properly granted the petitioner's petition for a writ of habeas corpus. Immediately thereafter, we orally affirmed the judgment of the habeas court.[3] Consistent with that ruling, we now issue this written opinion.

The following facts, as set forth by our Supreme Court in the petitioner's direct criminal appeal, and procedural history are relevant to this appeal. "On September 1, 2004 . . . the [petitioner, the petitioner's infant daughter, Ayanna, and the petitioner's boyfriend, David Bell, were driven] to the apartment of Sarah Tarini in Meriden. Tarini lived in the apartment with her ten year old daughter, Summer, and she had been allowing Michael Fontanella and Shanna Kropp to stay in one of the apartment's two bedrooms for several weeks. The [petitioner] and Bell asked Tarini if they could spend the night there and told her that they would be going to New York the next day. Tarini agreed to let

[2] On March 3, 2016, the petitioner filed a motion to expedite this appeal. The motion requested that it be assigned for oral argument before the end of the court year on the ground that the likely remedy, should this court affirm the habeas court's judgment, would be the imposition of the ten year sentence offered by the state. As the petitioner had already served more than ten years of her sentence, this court granted that motion to expedite on March 4, 2016.

[3] In the ruling from the bench on April 18, 2016, we specified that the decision to affirm the habeas court's ruling was made by two members of the three member panel. At that point in the proceedings, the third panel member, Judge Mihalakos, indicated the desire for additional time to determine whether to join the other members of the panel in deciding to affirm the judgment of the habeas court. Subsequently, and consistent with the corrected memorandum of decision issued by the habeas court, we immediately ordered the matter returned to the criminal court for further proceedings.

the [petitioner], Ayanna and Bell stay in the bedroom where Fontanella and Kropp usually stayed.

"On September 2, 2004, Kropp told the [petitioner] that she and Bell would have to leave Tarini's apartment. The [petitioner] appeared to Kropp to be aggravated and annoyed at this request. At about 6 p.m., the [petitioner] left the apartment with Ayanna, stating that she was going to call someone on a pay telephone to get a ride. The [petitioner] called the victim, Faye Bennett, who was a good friend of the [petitioner] and someone she had known since childhood, and asked her to come to the location of the pay telephone to pick her up. The victim, who was approximately six or seven months pregnant, arrived in her Chevrolet Blazer a short time later. The [petitioner] repaid the victim $20 that she previously had borrowed from her and the victim gave the [petitioner] a pair of sneakers as a birthday gift for Ayanna. At about 7 p.m., the victim called her boyfriend, told him that she and the [petitioner] were going to Tarini's apartment, and asked if he wanted to join them. He declined.

"At approximately 7:30 p.m. that same evening, Tarini, Summer, Fontanella and Kropp left the apartment and walked to a nearby store to purchase cell phone minutes and ice cream. At approximately 7:45 p.m., Scott Baustien, who lived in the first floor apartment directly below Tarini's apartment, saw the [petitioner] and the victim walk by his window and heard them walk up to the second floor and enter Tarini's apartment. He then heard thumping noises. Baustien also noticed that the victim's Blazer, which was parked in the driveway, was blocking his car and a car belonging to Clarence Labbe, who lived above Tarini in the building's third floor apartment. Baustien telephoned Labbe to tell him about the Blazer. Labbe told Baustien that he also had heard banging noises coming from Tarini's apartment, which he assumed were caused by children playing.

"Baustien then went outside to check the Blazer that was blocking the driveway and saw the [petitioner] seated behind the steering wheel and Ayanna in the passenger seat. He told the [petitioner] that she could not park there. The [petitioner], who appeared to Baustien to be extremely nervous and as 'white as a ghost,' said, 'I'm sorry, I'm sorry, I'm sorry,' and backed the Blazer quickly down the driveway toward the road, hitting the corner of the apartment building in the process. After Baustien returned to his apartment, he heard footsteps going down the front stairs of the apartment and a car horn beeping several times.

"At approximately 8:15 p.m., Tarini, Summer, Fontanella and Kropp returned to the apartment. Tarini knocked on the door of the bedroom where the [petitioner] and Bell had been staying. When she received no response, she opened the door and saw that the room was covered with blood and that there was a body in a garbage bag on the bed. Tarini immediately asked Fontanella to take Summer upstairs to Labbe's apartment and called 911. A short time later, Captain Timothy Topulos and Officer Justin Hancort of the Meriden police department arrived at the scene. They met Tarini and Fontanella, who were visibly shaken, outside the building. They then entered Tarini's apartment and observed the bloody crime scene and the victim's body on the bed. They also saw a baby bottle on the bedroom floor. Topulos summoned medical personnel, who determined that the victim was dead.

"Initially, the police misidentified the victim as the [petitioner]. It was not until the next day, during the victim's autopsy, that the victim was correctly identified as Bennett. The chief medical examiner determined that the cause of the victim's death was multiple stab wounds and strangulation. The [petitioner] and Bell were apprehended in the Bronx, New York, approximately eight days after the victim's murder." (Footnotes

omitted.) *State* v. *Helmedach*, 306 Conn. 61, 66–69, 48 A.3d 664 (2012).

During the jury trial that followed, "[t]he state's theory was that the [petitioner] had lured the victim to Tarini's apartment so that she and Bell . . . could steal the victim's car and money and escape to New York. The [petitioner] claimed that the evidence did not support a finding that she had lured the victim to the apartment so that she and Bell could rob her, and that her participation in the robbery after Bell's assault on the victim and his threat to kill her if she did not get the victim's car and wait for him in front of the building was the result of duress." Id., 69–70. Ultimately, however, the petitioner was found guilty of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), and conspiracy to commit robbery in the third degree in violation of General Statutes §§ 53a-48 and 53a-136. She was sentenced by the trial court to a term of incarceration of thirty-five years. The judgment of conviction was affirmed on appeal. See *State* v. *Helmedach*, 125 Conn. App. 125, 8 A.3d 514 (2010), aff'd, 306 Conn. 61, 48 A.3d 664 (2012).

Thereafter, on November 19, 2014, the petitioner filed an amended petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel. The petitioner claimed that the performance of her trial counsel, Richard Reeve, was deficient because he failed to timely and meaningfully communicate a plea offer of ten years to the petitioner.[4] On November 19 and December 12,

[4] The petitioner also included a second claim that her trial counsel's pretrial and trial representation was ineffective because he failed to investigate sufficiently the state's evidence and failed to have a pretrial assessment of the petitioner conducted by an expert on battered woman's syndrome. In its memorandum of decision, the habeas court noted that "[t]he petitioner did not provide evidence of this second claim during the trial and did not include the issue in [her] posttrial briefs"; it, therefore, "consider[ed] the issue abandoned." The petitioner has not challenged the habeas court's decision with regard to her second claim as an adverse ruling that should

2014, the habeas court, *Cobb*, *J.*, held a trial in which it heard testimony from the petitioner; Reeve; Gary Nicholson, the assistant state's attorney who prosecuted the case; and Michael Sheehan, Reeve's law partner.

After trial, the habeas court granted the petition for a writ of habeas corpus. In a corrected written memorandum of decision dated August 26, 2015,[5] the court concluded that Reeve's failure to relay the favorable offer to the petitioner in a timely manner before it was withdrawn fell below the objective standard of reasonableness required by attorneys under the state and federal constitutions. The habeas court granted certification to appeal. This appeal followed.

The respondent claims that the habeas court improperly concluded that Reeve had provided ineffective assistance to the petitioner by delaying to inform her of a plea offer until after she had completed her trial testimony. More specifically, the respondent contends that the habeas court improperly relied on *Missouri* v. *Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), and *Sanders* v. *Commissioner of Correction*, 83 Conn. App. 543, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004), in finding that Reeve's performance was deficient, because neither *Frye* nor *Sanders* addresses whether it is reasonable trial strategy for a defense attorney to delay informing the client of a plea offer if valid strategic reasons exist for that decision. The respondent also argues that Reeve's performance was objectively reasonable under the circumstances.

be considered in the event the respondent is successful in his appeal. See Practice Book § 63-4 (a) (1) (B). Accordingly, we do not address it further.

[5] The habeas court issued its original memorandum of decision on May 15, 2015, and issued a corrected memorandum of decision on August 26, 2015. The sole difference between the two decisions concerns the remedy ordered by the court.

In response, the petitioner argues that Reeve's conduct could not be reasonable trial strategy because, as a matter of law, the decision made by Reeve to delay informing the petitioner of a favorable plea offer is not one that counsel constitutionally is allowed to make because it undermined the petitioner's ability to meaningfully exercise a right that belongs solely to her. Thus, in the petitioner's view, Reeve's conduct cannot be characterized as a matter of trial strategy. The petitioner alternatively contends that if this court decides that Reeve's decision to delay communicating the plea offer to her was a matter of strategy, it should conclude that Reeve did not make a *reasonable* strategic decision under the circumstances. We agree with the petitioner that Reeve's decision to delay informing the petitioner about a plea offer was not within the realm of strategic decisions that an attorney is allowed to make.

The following additional facts, as found by the habeas court, are relevant to this claim. "Reeve was appointed to represent the petitioner after her arrest and represented her throughout the pretrial and trial proceedings in this case. . . . Like most criminal cases, the parties in this case engaged in pretrial plea negotiations in an attempt to resolve the case prior to trial. On December 18, 2006, the state made its first plea offer to the petitioner during a supervised pretrial with Judge Damiani. With Judge Damiani's assistance, the state offered the petitioner a plea to robbery or conspiracy to commit robbery and incarceration in the range of fifteen to twenty years, with the right to argue to the court that it impose a sentence at the low range or the 'floor.' The judge approved the [plea offer], but indicated to [Reeve] at the pretrial that he would likely sentence the petitioner at the high end of the range, absent some compelling circumstances that arose at the sentencing hearing. [Reeve] said he would discuss the offer with the petitioner and the state indicated it would discuss it with the victim's family.

"[Reeve] met with the petitioner and relayed to her the offer. He advised the petitioner about the strengths and weaknesses of the state's case, her defense and the risks of going to trial. The petitioner agreed to accept the offer. On January 10, 2007, [Reeve] wrote to [Nicholson] and indicated that the petitioner accepted the offer. . . . [Reeve] did not receive a written response from [Nicholson].

"At the next supervised pretrial, in mid-January 2007, [Nicholson] informed [Reeve] and the judge that the victim's family did not support the proposed agreement, and as a result, the state was withdrawing it. As a result, the parties decided to forgo plea negotiations until after the petitioner's codefendant, [Bell], had been tried or his case resolved.

"On May 23, 2007, Bell was convicted on all charges and on December 14, 2007, was sentenced to eighty-five years incarceration.

"This case was then placed on the trial list.

"On August 24, 2007, [Reeve] filed a motion to compel specific performance of the original plea offer. That motion was denied [by the court].

"The case proceeded to trial and while the parties were selecting the jury, the state made its second plea offer to the petitioner. That offer was twenty-two years, suspended after seventeen years incarceration. After discussing this offer with [Reeve], the petitioner rejected it.

"The state then made its third offer, during jury selection or during the first days of its case-in-chief. That offer was fourteen years to serve. The petitioner rejected this third offer, after conferring with [Reeve]. [Reeve] explained to the petitioner that if convicted she would be facing at least thirty years in prison, as the

felony murder charge had a twenty-five year mandatory minimum sentence.

"The petitioner rejected the second and third offers because the state's case had been weakened as a result of its key witness', Gabriel Colon, recantation of his prior oral statement to police that the petitioner spoke to him about participating in the setup of the robbery of the victim. Because Colon had not provided a written statement to police, his prior statement could not be introduced under [the] *Whelan* doctrine.[6] Colon was the only witness that was able to tie the petitioner directly to the robbery. Tying the petitioner to the robbery was essential to establishing the underlying felony on the felony murder charge.

"The petitioner's criminal trial was held on various days between October 1, 2007, and October 16, 2007. On Friday, October 5, 2007, the state rested its case.

"After the state rested, the case was continued to the following Tuesday, October 9, 2007. The courts were closed on Monday in observance of Columbus Day.

"[Nicholson] did not make any offers to the petitioner on Friday, October 5, 2007. Over the weekend, [Reeve] spent numerous hours at the York prison in Niantic, where the petitioner was incarcerated, preparing the petitioner for her testimony, which would begin the following Tuesday.

"On Tuesday morning, October 9, 2007, [Reeve] arrived at his office early to prepare for trial. Between 9:15 and 9:30 a.m., [Reeve] received an unexpected call from [Nicholson]. During the call, [Nicholson] offered the petitioner ten years to serve. [Reeve] told [Nicholson] that he had spent the entire weekend prepping the petitioner for her testimony on Tuesday. [Reeve]

[6] *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).

explained that although he believed that ten years was a very favorable offer, he was concerned about relaying it to the petitioner immediately prior to her testimony because she was young and flustered, and he believed that this unexpected news would negatively impact her testimony. [Reeve] asked [Nicholson] if he could convey the offer after the petitioner testified, and [Nicholson] said: 'that's okay.'

"After the call from [Nicholson] and prior to leaving for court that Tuesday morning, [Reeve] stopped by the office of his partner, [Sheehan], to inform him of the unexpected call he received from [Nicholson], the offer of ten years, as well as his concerns about relaying the offer to the petitioner before she testified.

"[Sheehan] agreed that the ten year offer was favorable and advised [Reeve] that he should not wait to communicate the offer to the petitioner until after she testified.

"In view of [Nicholson's] acquiescence to leave the offer open, [Reeve] followed his instincts and did not relay the offer to the petitioner on Tuesday morning, but instead waited until after her testimony concluded. The petitioner's testimony took two and one-half days. Upon learning of the ten year offer after she testified, the petitioner expressed her desire to accept it and indicated she wanted to discuss it with her mother and attorney jointly.

"[Reeve] then approached [Nicholson] and told him the petitioner was interested in accepting the offer of ten years. [Nicholson] informed [Reeve] that the offer was withdrawn.

"When [Reeve] returned to his office, he relayed these events to [Sheehan]. [Sheehan] told him that his failure to relay the ten year offer to the petitioner prior to its withdrawal created an issue of [Reeve's] ineffectiveness

under *Sanders* v. [*Commissioner of Correction*, supra, 83 Conn. App. 543]. [Sheehan] was aware of the *Sanders* case because he handled the matter on appeal. [Nicholson] was also involved in that case, having prosecuted . . . Sanders.

"With the offer withdrawn, the trial continued to its conclusion with the petitioner being convicted by the jury on the charges and later sentenced by the court to thirty-five years incarceration.

"At some point, [Reeve] approached [Nicholson] and told him that he had not relayed the ten year offer in a timely manner and that as a result, he believed there existed an ineffectiveness claim against him under the *Sanders* case. He told Nicholson he felt terrible about the situation and wished there was something he could do to remedy it.

"On January 27, 2008, [Reeve] sent a letter to Public Defender Martin Zeldes, the head of the public defenders' appellate unit, explaining the circumstances surrounding the final offer of the state, and his failure to convey the offer to the petitioner prior to its being withdrawn by the state.

"The petitioner would have accepted the ten year plea offer prior to its withdrawal had she been informed of the offer by her counsel in a timely manner, prior to it being withdrawn.

"The parties stipulated that 'Judge Damiani would have accepted the plea resolution and sentenced the petitioner in accordance with the state's final offer.' "

As an initial matter, we set forth the applicable standard of review and principles of law. "The petitioner's right to the effective assistance of counsel is assured by the sixth and fourteenth amendments to the federal constitution, and by article first, § 8, of the constitution

of Connecticut." *Sanders* v. *Commissioner of Correction*, supra, 83 Conn. App. 549. "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment [to the United States constitution]. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Citations omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . . ." *Strickland* v. *Washington*, supra, 697.

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

disavowed making any challenge to the habeas court's factual findings.

"The Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings." (Internal quotation marks omitted.) *Missouri* v. *Frye*, supra, 566 U.S. 140 "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials . . . it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. . . . In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." (Citations omitted; internal quotation marks omitted.) Id., 143–44. In *Hill* v. *Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), the United States Supreme Court expressly established that *Strickland*'s two part test governs ineffective assistance claims in the plea bargain context.

In the present case, the respondent concedes that if indeed Reeve performed deficiently, the habeas court properly determined that the petitioner suffered prejudice on the basis of a reasonable probability that (1) the petitioner would have accepted the ten year plea offer had it been conveyed to her immediately, and (2) the trial court would have accepted the plea agreement and sentenced the petitioner accordingly. Our review and analysis, therefore, is confined to the first prong of *Strickland*, the performance prong.

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." (Citations omitted; internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 688–90. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632–33, 126 A.3d 558 (2015).

At the same time, however, if the choice at issue implicates a fundamental right of constitutional magnitude, such a choice is "distinguishable from [a] tactical trial [right] that [is] not personal to the defendant and that counsel may choose to [make] as part of trial strategy." (Internal quotation marks omitted.) *State* v. *Fleury*, 135 Conn. App. 720, 728, 42 A.3d 499, cert. denied, 305 Conn. 919, 47 A.3d 388 (2012). "An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy. . . . That obligation, however, does not require counsel to obtain the defendant's consent to every tactical decision. . . . *But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate.* A defendant . . . has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. . . . Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

"A guilty plea . . . is an event of signal significance in a criminal proceeding. By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. . . . While a guilty plea may be tactically advantageous for the defendant . . . the plea is not simply a strategic choice; it is itself a conviction . . . and the high stakes for the defendant require the utmost solicitude . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Florida* v. *Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

"The opportunity to testify is . . . a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. . . . Every criminal defendant is

privileged to testify in his own defense, or to refuse to do so. . . . [The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . . The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege." (Citations omitted; internal quotation marks omitted.) *Rock* v. *Arkansas*, 483 U.S. 44, 52–53, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). With these legal principles in mind, we turn to the merits of the case.

We agree with the petitioner that this court need not consider whether, under the circumstances, Reeve's challenged action might be considered *sound* trial strategy, because the challenged action does not fall under the umbrella of trial strategy at all. The habeas court found that although Reeve "believed that ten years was a very favorable offer, he was concerned about relaying it to the petitioner immediately prior to her testimony because she was young and flustered, and he believed that this unexpected news would negatively impact her testimony." Such paternalistic decision-making on the part of defense counsel infringed upon the petitioner's basic trial right to plead guilty, which she, alone, had the ultimate authority to determine whether to exercise.[7]

Moreover, defense counsel's decision was not a matter of trial strategy, let alone a *reasonable* strategic decision, because, pursuant to *Frye*, if defense counsel

[7] By not timely informing the petitioner of the ten year plea offer, defense counsel not only deprived the petitioner of critical information that might have resulted in her forgoing the remainder of the trial in favor of pleading guilty, but, by virtue of the point in the trial during which the plea offer was made, deprived her of critical information that may well have factored into how she internally weighed the risks and benefits of testifying in her own defense. The decision made by the petitioner to testify was thus arguably based upon an incomplete calculus. Ultimately, the petitioner was entitled to make both decisions—whether to plead guilty and whether to testify in her own defense—fully informed of the state's very favorable plea offer.

violates his duty to communicate timely to the accused formal plea offers from the prosecution, he fails to render the effective assistance that the United States constitution requires. See *Missouri* v. *Frye*, supra, 566 U.S. 145. The basis for this rule is grounded largely in professional performance standards that govern the practice of law. See id., 145–46.

In *Frye*, the defendant was charged with a felony arising from driving with a revoked license. Id., 138. The prosecution sent a letter to his defense counsel that offered a choice between two plea bargains, with the offers set to expire on a fixed date. Id. Defense counsel did not inform the defendant of the offers, and after they lapsed, the defendant pleaded guilty but on more severe terms. See id., 139–40. The court held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. . . . When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires. Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The American Bar Association recommends defense counsel '*promptly* communicate and explain to the defendant all plea offers made by the prosecuting attorney,' ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2 (a) (3d ed. 1999) . . . . The standard for *prompt* communication and consultation is also set out in state bar professional standards for attorneys." (Citations omitted; emphasis added.) *Missouri* v. *Frye*, supra, 566 U.S. 145–46.

The respondent argues that the holding in *Frye* does not apply to the facts of the present appeal because this is not a "lapsed plea" case, i.e., Reeve did *not* allow

the state's ten year plea offer to expire without first advising the petitioner of it.[8] The respondent also argues that an attorney's duty to *promptly* inform his client of a plea offer, as discussed in *Frye*, does not constitute an obligation for the attorney to *immediately* convey the plea offer. Therefore, this case requires us to consider the meaning of the term "promptly" as contemplated by the United States Supreme Court.

As support for his argument, the respondent specifically references the language in *Frye* in which the court states that "[a]ny exceptions to [the general] rule [that defense counsel has the duty to communicate plea offers to the accused] need not be explored here, for the offer was a formal one with a fixed expiration date." *Missouri* v. *Frye*, supra, 566 U.S. 145. Because, according to the respondent, Reeve presented the petitioner with the plea offer at the conclusion of her trial testimony *before* he was aware the state withdrew its offer, *Frye* does not resolve the narrow question presented by the facts of this case, which, as framed by the respondent, is, "whether a criminal defense attorney performs within the wide range of reasonable professional assistance by deciding to delay informing the client of a plea offer for a valid strategic reason and [when] the attorney has good reason to believe that the offer would remain open."[9] (Footnote omitted.)

[8] This argument is dependent entirely on the habeas court's factual finding that after Reeve asked Nicholson if he could convey the ten year offer to the petitioner *after* she finished testifying, Nicholson replied, "That's okay."

[9] We note that the petitioner never filed an additional motion with the court asking that the court permit the petitioner to accept the ten year offer and be sentenced accordingly. The parties have not directed us to any criminal case, nor have we been able to find any, on the issue of whether the state can validly withdraw a plea offer after promising to keep it open. It is clear, however, that the interpretation of plea agreements is governed by contract law. *State* v. *Rivers*, 283 Conn. 713, 724–28, 931 A.2d 185 (2007).

A plea agreement is "evaluated with reference to the requirements of due process"; (internal quotation marks omitted) id., 724; however, "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally

We agree with the respondent that *Frye* does not necessarily control this case. We decline, however, to read *Frye* as narrowly as urged by the respondent because the respondent's assertion essentially ignores the thorough reasoning that the court provided for the general rule in *Frye*, which appears in the court's opinion immediately after its establishment of the rule. As previously discussed, the court repeatedly emphasized the requirement for *prompt* communication between defense counsel and client as set forth in both American Bar Association and state bar professional standards for attorneys. *Missouri* v. *Frye*, supra, 566 U.S. 145–46. Indeed, rule 1.4 of this state's Rules of Professional Conduct provides in relevant part: "(a) A lawyer shall: (1) *promptly* inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules . . . [and] (3) keep the client reasonably informed about the status of the matter . . . . (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[10] (Emphasis

protected interest. It is the ensuing guilty plea that implicates the Constitution." (Footnote omitted.) *Mabry* v. *Johnson*, 467 U.S. 504, 507–508, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984). Under Connecticut law, "[a]n offer may be withdrawn before acceptance, and a bare offer is ordinarily held to be withdrawn unless accepted immediately. The offer may be accompanied by a promise not to withdraw it within a specified time. In that case it may be accepted within the time specified, before an actual withdrawal. The promise not to withdraw is without consideration and cannot be enforced." *Patterson* v. *Farmington Street Railway Co.*, 76 Conn. 628, 642, 57 A. 853 (1904). "This court has long held that an offer imposes no obligation upon either party, until it is accepted by the offeree, according to the terms in which the offer was made. . . . Our holdings adhere to the basic principle of contract law that an offeror is the master of his offer, and therefore, is not obligated to make an offer on any terms except his own. . . . Thus, [a]n offer can be accepted by the rendering of a performance only if the offer invites such an acceptance." (Citation omitted; internal quotation marks omitted.) *Auto Glass Express, Inc.* v. *Hanover Ins. Co.*, 293 Conn. 218, 227, 975 A.2d 1266 (2009).

[10] Similarly, rule 1.3 of the Rules of Professional Conduct sets forth a general standard for attorneys to act with diligence, providing: "A lawyer shall act with reasonable diligence and promptness in representing a client."

added.) One such circumstance in which an attorney is required to promptly relay information to the client is set forth in rule 1.2 (a) of the Rules of Professional Conduct, which provides in relevant part: "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. . . ."

In determining whether Reeve acted promptly, within the confines of *Frye*, when he delayed informing the petitioner of the ten year plea offer until after her trial testimony had concluded, it is necessary to define the meaning of "promptly" as it is used in rule 1.4 (a) (1) of our Rules of Professional Conduct. When pressed at oral argument, the respondent conceded that defense attorneys have a duty to communicate plea offers promptly to their clients, but contended that *Frye* does not stand for the proposition that defense attorneys are required to communicate plea offers *immediately* to their clients; accordingly, the respondent contends that the term "promptly" does not equate to the term "immediately." In contrast, the petitioner asserted that defense counsel's duty was to communicate the plea offer immediately and without undue delay. Given that the Rules of Professional Conduct appear in our Practice Book, and given that "[t]he interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation"; (internal quotation marks omitted) *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010); we employ our well established tools of statutory construction to determine the term's meaning.

"The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to

the facts of the case . . . . 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 . . . . In seeking to determine that meaning . . . [we] 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. . . . 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 . . . . We recognize that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . .'' (Citation omitted; internal quotation marks omitted.) Id., 99–100.

We first note that rule 1.0 of the Rules of Professional Conduct, entitled ''Terminology,'' does not define ''promptly.'' Absent this definition, in order to assign ''promptly'' its ordinary definition, ''[w]e look to the dictionary definition of the [term] to ascertain [its] commonly approved meaning.'' (Internal quotation marks omitted.) *Rivers* v. *New Britain*, 288 Conn. 1, 17, 950 A.2d 1247 (2008). The eleventh edition of Merriam-Webster's Collegiate Dictionary defines ''prompt'' as ''being ready and quick to act as occasion demands . . . performed readily or immediately . . . .'' Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). In addition, Random House Webster's Unabridged Dictionary defines ''prompt'' as ''done, performed, delivered, etc., at once or without delay.'' Random House Webster's

Unabridged Dictionary (2d Ed. 2001). Similarly, although Black's Law Dictionary does not offer a definition for the word "prompt" used in the form of an adjective or adverb, it defines the verb form of "prompt" as "[t]o incite, esp. to *immediate* action." (Emphasis added.) Black's Law Dictionary (9th Ed. 2009). In turn, Black's Law Dictionary defines "immediate" as "[o]ccurring without delay; instant . . . ." Black's Law Dictionary, supra.

On the basis of these "commonly approved" definitions, an interpretation of the term "promptly" that would allow an attorney to delay informing his client about a plea offer well after counsel had an opportunity to do so, would be unreasonable. Each of these dictionary definitions references either immediacy or a lack of delay, concepts which the petitioner advanced in her construction of the term "promptly." In contrast, because the respondent argues that "promptly" does not necessarily mean "immediately" and admits that defense counsel here acted *with* delay, that construction of the term is unpersuasive. Accordingly, we determine that the term is clear and unambiguous for purposes of our statutory construction analysis.

In applying the common meaning of "promptly" to the facts of the present case, it is clear that Reeve did not act promptly in informing the petitioner of the plea offer. Once Reeve received the extremely advantageous ten year offer from Nicholson on the morning of October 9, he decided to wait to tell the petitioner about the offer until after she had taken the stand in her own defense and gone through her entire trial testimony, which ultimately took two and one-half days to complete. Significantly, the respondent does not claim on appeal that Reeve was prevented by circumstances outside of his control from communicating the plea offer to his client for several days. Because the trial proceeded on October 9, the very same day Reeve received

the offer from Nicholson, Reeve obviously was interacting with his client throughout each of the following days and had ample time to communicate the offer and to discuss the risks and benefits of accepting or rejecting it. In making the conscious decision to delay delivering this information to his client, Reeve did not act immediately or without delay within the definition of "promptly."[11] Nicholson's agreement to keep the offer open did not obviate Reeve's duty to promptly inform his client of the offer. Therefore, Reeve failed to comply with our Rules of Professional Conduct and, by extension, failed to fulfill his duty to timely communicate offers from the state in derogation of *Frye*.[12]

Because defense counsel's actions prevented the petitioner from properly exercising her constitutional right to plead guilty and to make a fully informed decision as to whether to testify on her own behalf, we agree with the petitioner that Reeve's decision may not properly be viewed as trial strategy at all, much less a *reasonable* trial strategy. Nevertheless, even if we were to consider counsel's decision to delay communicating the plea

[11] We do not mean to suggest that it is irrelevant to our analysis that counsel believed that the offer was to remain open for some period of time. Instead, the fact that an offer remains open is simply one aspect to be considered by a court in determining whether counsel "promptly" informed his or her client of the offer. In other words, the length of time that the offer is to be held open may impact how quickly an attorney must communicate the offer to his or her client in light of all of the other circumstances presented, including whether the offer is made at a stage in the trial proceedings during which other important decisions regarding the defense of the case must be made, the attorney's ease of access to the client, and the attorney's obligations to other clients.

[12] The respondent additionally argues that the habeas court's reliance on *Sanders* v. *Commissioner of Correction*, supra, 83 Conn. App. 543, was misplaced. In *Sanders*, this court upheld the habeas court's conclusion that the defendant's attorney had rendered ineffective assistance of counsel by failing to explain *meaningfully* the state's plea offer. Id., 546, 550–52. In the present case, we find the habeas court's reliance on *Frye* to be dispositive for the reasons previously discussed and, thus, decline to address the applicability of *Sanders*.

offer as falling within the penumbra of trial strategy, we would find that Reeve's decision was not reasonable under the circumstances.

In keeping with the analysis set forth in *Strickland*, we afford Reeve the presumption that the challenged decision might be considered sound trial strategy, and evaluate the decision from Reeve's perspective, under the circumstances as of the time of his conduct. See *Strickland* v. *Washington*, supra, 466 U.S. 689–90. In the present case, the habeas court found that after Reeve received the unexpected phone call and ten year plea offer from Nicholson, his immediate reaction was to tell Nicholson "that he had spent the entire weekend prepping the petitioner for her testimony on Tuesday," and that although "he believed that ten years was a very favorable offer, he was concerned about relaying it to the petitioner immediately prior to her testimony because she was young and flustered, and he believed that this unexpected news would negatively impact her testimony."[13] Moreover, on the basis of the record before us, the habeas court reasonably could have found that Reeve did not delay informing the petitioner

[13] This finding is supported adequately by the record. For example, during his habeas trial testimony, the following exchange took place between Reeve and counsel for the respondent:

"Q. If you were going to recommend this ten year offer . . .

"A. Right.

"Q. And thereby have a chance at resolving the case, why would you elect to go forward and have [the petitioner] testify for days and days? It's a tremendous amount of work. It's a tremendous amount of stress for her. . . .

"A. Well, I think, obviously in hindsight, I made a terrible mistake. . . . [A]s I indicated earlier, I knew that [the petitioner] had had a series of emotional difficulties before, there's a documented history of mental issues and problems. I knew she was very vulnerable during this trial, very emotional, very raw and very anxious about her testimony, and so that's why.

"Q. Well, if you knew that she was in such a fragile emotional state, wouldn't that be all the more reason to give her the opportunity to avoid being subjected to cross-examination by telling her about this offer?

"A. I think that's a rational conclusion. I wish I'd taken that position at that time. I didn't do that and I regret it."

of the offer for any reason grounded in legal strategy, such as increasing the chances of a more favorable plea offer from the state or of an acquittal by the jury. When asked during his habeas trial testimony whether it was true that he wanted the offer to remain open through the petitioner's trial testimony "for strategic reasons, so that you can see how . . . how she would do," Reeve responded, "I don't think that really—I don't really think that was a factor in my mind, to be honest. I think I said that earlier. I wasn't really thinking about that time, well, what if she falls apart on the stand, or, alternatively, as you're now positing a question, what if she does better? I've answered both. I would answer the same way, that really wasn't in my limited thinking calculus at that time." Given that, from Reeve's perspective, he withheld the exceptionally advantageous ten year offer from his client in the sole interest of protecting her fragile emotional state and has not explained how this would affect his trial strategy, Reeve's conduct cannot be considered sound trial strategy.[14]

Further, Reeve's decision is unreasonable in the context of the history of Reeve and Nicholson's plea negotiations in this case. As the habeas court found, the state made its first offer to the petitioner, a plea to robbery or conspiracy to commit robbery and incarceration in the range of fifteen to twenty years, during a supervised pretrial conference in December, 2006. The judge

[14] In some respects, this decision bears some resemblance to a doctor who chooses to withhold critical medical information from a patient whose health is at risk on the ground that he does not want to upset her. Although the choice to withhold this information from a patient may be motivated by a beneficent purpose, it violates a patient's fundamental autonomy to make critical decisions about his or her care. See *Logan* v. *Greenwich Hospital Assn.*, 191 Conn. 282, 288, 465 A.2d 294 (1983) ("[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" [internal quotation marks omitted]). Likewise, it is not reasonable for counsel to choose to withhold critical information from a criminal defendant whose constitutional liberties are at stake on the ground that he does not want to distress her.

approved the sentence, and Reeve said he would discuss the offer with the petitioner, and the state indicated it would discuss it with the victim's family. After Reeve advised the petitioner about the strengths and weaknesses of the state's case, her defense, and the risks of trial, the petitioner agreed to accept the offer, and Reeve wrote to Nicholson on January 10, 2007, to inform him of the petitioner's acceptance. Reeve did not receive a response from Nicholson, and at the next supervised pretrial conference in mid-January, Nicholson informed Reeve and the judge that the state was withdrawing the offer due to the lack of support from the victim's family. On August 24, 2007, Reeve filed a motion to compel specific performance of the original plea offer, which the court ultimately denied.

On the basis of these events, Reeve knew that Nicholson had already rescinded a plea offer that had been discussed by both parties in a supervised pretrial conference, had been agreed to by the judge, had been open for several weeks, and already had been accepted by the petitioner in writing. In fact, Reeve had been so concerned with the circumstances surrounding the withdrawal of the earlier plea offer that he had taken the time to file a motion to compel specific performance of the offer. That he did not register any similar concern about the possible withdrawal of a much better offer that arrived orally, by telephone, in the last moments before his client was to testify in her own defense, is unreasonable on his part.

Finally, as additional evidence that establishes that Reeve's decision lacked reasonableness, we turn our attention to the testimony of Sheehan, Reeve's law partner. Pursuant to the habeas court's factual findings, after Reeve received the call from Nicholson and prior to when he left for court, Reeve stopped by Sheehan's office to inform him of the ten year plea offer as well as his concerns about relaying the offer to the petitioner

before she testified. Significantly, "Sheehan agreed that the ten year offer was favorable and advised Attorney Reeve that he should not wait to communicate the offer to the petitioner until after she testified." Reeve, however, decided to follow "his instincts" and wait to tell the petitioner.

Although Reeve certainly was not bound by Sheehan's advice, it makes a difference, for purposes of analyzing the reasonableness of his decision, that Reeve was made aware by a fellow attorney, his law partner, that the decision might not be a reasonable course of action under the circumstances. That Reeve quickly dismissed Sheehan's recommendation reinforces the conclusion that defense counsel's mind was closed to advice and that he acted unreasonably, without meaningfully calculating the risks of his decision beforehand.

In sum, we conclude that even if defense counsel's conduct was a matter of trial strategy, the petitioner has successfully rebutted the presumption, under that framework, that defense counsel's conduct was reasonable. Ultimately, however, we conclude that defense counsel's decision to delay communication of the plea offer to the petitioner cannot be considered an exercise of trial strategy under the facts of this case; thus, he performed deficiently. We, therefore, conclude that the habeas court did not improperly conclude that the petitioner's trial counsel provided ineffective assistance. Accordingly, we affirm the judgment of the habeas court. As the habeas court terminated the appellate stay and returned the matter to the criminal trial court for further proceedings, we hereby order the trial court to fashion, on an expedited basis, an appropriate remedy pursuant to *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 53 A.2d 983 (2012).

The judgment is affirmed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

CODY B. HEISINGER *v.* ANN H. DILLON ET AL. (AC 37967)

IN RE PROBATE APPEAL OF CODY B. HEISINGER* (AC 37969)

Beach, Sheldon and Sullivan, Js.

Syllabus

The plaintiff appealed to this court from the summary judgments rendered by the trial court in two separate actions in favor of the defendant D, his aunt, and the defendants B and T, the trustees of a certain residual trust created in the will of the plaintiff's great grandfather. In one action, the plaintiff sought a declaratory judgment determining that pursuant to that trust, following the death of the plaintiff's father, the plaintiff was entitled to his father's share of the trust income, which B and T had distributed to D. The plaintiff also sought damages from B and T for breach of their fiduciary duty as trustees, and from D for her unlawful detention of the trust income distributed to her. In the second action, the plaintiff appealed from a Probate Court order approving an interim accounting of the trust's assets, including distributions to D of the income previously distributed to the plaintiff's father before his death. The trial court rendered summary judgment in favor of the defendants in both actions, concluding, inter alia, that the plaintiff was not entitled to receive his deceased father's distribution of the trust income. Thereafter, the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court erred in determining that D, the sister of the plaintiff's father, rather than the plaintiff, was entitled to receive his deceased father's share of the trust income: the intent of the plaintiff's great grandfather, as expressed in his will, was clear that, if the plaintiff's father predeceased D, his share of the trust income was to be paid to D for her lifetime, and, contrary to the plaintiff's interpretation of the will, it did not evince an overall purpose of providing an income stream to the testator's great grandchildren but, rather, supported the conclusion that the testator's intention in creating the trust was to have trust income payable only to his wife, his children and his grandchildren, during their lifetimes, while reserving only per stirpes distributions of the trust's remaining principal, upon

* The appeal in the second case originally was filed with the caption *Cody B. Heisinger* v. *Probate Appeal.* The caption has been changed to reflect that the Probate Appeal is not a party. It should be noted that the microfiche version of the Appellate Court Records and Briefs in this case will be found under the original title.

its termination, for his great grandchildren; moreover, because this court concluded that the testator's intent, as reflected in his will, was clear, it was not necessary for this court to turn to default rules of the construction of wills, the testator's intent having been controlling pursuant to law.

2. Because this court concluded that the trial court did not err in construing that the will of the plaintiff's great grandfather excluded the plaintiff from receiving income from the subject trust after the death of his father and that the court properly rendered summary judgment on that ground, this court concluded that the plaintiff's appeal in the probate action was moot.

Argued May 16—officially released September 27, 2016

Procedural History

Action, in the first case, for, inter alia, a declaratory judgment to determine the rights of the plaintiff as a beneficiary of a certain trust, and for other relief, and appeal, in the second case, from the order of the Probate Court for the district of Stamford approving an interim accounting of that trust, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of Hartford, Complex Litigation Docket, where the court, *Dubay, J.*, granted the defendants' motion in each case for summary judgment and rendered judgments thereon, from which the plaintiff appealed to this court. *Affirmed in AC 37967; appeal dismissed in AC 37969.*

Ralph P. Dupont, for the appellant (plaintiff).

James R. Fogarty, for the appellee (named defendant).

Linda L. Morkan, with whom, on the brief, was *Christopher J. Hug*, for the appellees (defendant Robert A. Bartlett, Jr., et al.).

Opinion

SHELDON, J. In these two related actions, the plaintiff, Cody B. Heisinger, appeals from the summary judgments rendered by the trial court in favor of the defendant Ann H. Dillon, and the defendant trustees

Robert Bartlett, Jr., and Frederick M. Tobin. Both actions arise from a dispute between the plaintiff and the trustees concerning the latters' decision, following the death of Frank Heisinger, the plaintiff's father and Dillon's brother, to distribute income from a certain trust that previously was payable to Frank Heisinger to Dillon rather than to the plaintiff. In 1950, Francis Bartlett, the plaintiff's great grandfather and Dillon's grandfather, drafted a will in which he created a trust to benefit his descendants. Pursuant to the terms of the trust, Frank Heisinger and Dillon each began to receive a 25 percent share of the trust income upon the death of their mother, Jane Bartlett Heisinger, in 1991. Upon Frank Heisinger's death in 2007, the trustees began to distribute his 25 percent share of the trust income to Dillon. The plaintiff, claiming that that share should then be distributed to him, as his father's sole heir, instead of to Dillon, initiated these two actions. In the first action, *Cody B. Heisinger* v. *Ann H. Dillon et al.* (AC 37967) (declaratory judgment action), the plaintiff sought a declaratory judgment against Dillon and the trustees, construing the trust to provide that following his father's death, the trust income formerly distributed to his father should be distributed to him rather than to Dillon. In the second action, *In re Probate Appeal of Cody B. Heisinger* (AC 37969) (probate action), the plaintiff appealed from a Probate Court order approving an interim accounting of the trust's assets, including distributions to Dillon of income previously distributed to Frank Heisinger before his death. After all parties in the two actions filed and argued motions for summary judgment, the trial court concluded that the plaintiff was not entitled to receive his deceased father's distribution of trust income, and thus rendered summary judgment in favor of the defendants in both actions. The plaintiff appeals, claiming that the trial court erred in construing the trust not to entitle

him to receive his father's share of the trust income. We disagree with the plaintiff, and we thus affirm the summary judgment rendered in favor of the defendants in the declaratory judgment action and dismiss the appeal in the probate action as moot.

The following undisputed facts are relevant to this appeal. Francis A. Bartlett signed his last will and testament on December 11, 1950. The will created a trust for the benefit of his descendants, the corpus of which was funded by the common and preferred stock of the F. A. Bartlett Tree Expert Company and the Bartlett Realty Company. The provisions of the will directed that the income of the trust would be paid to his wife, Myrtle K. Bartlett, until her death, and then paid in equal shares to his two children, Robert A. Bartlett and Jane Bartlett Heisinger, for and during their respective lives.[1] The will further provided that when Robert A. Bartlett or Jane Bartlett Heisinger died, his or her half of the trust income would be paid thereafter to his or her respective children.[2] The will did not expressly

[1] The will directed the trustees "to pay the net income therefrom, quarter-annually, to my wife, Myrtle K. Bartlett, for and during the term of her natural life, and upon her death, or should she predecease me, then I direct that the net income from said trust fund be paid, in equal shares, quarter-annually, to my son, Robert A. Bartlett, and my daughter, Jane Bartlett Heisinger, for and during the term of their respective lives."

[2] The will provided: "Upon the death of my son, Robert A. Bartlett, or should he predecease me, and my wife, then upon the death of my wife I direct that one-half of the net income from said trust fund be paid to the children of my said son, in equal shares, until the death of the last surviving child of my son who was in being at the time of death, and upon the death of said last surviving grandchild in being at the time of death, I give devise and bequeath one-half of the principal of said trust fund to the children of my said son, in equal shares, freed from said trust, the children of any deceased grandchild to take the share which the parent would have taken, if living, per stirpes and not per capita, freed from said trust. . . .

"Upon the death of my daughter, Jane Bartlett Heisinger, or should she predecease me, and my wife, then upon the death of my wife, I direct that one-half of the net income from said trust fund be paid to the children of my said daughter, in equal shares, until the death of her last surviving child, who was in being at the time of my death, and upon the death of said last surviving child of my said daughter, in being at the time of my death, I give,

provide for how income of the trust that was payable either to the children of Robert A. Bartlett, on the one hand, or to the children of Jane Bartlett Heisinger, on the other, would be distributed among his or her surviving children upon the death of one or more, but not all, of such children. It did, however, provide for the separate termination of the trust in two equal portions, one for the benefit of Robert A. Bartlett's descendants and the other for the benefit of Jane Bartlett Heisinger's descendants, as follows. Upon the death of Jane Bartlett Heisinger's last surviving child who was in being at the time of Francis Bartlett's death, the Heisinger portion of the trust would terminate and 50 percent of the trust principal would be distributed to her children, with any children of those children taking a deceased parent's share, per stirpes. Upon the death of Robert A. Bartlett's last surviving child who was in being at the time of Francis Bartlett's death, the Bartlett portion of the trust would terminate and the other 50 percent of the trust principal would be distributed to his children and/or grandchildren in the same manner.[3]

When Jane Bartlett Heisinger died in 1991, the trustees began to distribute one half of the trust income, in

devise and bequeath one-half of the principal of said trust fund to the children of my said daughter, in equal shares, freed from said trust, the children of any deceased grandchild to take the share which the parent would have taken, if living, per stirpes and not per capita, freed from said trust."

[3] The will also provided for the distribution in the event that Jane Bartlett Heisinger died without leaving any surviving children: "In case my said daughter shall die without leaving her surviving any children, then I direct that all of the net income from said trust fund be paid to my said son, Robert A. Bartlett, as aforesaid, and upon his death, I give devise and bequeath the net income from said trust fund to his children, in equal shares, until the death of his last surviving child who was in being at the date of my death, and upon the death of said last surviving child, in being at the time of my death, I give, devise and bequeath the principal of said trust fund to the children of my said son, in equal shares, freed from said trust, the children of any deceased grandchild to take the shares which the parent would have taken, if living, per stirpes and not per capita, freed from said trust." The trust had a parallel provision in the event that Robert A. Bartlett died without leaving any surviving children.

two equal shares of 25 percent each, to her two children: Frank Heisinger and Dillon. Frank Heisinger died in 2007,[4] after which the trustees began to distribute his 25 percent share of the trust income to Dillon. The plaintiff claims that this 25 percent share should be paid to him.

On July 18, 2013, the plaintiff filed a revised complaint in the declaratory judgment action, which was the operative complaint at the time of the court's summary judgment ruling. In that three count complaint, the plaintiff (1) sought advice, pursuant to General Statutes §§ 52-1[5] and 52-29,[6] and Practice Book §§ 17-54[7] through 17-59, as to his entitlement to his father's share of the trust income after his death; (2) sought damages from the trustee defendants for breach of fiduciary duty; and (3) sought damages and prejudgment interest from Dillon for unlawfully receiving and retaining the share of trust income to which the plaintiff claims he is entitled.

The plaintiff filed a complaint in the probate action on August 26, 2013, claiming that he was aggrieved by

[4] The parties dispute when Frank Heisinger died; Dillon's appellate brief states that he died in 2008.

[5] General Statutes § 52-1 provides: "The Superior Court may administer legal and equitable rights and apply legal and equitable remedies in favor of either party in one and the same civil action so that legal and equitable rights of the parties may be enforced and protected in one action. Whenever there is any variance between the rules of equity and the rules of the common law in reference to the same matter, the rules of equity shall prevail."

[6] General Statutes § 52-29 (a) provides: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment."

[7] Practice Book § 17-54 provides: "The judicial authority will, in cases not herein excepted, render declaratory judgments as to the existence or nonexistence (1) of any right, power, privilege or immunity; or (2) of any fact upon which the existence or nonexistence of such right, power, privilege or immunity does or may depend, whether such right, power, privilege or immunity now exists or will arise in the future."

the Probate Court's approval of an interim accounting of the trust for the period from January 1, 2009 through December 31, 2011. The plaintiff requested an order and judgment that the Probate Court lacked subject matter jurisdiction to issue its order and decree approving the interim accounting of the trust and an order and decree that the interim accounting be held in abeyance pending the outcome of the declaratory judgment action. In the alternative, the plaintiff requested that the interim accounting be accepted without res judicata or collateral estoppel effect pending final determination of the declaratory judgment action.

All of the parties filed motions for summary judgment in both the declaratory judgment action and the probate action.[8] The trial court heard argument on all of the motions for summary judgment[9] together on April 13, 2015. On May 4, 2015, it issued a single memorandum of decision granting the defendants' motions for summary judgment in both actions. The court explained its decision as follows: "[T]he proper starting point for the court's analysis is the language of the trust. As previously stated, the clause at issue provides, in relevant part as follows: 'Upon the death of my daughter, Jane Bartlett Heisinger . . . I direct that one-half of the net income from said trust fund be paid to the children of my said daughter, in equal shares, *until the death of her last surviving child, who was in being at the time*

[8] On November 3, 2014, the plaintiff filed a motion for summary judgment in the declaratory judgment action, and on December 9, 2014, the trustee defendants filed a cross motion for summary judgment in the declaratory judgment action and a motion for summary judgment in the probate action. The following day, Dillon filed a cross motion for summary judgment in the declaratory judgment action and a motion for summary judgment in the probate action. On February, 23, 2015, the plaintiff filed a motion for summary judgment against Dillon in the probate action.

[9] Although no motion to consolidate was ever filed, the trial court addressed all of the motions for summary judgment in a single memorandum of decision.

of my death, and upon the death of said last surviving child of my said daughter, in being at the time of my death, I give, devise and bequeath one-half of the principal of said trust fund to the children of my said daughter, in equal shares, freed from said trust, the children of any deceased grandchild to take the share which the parent would have taken, if living, per stirpes and not per capita, freed from said trust.' . . .

"The highlighted language clearly provides that Jane Bartlett Heisinger's children (Frank Heisinger and Ann Dillon) are to receive her portion of the trust income, in equal shares, until the death of her last surviving child that was in being at the time of Francis A. Bartlett's death. Frank Heisinger was born in 1950 and Ann Dillon was born in 1953. Francis A. Bartlett died in 1963. The plaintiff, on the other hand, was not born until 1985. Therefore, he was plainly not a life in being at the time of Francis A. Bartlett's death. The highlighted language indicates that it was Francis A. Bartlett's intent to provide trust income to Jane Bartlett Heisinger's children, in equal shares, until the death of her last child. As we know, Jane Bartlett Heisinger's daughter, the defendant Dillon, is still alive. As a result, Dillon is entitled to the full 'Heisinger portion' of the trust income until her death. Thereafter, 'the children of any deceased grandchild,' such as the plaintiff, will take 'the share which the parent would have taken, if living, per stirpes and not per capita, freed from said trust.' " (Emphasis in original.)

The court rejected the plaintiff's contention that *Stanley* v. *Stanley*, 108 Conn. 100, 142 A. 851 (1928), stands for the dispositive proposition that " 'when there are multiple income beneficiaries, a surviving income beneficiary is not entitled to the entire trust income'." Rather, the trial court stated that the court in *Stanley*

was merely "interpreting the language of a specific testamentary document," not "[setting] forth a general rule of testamentary construction . . . ."

The court then reasoned that the default rules of construction set forth in the Restatement (Second) of Trusts supported its conclusion, noting that it is "proper for the court to use the Restatement (Second) of Trusts, which was published in 1959, as opposed to the relevant section of the Restatement (Third) of Trusts, which was not published until 2003, because the relevant law is that which was in existence at the time of the drafting of the trust document at issue."

On appeal, the plaintiff claims that the trial court erred in rendering summary judgments in favor of the defendants and requests that we reverse those judgments and remand the case with direction to render partial summary judgment in his favor in the declaratory action as to his entitlement to receive his father's share of the trust income following his father's death.[10] The defendants maintain that the trial court properly interpreted the trust to require that Frank Heisinger's share of the trust income be paid to Dillon until her death.[11] The parties agree that a decision interpreting the trust in favor of the defendants in the declaratory judgment action also would be conclusive of the probate action.[12]

[10] The parties do not dispute that the "Heisinger portion" of the trust principal will not be distributed until the passing of Dillon, at which point the plaintiff will be entitled to Frank Heisinger's share of the trust principal.

[11] Dillon asserted as an alternative ground for affirmance that the first accounting approved by the Probate Court is entitled to full faith and credit under General Statutes § 45a-24. We will not address this alternative ground in light of our conclusion that summary judgment was properly rendered.

[12] In the probate action, the plaintiff claims that the Probate Court lacked subject matter jurisdiction to approve the interim trust accounting before final judgment was rendered in the declaratory judgment action. Assuming that jurisdiction existed, the plaintiff also reiterated his claim that he is entitled to his father's share of the trust income. Because we conclude that the plaintiff is not entitled to his father's share of the trust income, his claims in the probate action are moot, and we will not address them. "Mootness raises the issue of a court's subject matter jurisdiction and is therefore

The plaintiff argues that the language of the trust does not expressly provide for the distribution of trust income upon his father's death. Accordingly, he argues that we should turn to provisions in the Restatement (Third) of Trusts and the Restatement (Third) of Property to supply the default construction rules. The defendants argue, however, that the intent of Francis Bartlett is clear, and that, if we conclude that it is not, we should look to the Restatement (Second) of Trusts and the Restatement (First) of Property, which were in existence closer to the time his will was drafted.

"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. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . In evaluating the propriety of a summary judgment, we are confined to an examination of the pleadings and affidavits of the parties to determine whether (1) there is no genuine issue

appropriately considered even when not raised by one of the parties. . . . Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction. . . . We begin with the four part test for justiciability established in *State* v. *Nardini*, 187 Conn. 109, 445 A.2d 304 (1982). . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555–56, 979 A.2d 469 (2009).

as to any material fact, and (2) the moving party is entitled to judgment as a matter of law." (Citation omitted; internal quotation marks omitted.) *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 744–45, 660 A.2d 810 (1995). Here, the only determination necessary is whether the moving party is entitled to judgment as a matter of law because "[t]he construction of a will presents a question of law"; (internal quotation marks omitted.) *Corcoran* v. *Dept. of Social Services*, 271 Conn. 679, 698, 859 A.2d 533 (2004); and there are no disputed material factual issues. Finally, "[s]ummary judgment rulings present questions of law; accordingly, [o]ur review of the . . . decision to grant [a] . . . motion for summary judgment is plenary." (Internal quotation marks omitted.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 154, 61 A.3d 485 (2013).

We first turn to the language of the will in order to determine the intent of the testator. "It is well settled that in the construction of a testamentary trust, the expressed intent of the testator must control." *Gimbel* v. *Bernard F. & Alva B. Gimbel Foundation, Inc.*, 166 Conn. 21, 26, 347 A.2d 81 (1974). "In seeking the intention of the testator, resort must first be had to the will itself." *Hoenig* v. *Lubetkin*, 137 Conn. 516, 519, 79 A.2d 278 (1951).

We conclude that the intent of Francis Bartlett, as expressed in his will, is clear: if Frank Heisinger predeceased his sister, Dillon, his share of the trust income must be paid to Dillon for her lifetime. Contrary to the plaintiff's reading of the will, it does not evince an overall purpose of providing an *income stream* to Francis Bartlett's great grandchildren. The will provides that income shall "be paid to the children of [Jane Bartlett Heisinger], in equal shares, until the death of her last surviving child, who was in being at the time of [Francis Bartlett's] death." The condition of "the death of [Jane

Bartlett Heisinger's] last surviving child" has not occurred and, regardless, the plaintiff is not a child of Jane Bartlett Heisinger, and thus is not entitled to a distribution of income.

Francis Bartlett was aware of how to draft a provision in which a great grandchild would take in place of a deceased grandchild. In distributing the trust principal, the will states, "[T]he children of any deceased grandchild to take the share which the parent would have taken, if living, per stirpes . . . ." The distribution of income, however, is limited to Francis Bartlett's wife, children, and grandchildren.

Notably, even the language distributing the trust principal upon the termination of the trust focuses on Francis Bartlett's grandchildren, not his great grandchildren: "I give devise and bequeath one-half of the principal of said trust fund to the children of my said [son/daughter], in equal shares, freed from said trust, the children of any deceased grandchild to take the share which the parent would have taken, if living, per stirpes and not per capita, freed from said trust." The will thus supports the conclusion that Francis Bartlett's intention in creating the trust was to have trust income payable only to his wife, his children and his grandchildren, during their lifetimes, while reserving only per stirpes distributions of the trust's remaining principal, upon its termination, for his great grandchildren.

Because we have concluded that the intent of the testator is clear, it is not necessary for us to turn to default rules of construction. We note, however, that if it were necessary to resort to a default rule of construction, the default rule of construction in existence at the time the will was drafted would govern. *Hartford National Bank & Trust Co.* v. *Birge*, 159 Conn. 35, 43, 266 A.2d 373 (1970) ("[an attorney] may be assumed to have been familiar with accepted rules of construction

as of the time the will was drawn"). Although the Restatement (Second) of Trusts had not yet been published at the time Francis Bartlett's will was drafted, the rules announced therein support our construction of the trust and is an expression of the default rules of construction in existence in 1950.

Section 143 (2) of the Restatement (Second) of Trusts provides: "If a trust is created under which the income is payable to two or more beneficiaries and the principal is payable to another on the death of the survivor of the income beneficiaries, and one of them dies, the survivor or survivors are entitled to the income until the death of the last survivor, unless the settlor manifested a different intention." Comment (b) to § 143 (2) provides: "Where the income under a trust is payable to several beneficiaries, and there is a gift over to another on the death of the survivor of the beneficiaries, and one of the beneficiaries dies, the disposition of the share of the income which was payable to the deceased beneficiary depends upon the settlor's manifestation of intention. Where there is no provision in the terms of the trust as to its disposition, the question is what the settlor would probably have intended. Usually the inference is that he intended that the income should be divided among the surviving beneficiaries. This is true even though the beneficiaries are not referred to as a class. It may appear from the circumstances, however, that the settlor would have preferred that the income should be paid to the estate of the deceased beneficiary, until the death of the last surviving beneficiary. Or it may appear that he intended the income to be paid to or accumulated for the beneficiary in remainder. Or it may appear that he did not intend to make any disposition of the share of the income of the deceased beneficiary, in which case the income would be payable to the

settlor's estate until the death of the last surviving beneficiary. See Restatement of Property, § 115."[13] 1 Restatement (Second), Trusts § 143 (2), p. 303 (1959).

The Restatement (Second) of Trusts is an expression of the rules of construction in existence in 1950, as demonstrated by its citation to cases decided before 1950. See 3 Restatement (Second), Trusts § 143, Appendix, reporter's notes, p. 218 (1959), citing *Loring* v. *Coolidge*, 99 Mass. 191, 191 (1868); *Clarke* v. *Rathbone*, 221 Mass. 574, 109 N.E. 651 (1915); *Old Colony Trust Co.* v. *Treadwell*, 312 Mass. 214, 43 N.E.2d 777 (1942); *Camden Safe Deposit & Trust Co.* v. *Fricke*, 99 N.J. Eq. 506, 133 A. 882 (1926); *Rhode Island Hospital Trust Co.* v. *Thomas*, 73 R.I. 277, 54 A.2d 432 (1947); *Will of Levy*, 234 Wis. 31, 289 N.W. 666, 290 N.W. 613 (1940).

Finally, the cases relied upon by the plaintiff, *Hartford-Connecticut Trust Co.* v. *Gowdy*, 141 Conn. 546, 107 A.2d 409 (1954), and *Stanley* v. *Stanley*, supra, 108 Conn. 100, do not set forth a general rule of construction that is different from that in the Restatement (Second) of Trusts. Those cases merely interpret the language of the specific documents at issue. "Indeed, in the construction of a will or trust, precedents are usually inconclusive, since the same or substantially similar expressions seldom occur in different wills or trust agreements. And precedents are entitled to little weight where they do not involve precisely analogous language used by testators or settlors who are surrounded by

[13] Section 115 of the Restatement (First) of Property provides: "When an otherwise effective conveyance creates concurrent estates for life held as a tenancy in common, and also creates a future estate limited to take effect on the death of the survivor of the expressly designated life tenants, then, in the absence of a manifestation of an inconsistent intent, such conveyance also creates in favor of each such life tenant a remainder estate for life in the share of each other such life tenant, which remainder takes effect in possession only if the first life tenant outlives the life tenant as to whose share such remainder estate is created." 1 Restatement (First), Property § 115, p. 359 (1936).

like circumstances at the execution of the will or trust agreement. In each case, it is the intention expressed by the particular language employed which must be construed." *Hartford National Bank & Trust Co.* v. *Birge*, supra, 159 Conn. 42–43.

The plaintiff urges us to rely on § 49 of the Restatement (Third) of Trusts[14] and § 26.9 of the Restatement (Third) of Property;[15] however, those sections were published in 2003 and 2011, respectively. An attorney drafting a will cannot be expected to be familiar with default rules of construction published more than one-half of a century later.

Even so, the plaintiff maintains that the rules promulgated in the Restatement (Third) of Trusts do not conflict with the provisions in the Restatement (Second)

[14] Comment (c) (3) to § 49 of the Restatement (Third) of Trusts provides in relevant part: "Where the terms of the trust make no express provision for the situation, the normal inference is that the settlor intended the income share to be paid to the issue (if any) of the deceased income beneficiary in the typical case of this type in which the remainder is to pass to the descendants of the income beneficiaries upon the survivor's death. This presumed result applies whether or not the beneficiaries are described in class terminology. It may appear from language of the trust or the circumstances, however, that the settlor would have preferred: (i) that the income be paid to or divided among the surviving income beneficiary or beneficiaries (as 'cross remainder'), even if the beneficiaries are not described as a class . . . ." 2 Restatement (Third), Trusts § 49, comment (c) (3), p. 247 (2003).

[15] Comment (e) (1) to § 26.9 of the Restatement (Third) of Property provides in relevant part: "A gap potentially arises if the terms of the trust direct that the trust principal is to be distributed on the death of the last living income beneficiary, and if the terms of the trust make no express provision for the distribution of the share income that a deceased income beneficiary other than the last living income beneficiary had been receiving. . . .

"A gap arises if the income beneficiary's income interest is limited to the beneficiary's lifetime. The traditional rule of construction is that the gap is filled by an implied cross remainder to the living income beneficiary or beneficiaries. See Restatement [(First)] of Property § 115; Illustration 3. An exception, however, arises if the remainder in trust principal is to pass to the issue of the beneficiaries upon the survivor's death. In such a case, filling the gap by implying an income interest in favor of the deceased beneficiary's issue from time to time living would be more consistent with

of Trusts, but rather describe an exception for multigenerational and multibeneficiary trusts that was not described in the Restatement (Second) of Trusts. The plaintiff, however, has not presented any legal authority upon which we could conclude that such an exception was an accepted rule of construction in 1950. Even if it were the prevailing default rule of construction at that time, it would not override the testator's intent, which we have found to be clear in this case. Accordingly, the trial court did not err in construing Francis Bartlett's will to exclude the plaintiff from receiving income from the trust after his father's death, and thus properly granted summary judgment on that ground. Because we reach that conclusion, the plaintiff's appeal in the probate action is moot.

The judgment is affirmed in the declaratory judgment action. The appeal in the probate action is dismissed as moot.

In this opinion the other judges concurred.

NEIL SCARFO *v.* PATRICK SNOW ET AL.
(AC 37794)

Alvord, Prescott and Mullins, Js.

Syllabus

The plaintiff realtor formed a limited liability company, C Co., with the defendant developer, S, for the purpose of developing land in a certain subdivision. The plaintiff and S and entered into an operating agreement for C Co. The plaintiff commenced this action alleging that S had breached his fiduciary duties arising out of his management of the development project and breached the operating agreement in various ways. The plaintiff named C Co. and several other business entities associated with S as defendants in this action. The trial court rendered judgment for the defendants on the plaintiff's complaint, concluding that he did not establish his claims of spoliation of evidence, breach of

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the transferor's overall plan of disposition." 3 Restatement (Third), Property § 26.9, comment (e) (1), p. 541 (2011).

contract, or breach of fiduciary duty, and rendered judgment for the plaintiff on a counterclaim filed by S and C Co. The plaintiff appealed to this court, raising various claims of error. Thereafter, this court, sua sponte, asked the parties to brief the question of whether the plaintiff had standing to maintain this action in his individual capacity. *Held* that the plaintiff did not have standing in his individual capacity to maintain his various causes of action against the defendants and, therefore, the trial court should have dismissed his complaint for lack of subject matter jurisdiction for failure to allege a claim of direct injury: a limited liability company is a distinct legal entity whose existence is separate from its members and a member or manager may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company, and in this case any damages that arose from the alleged improprieties concerning S's management of the development project were sustained by C Co. and would have flowed to the plaintiff only through C Co., and thus the plaintiff did not sustain a direct injury in his individual capacity and did not have standing to bring a direct action against S as the only other member of C Co. or against C Co. itself; furthermore, both the plaintiff and S had signed the operating agreement for C Co. as agents for C Co., and as neither of them were parties to the agreement in their individual capacities, the plaintiff could not claim direct injury arising out of any alleged breach of the operating agreement.

Argued March 2—officially released September 27, 2016

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the named defendant filed a counterclaim; thereafter, the matter was tried to the court, *Epstein*, *J.*; judgment for the defendants on the complaint and for the plaintiff on the counterclaim, from which the plaintiff appealed to this court. *Improper form of judgment; judgment directed.*

Michael F. Dowley, with whom, on the brief, was *Melissa S. Harris*, for the appellant (plaintiff).

John C. Leary, for the appellees (named defendant et al.).

Opinion

MULLINS, J. The plaintiff, Neil Scarfo, appeals from the judgment of the trial court, rendered in favor of the

defendants, Patrick Snow, Cider Hill Associates, LLC (Cider Hill),[1] Premier Building & Development, Inc., Kane Street Associates, LLC, Cobblestone Associates, LLC, Premier Financial, Inc., Sydney Property Management, LLC, and Premier Development, Inc.[2] On appeal, the plaintiff claims that the court erred in concluding that he did not establish his claims of spoliation of evidence, breach of contract, and breach of fiduciary duty against Snow. Although the trial court authored a well written and thorough memorandum of decision, we, nevertheless, conclude that the form of judgment was improper because the plaintiff lacked standing to assert these claims in his individual capacity, and we reverse the judgment and remand the matter with direction to dismiss the case.

The following extensive facts, as specifically found by the trial court, inform our review. Scarfo "has been a licensed realtor in the State of Connecticut for almost twenty-eight years and works with the Century 21 agency. . . . Snow . . . has been engaged in construction and real estate development for more than twenty years. The parties had known one another for a period of time before [they entered into] the December, 2004 contract . . . . [Scarfo] had an office across the hall from [Snow] at the time of the contract, and the parties continued to have their business offices in the same building, on the same floor, across from one another, for the entire period of time at issue. . . .

"Sometime in 2002 or 2003, Snow saw a Century 21 ad for a 'raw' piece of land for sale in Cromwell. The

[1] Cider Hill is owned by both the plaintiff and Snow. After Snow's attorney filed an appearance with the trial court on behalf of all defendants, the plaintiff filed a motion to disqualify counsel from representing Cider Hill on the ground that, as a 50 percent owner of the company, he had not agreed to counsel's representation. On May 5, 2010, the trial court granted that motion, and Cider Hill was no longer represented. Cider Hill is listed on the trial court docket as "nonappearing." It also has not participated in this appeal.

[2] Snow is a participant in each of the defendant companies.

owner was Evergreen Realty [(Evergreen)]. Snow consulted with a local planning and zoning attorney with regard to a possible project, but there were difficulties with initial proposals. In the spring of 2004, Snow submitted to the Connecticut Secretary of [the] State papers for registering Cider Hill Associates as a limited liability company, partially for insurance and liability reasons, with the intent of development of the property. One of Snow's companies, Premier Development, entered into a purchase agreement for the land from Evergreen in April, 2004. Scarfo had discussed with Snow the possibility of buying a lot in the planned subdivision, but instead decided to become a partner in the project.

"On December 17, 2004, [Cider Hill] filed with the Secretary of [the] State its Articles of Organization.[3] As memorialized in their agreement dated December 30, 2004, Scarfo presented Snow with a cashier's check in the amount of $262,500 on December 17, 2004, and, on December 20, 2004, the closing took place in which [Cider Hill] purchased the property at issue from Evergreen. As listing agent, Scarfo took a $25,000 commission on the sale of the property, which Snow admits was a reduced commission. . . . Scarfo contends that Snow never contributed his $262,500 share of the initial investment. Snow claims that his work in making all of the arrangements to procure the land, investigation, hiring engineers and soil scientists, planning, and incurring other professional fees before the December, 2004 agreement, amount to costs in the range of $250,000, plus he contributed the option moneys from the November, 2004 agreements.[4] . . .

[3] The articles of organization were executed by Snow, who was listed as the statutory agent for service of process. The document listed Snow's title as "Mem/Mgr" and Scarfo's title as "Member." The document also contained a box that the preparer was to check if management of the company was vested in a manager or managers. That box was not checked.

[4] The court stated the following: "For example, in November, 2004, in option agreements with three tile vendors with whom Snow had had previous

"On December 30, 2004, [Scarfo] and [Snow] signed a written [operating] agreement [(agreement)], calling themselves 'members,' with each to have a 50 percent interest in Cider Hill . . . . They further agreed that, as of the date of the agreement, the value to each member was one half of the unpaid obligations of the company plus $262,500.

"The agreement obligated each of the members, at the end of each fiscal year, to ascertain a valuation based primarily upon the opinion of the [certified public accountant] retained by the company, and further provided that, if the members could not agree on the valuation, another certified public accountant was to determine the value of the interest. Neither member to the agreement ever provided an accounting and neither member submitted an inquiry for an accounting to a specially nominated accountant during the pendency of the agreement. However, Snow arranged for the accounting firm of Guilmartin, DiPiro & Sokolowski[5] for [Cider Hill] and Michael DiPiro of that firm prepared all of [Cider Hill's] tax returns and [schedule K-1 tax forms]. One might find that this revealed Snow's compliance with the 'accounting' portion of the agreement mentioned . . . .

"In an 'Amendment' to the agreement, also dated December 30, 2004, the parties stated that each of them was contributing 'real property to [Cider Hill] with an agreed upon value of $262,500.' [Scarfo] and [Snow] further agreed that they would obtain financing to complete the acquisition of real property to develop a project in the estimate amount of $1,500,000, and they

dealings, Snow agreed to provide them with reduced lot purchase prices for payment of $50,000 each at the time of the making of the agreement. Two of those were later returned by [Cider Hill]."

[5] According to the trial court: "Snow engaged this particular [accounting] firm because it was Scarfo's accounting firm, and Scarfo had asked Snow to retain that firm for [Cider Hill]."

further agreed to divide equally the costs associated with debt service, taxes, and other expenses. The only specific delineation of responsibilities to either of the partners was that . . . Snow was to be responsible to 'obtain all required approvals, including but not limited to subdivision approvals, planning and zoning approval, permitting, Cromwell approvals, Department of Transportation approvals, architectural rendering.' . . .

"There has been no allegation that Snow did not perform these duties. Instead, [Scarfo] has alleged in his amended complaint . . . that Snow was the 'managing partner' and [and that he] failed to value the membership annually, failed to notify [Scarfo] of the value of his membership interest, failed to obtain bids, and failed to distribute profits from the sale of the lots on the development property [in breach of the amended agreement].

"Neither the agreement, nor the [December 30, 2004] amendment . . . renders [Snow] the 'manager' of the property. Nor does the agreement require [Snow] to determine a value of the membership and provide it to [Scarfo]. Indeed, each partner had that responsibility to the other. Except for the annual tax returns and K-1s provided by the [Cider Hill] accountant, neither party did so and neither inquired of the other.

"Two other provisions of this agreement specifically applicable to this litigation are paragraphs 7 and 8, which provide:

"7. All aspects of the construction of the housing units and related structures shall be performed by PREMIER BUILDING & DEVELOPMENT, INC., at a cost plus 5 [percent]. [Cider Hill] shall obtain [three] bids for this work to estimate the fair market value of this work and to agree on the cost of said work.

"8. The cost of work performed by PREMIER BUILDING & DEVELOPMENT, INC., or its affiliates or assigns,

and PATRICK SNOW, or his affiliates or assigns, shall be paid from the proceeds of the construction loan as customary . . . .

"Scarfo contends that he entered the agreement because he relied on a preliminary budget prepared by Snow, which reflected expenditures of $1,727,100. The agreement does not make any mention of budgets or reliance thereon. In addition, neither the agreement nor any other document provides any guarantee of profit nor pay-back to an investor in the event of going over budget. Nor does the agreement provide that lots should sell at a certain price or that the partner who actually was negotiating the sale of the lots could not exercise discretion in the sale, depending on the benefit to [Cider Hill] or the difficulty in selling any particular lot on the property.

"Snow devoted full-time effort to the development of the [Cider Hill] subdivision and sale of the properties. While he was not designated by the parties in their agreement as the 'managing partner,' he was the only one of the two equal partners who worked on developing the property, engaging engineers, pavers, landscapers, etc.; procuring estimates; considering the contractors and providers to be hired and used, etc.; negotiating the necessary arrangements and business transactions, as well as the loans; and, preparing for and procuring necessary approvals from appropriate authorities. In essence, he was the 'de facto' managing member, or the operation would never have even begun to get under way. Snow never received any salary or compensation for his efforts.

"In November, 2005, the Town of Cromwell Planning and Zoning Commission approved the subdivision, with special and general conditions. In 2006, lots began to be sold; indeed approximately twelve of the twenty-three lots were sold in that year. The number decreased

in 2007 and 2008. The real estate market, which had been 'on a roll,' began the tumultuous decline from which we are only now beginning to recover, just as is the general economy. As Snow testified, he had high hopes in 2004, and before 2008, he never expected a loss. In an undated supplementary budget, proposed expenditures had increased to $2,979,050. This was prepared by Snow, and Scarfo did not ask any questions about it. Snow testified that the property proved to be a very difficult site on which to work. Among other things, trees had to be cleared, there were inclines and declines, a hill, the necessity of the construction of a retaining wall, the soil was a type that was difficult to control and had to be moved.

"The income tax returns for [Cider Hill] reflect the following: 2004—no gross receipts or sales; 2005—loss of $455; 2006—profit of $166,705; 2007—loss of $98,501; 2008—loss of $230,048; 2009—loss of $13,845; 2010—loss of $157,472, and, 2011—loss of $20.

"Snow's 'bookkeeping' and 'records' keeping in this project [were] unique. According to Kathy Lehman, the woman who was his bookkeeper, customer service representative and office manager for seven years until 2010, each lot in the twenty-three lot [Cider Hill] subdivision had its own folder, containing the plot plan and closing documents. The records produced at trial certainly confirm that. Invoices from subcontractors were placed in a 'to be paid' pile and she never paid any bill without an invoice. Thereafter, the payment set-up got confusing. [Cider Hill] did not have a credit card and had little in the way of equity at its commencement. In order to benefit from the delay of having to pay immediately, Snow took advantage of the sixty day payment plan for vendors [and] on various of the other entities' and Snow's credit cards, and those cards were used to pay [Cider Hill] bills. Snow would then later make the credit card payments. Whenever Snow needed

to be reimbursed for an expenditure, he would give Ms. Lehman the receipt. According to Ms. Lehman, the credit card statements were at the office when she left.

"In the early portion of its existence, [Cider Hill] used a [particular] software package . . . [but], by the time of the commencement of this litigation, it was no longer accessible. [Cider Hill] then changed to Quick Books.

"Neither Scarfo nor any of his Century 21 colleagues assisted in the sale of any of the lots in the development. In late 2008, or early in 2009, Snow advised Scarfo that he thought that they would come in under budget. Subsequently, however, when Snow advised Scarfo that such was not the case and that there would not be a profit, Scarfo initiated this lawsuit.

"According to Ms. Lehman, Scarfo never asked her for any documents or made any inquiries about [Cider Hill] or Snow until 2009, when she provided Scarfo documents in response to a request he made to her.

"[Scarfo] alleges that the equities favor him because of numerous discrepancies [that] he and his experts are unable to resolve at this time and because of his belief that the defendant was self-dealing. There is no question in this court's mind that the evidence in this case presents examples of what one might consider unorthodox ways of making and keeping records. It may go beyond 'sloppy'; however, the evidence does not reveal that there was an intent to deceive or hide or self-deal.

"One of the major complaints raised by Scarfo is that Snow authorized 'credits' on the sale of lots in the subdivision without authorization.[6] Scarfo does not

[6] The trial court stated: "For example, in November, 2004, in option agreements with three tile vendors with whom Snow had had previous dealings, Snow agreed to provide them with reduced lot purchase prices for payment of $50,000 each at the time of the making of the agreement. Two of those were later returned by [Cider Hill]."

point to any portion of the agreement, however, that requires the partner working on the project to not be able to exercise discretion in his attempts to move the property.

"Scarfo also complains that he only signed one of the 'consent' forms for the sale of the properties and that was at a fax request of the closing attorney when Scarfo was in Florida. These forms listed the sales price terms, including credits, for each lot in the subdivision. Scarfo contends that he did not sign the other forms [that] appear to have his signature. Snow denies that he affixed that signature. No handwriting expert testified, and the court has no idea as to how these consent forms were signed. Scarfo contends that he would never have approved these credits had he known about them. These forms, however, together with all of the other closing documents . . . were all available to Scarfo at any time during the course of the tenure of the contract. In addition, Scarfo, having been in the real estate business for more than twenty-five years, knew of the necessity of such documents, and if he did not, he certainly was alerted to that when he was asked to fax his signature by the [Cider Hill] attorney at one of the closings.

"Scarfo also contends that the agreement was breached because three written bids were not procured for each phase of the project. The agreement does not call for bids to be 'written.' In addition, the credible testimony reveals that the [three bid] rule was usually abided by and that, in his many years of experience, Snow had established relationships with vendors and subcontractors who were reliable, competent, and provided work and goods at competitive prices.

"[Scarfo's] expert, [certified public accountant] Michael Sobol, was retained in 2013. At trial, he testified that 'his firm' reviewed every item in the five boxes of

documents produced in discovery in this case, delivered to [Scarfo's] counsel in 2011 or 2012. Mr. Sobol explained that, with regard to the documents which were 'some eight years after the events took place,' he and his office tried to 'get our heads around what transpired from an accounting perspective.' He expected to find matching invoices or similar documents and accounts for all transfers and expenditures made, but was not able to do so. As an example, Mr. Sobol stated that, while he saw disbursements to [Connecticut Light and Power], he would find it an unsupported disbursement unless he could find an invoice. As another example, Mr. Sobol could not match expenditures for General Paving, but a document shown to him in court revealed a good portion of the amount paid was indeed for that entity. There were, however, many other discrepancies for which there was no identifiable vendor or service provider.

"Mr. Sobol testified that all of the credit card statements were not in the materials delivered from [Snow], but he also admitted that, even if he had all of the credit card statements, he might not be able to identify the vendor or service provider. Mr. Sobol concluded that the fact that disbursements were unsupported did not mean that they were inappropriate or unauthorized. Clearly, Mr. Sobol found, and this court cannot disagree, that as of the time of the delivery of these documents, they did not reveal the pristine accounting or documentation that was desired, nor did the document production even come close to it. The records at this point in time were certainly not in good order or well maintained. However, Mr. Sobol, [Scarfo's] own expert, testified that he could not say that there was unrealized profit for which Scarfo was entitled to payment.

"In 2011, the town of Cromwell brought a civil action against [Cider Hill] and General Paving and Construction Corp[oration (General Paving)], alleging that [they]

failed to construct properly certain public improvements within the subdivision in accordance with the plans that had been filed and approved [(Cromwell action)]. There is dispute about how and when Scarfo learned about [the Cromwell action]. Scarfo testified that [he first learned of that action when he read] about it in the newspaper. Snow contends that he approached Scarfo, advising him not only of the suit, but also asking him to advance his share of the funds necessary to defend [that action] and proceed against General Paving. It was Snow's belief that [Cider Hill] could prevail in its claim that General Paving was responsible to the town of Cromwell and to [Cider Hill]. Because neither he nor [Cider Hill] had the financial resources to hire counsel, Snow asked Scarfo to contribute to legal representation costs. By this time, the [present] litigation had commenced and, on the advice of counsel, Scarfo refused to contribute and also refused the choice of [Snow's] counsel in the [present] lawsuit as counsel to represent [Cider Hill] in the Cromwell [action] and the proposed claims against General Paving. The town of Cromwell was requiring the repair to the roads; [Cider Hill] could not do it; and General Paving refused to do it. Snow agreed to forfeit the bond and have the town correct the problem, and a default judgment entered against [Cider Hill]. In his counterclaim, Snow asserts breach of contract, breach of fiduciary duty and negligence claims against Scarfo for refusing to contribute to legal costs [arising out of the Cromwell action]." (Footnotes altered.)

The court also found that there remained many unanswered questions after the close of evidence, and it stated that it had "much doubt about the veracity of" either Scarfo or Snow. Furthermore, the court opined: "The complexity of the issues in this case arise from the various allegations the parties have made, the very

confusing and manipulative way in which [Snow] conducts his business(es), and the complete lack of any attention whatsoever by [Scarfo] to the subdivision development [that] is the subject of this lawsuit, as well as a complete lack of any attention at all by [Scarfo] to the partnership or the business on which he premises his contentions that he is now entitled to damages and other relief."

On the basis of these findings and astute observations, the court concluded that the plaintiff had failed to establish any of his causes of action, and it rendered judgment in favor of the defendants.[7] This appeal followed.[8]

[7] Snow also had filed counterclaims in this case, upon which the court found in favor of Scarfo. This aspect of the judgment is not relevant to this appeal.

[8] In this appeal, the plaintiff's claims are twofold. First, the plaintiff claims: "The trial court erred in failing to apply the appropriate standard with regard to the spoliation of evidence, [and it] erred in failing to find that [the] plaintiff established a rebuttable presumption that but for the fact of spoliation of evidence, [the] plaintiff would have recovered [on his claims]." Second, the plaintiff claims that "the trial court erred in failing to apply the appropriate standard with regard to breach of fiduciary duty" in a limited liability company. He argues that "[t]he court failed to recognize that, by the very nature of a limited liability company, a fiduciary duty between members exists." He argues: "Where there is no dispute that Scarfo and Snow were members, Scarfo and Snow had a fiduciary relationship to one another, and the trial court should have shifted the burden to Snow to prove fair dealing by clear and convincing evidence." The plaintiff's claim of breach of fiduciary duty was based on Snow's alleged breach of the amended agreement.

As to the plaintiff's claim of spoliation of evidence, the trial court specifically found: "While the evidence clearly reflects discrepancies and very poor recordkeeping or retention many years after the inception of this project, the credible evidence does not reveal any intentional destruction or hiding of materials needed for litigation." We note that during oral argument before this court, the plaintiff clearly stated that he was not contesting the court's factual findings in this case, and that his appeal concerned only matters of law.

As to the plaintiff's claim of breach of fiduciary duty, the trial court specifically found: "[T]hese partners were equal in every way whatsoever, and Scarfo was not precluded in any way from avoiding the alleged difficulties about which he is now complaining. There has not been any breach of fiduciary duty by the defendant."

Following appellate briefing and oral argument, we, sua sponte, issued the following supplemental briefing order: "The parties are hereby ordered to file simultaneous supplemental briefs of no more than ten pages within ten days of issuance of notice of this order to address the following issue:

"1. Whether the plaintiff has standing to maintain this suit in his individual capacity. See *Smith* v. *Snyder*, 267 Conn. 456, 460–63, 839 A.2d 589 (2004); *Padawer* v. *Yur*, 142 Conn. App. 812, 66 A.3d 931 [cert. denied, 310 Conn. 927, 78 A.3d 146] (2013); see also *Calpitano* v. *Rotundo*, Superior Court, judicial district of New Britain Docket No. CV-11-6008972 (August 3, 2011) (52 Conn. L. Rptr. 464); *Ward* v. *Gamble*, Superior Court, judicial district of Hartford, Docket No. CV-08-5017829 (July 23, 2009) (48 Conn. L. Rptr. 286).

"The parties are further ordered to include in their supplemental briefs an analysis of the following matters:

"A. Based on the allegations throughout the complaint that the defendant Snow breached the operating agreement and amendment thereto of Cider Hill . . . which documents were signed and entered into by Scarfo and Snow as duly authorized members of Cider Hill, what, if any, injury has the plaintiff incurred individually that is distinct and separate from the alleged injury to Cider Hill.

"B. What is the basis for the plaintiff's standing to raise a claim that Snow breached his alleged fiduciary

As to the plaintiff's claim for breach of the amended agreement, the court specifically found: "The court cannot find that Snow violated the terms of the contract. Furthermore, while there has been a great deal of innuendo, the evidence does not support the contention that Snow did not fulfill his responsibilities . . . ."

We reiterate that, during oral argument, the plaintiff clarified that he was not challenging any of the trial court's factual findings. He specifically stated that his appeal is one of law and that he is not trying to relitigate the facts.

duty to Cider Hill and to the individual plaintiff by breaching the operating agreement of Cider Hill, and the amendment thereto, and by self-dealing.

"C. Whether the plaintiff has standing to raise a claim of spoliation of evidence, which specifically alleges as its basis, that Snow failed to preserve evidence despite knowing that he had 'obligations to the plaintiff and [Cider Hill] under the December 30, 2004 [operating] agreement and amendment dated December 30, 2004.' "

The parties, thereafter, submitted their supplemental briefs.

In his supplemental brief, the plaintiff contends that he has standing, individually, to maintain his direct causes of action because he is claiming a direct rather than a derivative injury. The plaintiff then specifies the particular parts of the amended operating agreement he alleges Snow violated and how he sustained direct injury, separate and apart from any injury to Cider Hill. For example, the plaintiff argues: "The [amended] agreement between [the] plaintiff and . . . Snow regarding capital contributions created personal duties and obligations under the operating agreement to each other. The claim is direct because it arises from a special relationship, [namely] the contractual relationship between [the] plaintiff and . . . Snow. . . . The agreement between [the] plaintiff and . . . Snow to divide equally the costs and expenses of the company created a joint duty and obligation wherein [the] plaintiff has a right to contribution/damages." Specifically as to his breach of fiduciary duty claim, the plaintiff argues that he has standing to raise a direct claim because his "claim is for express and continuing breaches of personal duties and obligations under the [amended] agreement by . . . Snow and not general fiduciary duties and obligations to the company . . . ." He also contends that he has "standing to raise [a] claim

that . . . Snow breached his fiduciary duty to defendant [Cider Hill] and [to the] plaintiff, individually, by breaching the operating agreement and [the] amendment [thereto] by self-dealing." We disagree that these are direct injuries, and we conclude that the plaintiff did not have standing in his individual capacity to maintain his various causes of action and that the trial court should have dismissed his case.

"It is axiomatic that a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. [When], for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them. . . .

"A limited liability company is a distinct legal entity whose existence is separate from its members. . . . [It] has the power to sue or to be sued in its own name; see General Statutes §§ 34-124 (b) and 34-186; or may be a party to an action brought in its name by a member or manager. . . . A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company. . . . [A] member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the

limited liability company or as otherwise provided in an operating agreement . . . .'' (Internal quotation marks omitted.) *Padawer* v. *Yur*, supra, 142 Conn. App. 817–18.

In the present case, Snow filed articles of organization for Cider Hill with the Secretary of the State's Office on December 17, 2004, listing himself as the agent for service of process and listing his title as ''Mem/Mgr.'' Snow also listed Scarfo as a ''Member'' of Cider Hill. The nature of the business to be transacted by Cider Hill is listed as ''[a]ny lawful business that may be carried on under the Limited Liability Act.'' Question five of the articles of organization form provides:

''MANAGEMENT

''(Place a check mark next to the following statement *only* if it applies.)

''_____ The management of the limited liability company shall be vested in one or more managers.'' (Emphasis in original.) There is no check mark in question five.

On December 30, 2004, Scarfo and Snow then entered into a written operating agreement for Cider Hill and an amendment thereto. The agreement provides that Scarfo and Snow each were 50 percent members of Cider Hill. The amendment specifically states that it was drafted for the purpose of ''memorializ[ing] their agreement regarding the division of labor and expenses regarding the development of the property on Evergreen Road in Cromwell . . . .'' Both Scarfo and Snow each signed the original operating agreement as a ''Member'' of Cider Hill. They each then signed the amendment to the Cider Hill operating agreement as ''Its Member, Duly Authorized.''

On October 27, 2009, Scarfo brought a six count amended complaint against Snow and Cider Hill alleging damages, breach of fiduciary duty, and spoliation

of evidence, as well as requesting an accounting and an opportunity to pierce the corporate veil of the various defendant companies in which Snow was a participant, including Cider Hill. The complaint was based upon Snow's alleged breaches of the amended agreement regarding the Evergreen Road development (Evergreen Project). The court found that Scarfo had failed to prove his causes of action, and it rendered judgment in favor of the defendants. Although neither the trial court nor the parties questioned the issue of the plaintiff's standing in this case, we requested supplemental briefing on that issue, and we now conclude that the plaintiff did not have standing in his individual capacity to maintain this suit.

"Our common law does not recognize [limited liability companies], which were first created by statute in Connecticut in 1993. Public Acts 1993, No. 93-267. [A limited liability company] is a distinct type of business entity that allows its owners to take advantage of the pass-through tax treatment afforded to partnerships while also providing them with limited liability protections common to corporations. . . . The [Limited Liability Company Act, General Statutes § 34-100 et seq.] establishes the right to form [a limited liability company] and all of the rights and duties of the [limited liability company], as well as all of the rights and duties of members and assignees. It permits the members to supplement these statutory provisions by adopting an operating agreement to govern the [limited liability company's] affairs." (Citations omitted.) *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 317, 138 A.3d 257 (2016). "A limited liability company . . . is a hybrid business entity that offers all of its members limited liability as if they were shareholders of a corporation, but treats the entity and its members as a partnership for tax purposes. All [fifty] states and the District of

Columbia have enacted [limited liability company] legislation, and every state has adopted or is considering its own distinct [limited liability company] act."[9] (Footnotes omitted.) Annot. 48 A.L.R.6th 1, § 2 (2009 and Supp. 2016); see General Statutes § 34-100 et seq.

"A limited liability company is a distinct legal entity whose existence is separate from its members. . . . A limited liability company has the power to sue or be sued in its own name . . . or may be a party to an action through a suit brought in its name by a member. . . . A member may not sue in an individual capacity to recover for an injury the basis of which is a wrong to the limited liability company." (Citations omitted.)

[9] "[A] number of states have adopted or substantially adopted the Uniform Limited Liability Company Act (ULLCA) . . . . According to the ULLCA, a member of a member-managed [limited liability company] owes to the company and the other members the fiduciary duties of loyalty and care, and a member in a member-managed [limited liability company] or a manager-managed [limited liability company] shall discharge the duties under the ULLCA or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing." (Footnotes omitted.) Annot. 48 A.L.R.6th 1, § 2 (2009 and Supp. 2016).

Although Connecticut previously had not adopted the ULLCA, our governor, on June 2, 2016, signed into law Substitute House Bill No. 5259, 2016 Sess., codifying what will be known as the Connecticut Uniform Limited Liability Company Act. Public Acts 2016, No. 16-97. This law will take effect on July 1, 2017, and it makes substantial changes to our current law.

We also note the existence of the Prototype Limited Liability Company Act (Prototype Act), which was drafted by the Working Group on the Prototype Limited Liability Company Act, Subcommittee on Limited Liability Companies Committee on Partnerships and Unincorporated Business Organizations Section of Business Law American Bar Association in 1992. See 3 L. Ribstein & R. Keatinge, Ribstein and Keatinge on Limited Liability Companies (June 2016 Ed.) Appendix C; see also J. Burkhard, "Resolving LLC Member Disputes in Connecticut, Massachusetts, Pennsylvania, Wisconsin, and the Other States that Enacted the Prototype LLC Act," 67 Bus. Law. 405, 416–18 (2012) (explaining that Connecticut modeled its limited liability company statutes on Prototype Act but that Connecticut courts have treated claims as derivative actions, similar to claims by corporations, in apparent contravention of Prototype Act). The parties do not rely on either the ULLCA or the Prototype Act in their supplemental briefs, and we, accordingly, do not discuss them directly in addressing the issue of standing.

Wasko v. *Farley*, 108 Conn. App. 156, 170, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008).

"A corporation is a separate legal entity, separate and apart from its stockholders. . . . It is an elementary principle of corporate law that . . . corporate property is vested in the corporation and not in the owner of the corporate stock. . . . That principle also is applicable to limited liability companies and their members." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 147, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002).

"[T]he law [permits] shareholders to sue derivatively on their corporation's behalf under appropriate conditions. . . . [I]t is axiomatic that a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding secondarily, deriving his rights from the corporation which is alleged to have been wronged. . . . [I]n order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation. . . . It is commonly understood that [a] shareholder—even the sole shareholder—does not have standing to assert claims alleging wrongs to the corporation." (Citations omitted; internal quotation marks omitted.) *Smith* v. *Snyder*, 267 Conn. 456, 461, 839 A.2d 589 (2004).

"[A] derivative suit is an action brought on behalf of a corporation by some percentage of its shareholders. . . . [In many of these actions, the] corporation is in an anomalous position of being both a defendant and a plaintiff in the same action. This unusual posture for the corporation is the result of the historical evolution of the derivative suit. At common law, there was no

action in law permitting a shareholder to call corporate managers to account. . . . In equity, there were two actions that evolved into a single derivative action: in one action the corporation was named as a defendant in order to compel it to take action against its controlling officers; in the second, the shareholder maintained an action against the officers and directors of the corporation, on behalf of the corporation. The dual actions were cumbersome and evolved into the present day unitary derivative action. . . . A shareholder's derivative suit is an equitable action by the corporation as the real party in interest with a stockholder as a nominal plaintiff representing the corporation. . . . It is designed to facilitate holding wrongdoing directors and majority shareholders to account and also to enforce corporate claims against third persons. . . .

"The use of a nominal plaintiff in a derivative action makes it an unusual procedural device by reason of its dual nature in that it consists of the basic cause of action, which pertains to the corporation and on which the corporation might have sued, and the derivative cause of action, based upon the fact that the corporation will not or cannot sue for its own protection. . . . Thus the dual nature of the stockholder's action: first, the plaintiff's right to sue on behalf of the corporation, and, second, the merits of the corporation's claim itself." (Citations omitted; internal quotation marks omitted.) *Ma'Ayergi & Associates, LLC* v. *Pro Search, Inc.*, 115 Conn. App. 662, 668–69, 974 A.2d 724 (2009).

Pursuant to General Statutes § 34-187: "(a) Except as otherwise provided in an operating agreement, suit on behalf of the limited liability company may be brought in the name of the limited liability company by: (1) Any member or members of a limited liability company, whether or not the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by

the vote of a majority in interest of the members, unless the vote of all members shall be required pursuant to subsection (b) of section 34-142; or (2) any manager or managers of a limited liability company, if the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by the vote required pursuant to section 34-142.

"(b) In determining the vote required under section 34-142 for purposes of this section, the vote of any member or manager who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded."[10]

"[Section] 34-187 applies to all limited liability companies unless the operating agreement provides for a different rule that conflicts with the statute or provides that the statute does not apply at all. That is the plain meaning of the statutory language, "[e]xcept as otherwise provided . . . . Thus, if the operating agreement is silent as to the applicability of the statute, the statute controls. . . . In other words . . . the statutory scheme controls and provides for the default method of operation, unless the organizers or members of the limited liability company contract, through the operating agreement, for another method of operation. Indeed, this is one of the foundational principles of the law governing limited liability companies." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 304 Conn. 820, 836–37, 43 A.3d 607 (2012).

[10] Here, it appears that the plaintiff may have had the ability to bring suit in the name of Cider Hill without the need for a vote of members to authorize suit on behalf of Cider Hill; see General Statutes § 34-187 (b); because the only other member was Snow, who, obviously would have an interest in the outcome of the suit that is likely adverse to the interest of Cider Hill. A thorough review of the operating agreement also reveals that there was no part of that agreement that addressed § 34-187 or any procedure for filing suit for alleged wrongdoing.

In the present case, the plaintiff brought a direct action against the only other member of Cider Hill, against Cider Hill itself, and against other companies in which Snow had an interest. He alleges various causes of action flowing from an alleged breach of a fiduciary type duty and a breach of the amended operating agreement, which was signed by the plaintiff and Snow, specifically *as agents for Cider Hill*. See *Chila* v. *Stuart*, 81 Conn. App. 458, 464, 840 A.2d 1176 ("[i]t is axiomatic that an action upon a contract or for breach of a contract can be brought and maintained by one who is a party to the contract sued upon" [internal quotation marks omitted]), cert. denied, 268 Conn. 917, 847 A.2d 311 (2004). Indeed, neither the plaintiff nor Snow were parties to the agreement in their individual capacities.

The plaintiff contends that Snow essentially mismanaged the Evergreen Project. Although the plaintiff contends that he suffered direct injury by the alleged action or inaction of Snow, any benefit he would have received from the Evergreen Project, were it not for the alleged improprieties of Snow, would have flowed to him only through Cider Hill, first benefiting Cider Hill. Accordingly, if there was an injury, that injury was sustained by Cider Hill and then sustained by the plaintiff. Thus, the plaintiff's injury is not direct, and he has no standing to sue in his individual capacity. See *Padawer* v. *Yur*, supra, 142 Conn. App. 817 (member or manager may not sue in individual capacity to recover for injury based on wrong to limited liability company); *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 216, 55 A.3d 583 (2012) (same), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013); *Wasko* v. *Farley*, supra, 108 Conn. App. 170 (same).

The form of the judgment is improper, the judgment is reversed, and the case is remanded with direction to dismiss the case for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAYEVON BLAINE (AC 36832)

Beach, Sheldon and Prescott, Js.

Syllabus

Convicted of conspiracy to commit robbery in the first degree, the defendant appealed to this court. The defendant's conviction stemmed from his involvement in a conspiracy with four other men to rob a drug dealer, which resulted in the shooting death of the victim. The jury found the defendant not guilty of the other charges of which he was accused, which included murder, felony murder and attempt to commit robbery. The four alleged coconspirators testified that they, together with the defendant, had devised a plan to rob the drug dealer. There also was evidence that the defendant agreed to participate as the shooter. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to support his conviction because it suggested that he participated in the conspiracy only as the shooter. He claimed that by finding him not guilty of murder, felony murder and attempted robbery, the jury necessarily rejected the state's theory that he was the shooter. He contended that if the evidence that he was the shooter was not credited, there was no other evidence on which his conspiracy conviction could be based. *Held*:

1. The defendant's claim that the evidence was insufficient to sustain his conviction of conspiracy to commit robbery in the first degree was not reviewable, his assertion that the evidence suggested that he participated in the conspiracy only as the shooter having been simply another way to phrase a claim that the verdict was inconsistent: in reviewing a claim alleging an inconsistent verdict this court may examine only whether there was sufficient support for the conviction, and there was no doubt here that the evidence was sufficient to sustain the defendant's conviction, as he conceded that there was evidence that he had agreed to participate in the crime as the shooter.
2. The defendant's claim that the trial court erred in denying his request to give the jury a third-party culpability instruction was unavailing: because the defendant was found not guilty of all the other charges against him, the jury's verdict on the conspiracy count logically could not have been affected by the giving of the requested charge; moreover, because there was strong evidence that the defendant participated in some capacity in the robbery, as the testimony of the four other coconspirators supported the proposition that he played a role in the conspiracy, any alleged error in the court's refusal to give the third-party culpability instruction was harmless.
3. The defendant was not entitled to review of his claim that the trial court erred by declining to instruct the jury as to the requisite intent to find

him guilty of conspiracy to commit robbery in accordance with this court's decision in *State* v. *Pond* (138 Conn. App. 228), the defendant's counsel having waived that claim when he made no mention of *Pond* in his written request to charge after the court had given him a copy of its proposed jury instructions and a meaningful opportunity to review them, and he agreed with those instructions and did not object to them after the court instructed the jury: moreover, contrary to the defendant's assertion that he did not waive his claim because our Supreme Court did not affirm this court's decision in *Pond* until after his trial, the defendant's trial began nearly one year after this court's decision in *Pond* and, thus, an instruction pursuant to *Pond* could have been requested; furthermore, the fact that our Supreme Court had granted certification to appeal from this court's decision in *Pond* did not affect the waiver of that claim.

Argued January 19—officially released September 27, 2016

Procedural History

Substitute information charging the defendant with the crimes of murder, attempt to commit robbery in the first degree, felony murder and conspiracy to commit robbery in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kahn, J.*; verdict and judgment of guilty of conspiracy to commit robbery in the first degree, from which the defendant appealed to this court. *Affirmed.*

Katherine C. Essington, assigned counsel, for the appellant (defendant).

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

Opinion

BEACH, J. The defendant, Jayevon Blaine, appeals from the judgment of conviction, rendered after a jury trial, of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134

(a) (2).[1] On appeal, the defendant claims that (1) the evidence was insufficient to sustain his conviction; (2) the trial court erred in denying his request for a jury instruction on third-party culpability; and (3) the court incorrectly instructed the jury on the requisite intent to find him guilty of conspiracy to commit robbery in the first degree. We affirm the judgment of the trial court.

Evidence supporting the following facts was presented to the jury. On September 6, 2009, at approximately 9:35 p.m., Bridgeport police Officer Paul Scillia was dispatched to Bretton Street in Bridgeport to respond to reports of gunshots and a suspicious vehicle. Upon arrival, he observed the victim, later identified as Kevin Soler, lying in the backseat of a vehicle, with his legs hanging out of an open door. Scillia checked the victim for a pulse and determined that he was deceased. He radioed for backup.

Soon after the other officers arrived at the scene, Scillia and the other officers were approached by Priscilla LaBoy. She was crying hysterically. LaBoy told Scillia that the deceased person in the car was her boyfriend. She told Scillia that the victim had picked her up earlier in the day and that they met a friend of his.[2] The three drove to a designated location where they parked and waited for another person. After they waited there for a couple of minutes, a black male, approximately six feet tall and wearing a black hoodie, approached their vehicle from across the street. The victim exited his vehicle and met the other man in the middle of the street. LaBoy overheard Soler, who sounded anxious, tell the other man that they had met each other at the other man's "baby mama's party."

[1] The defendant was found not guilty of murder in violation of General Statutes § 53a-54a (a); attempt to commit robbery in the first degree in violation of General Statutes §§ 53-49 and 53a-134 (a) (2); and felony murder in violation of General Statutes § 53a-54c.

[2] As we will discuss in this opinion, the friend's name was Robert Taylor.

LaBoy told Scillia that the other man then shot her boyfriend.

Police investigators at the scene found a cell phone belonging to Robert Taylor, who had been the third person in the car; an examination of the cell phone led the police to Jihad Clemons. The police questioned Clemons, who said the defendant was the shooter. Two days later, police executed a warrant for the arrest of the defendant on other charges. The defendant lived at the time with DeAndre Harper and Harper's younger brother and sister, Sean Harper and Antonajia Pettway. In the course of executing the warrant, the police found two guns under a mattress, which Harper and his brother slept on; the defendant slept in the same small bedroom on a different mattress. One of the guns, a nine millimeter handgun, was determined by a firearms expert to have fired the bullet recovered from the victim's body. Further investigation led to the arrests of four people who, together with the defendant, were charged with, inter alia, conspiracy to commit robbery in the first degree.

All four of the defendant's coconspirators, Clemons, Craig Waddell, Hank Palmer, and Mike Lomax, who had known each other for several years but had only recently been introduced to the defendant, testified for the state at the defendant's trial. The crux of their testimony, as it related to the charge of conspiracy, was that they and the defendant had entered into an agreement to rob Taylor, a drug dealer.

Clemons was the first of the conspirators to testify. He testified that on September 6, 2009, he and Waddell visited their friend, Braxton Gardner, and decided to buy some marijuana. To that end, Gardner made a phone call to Taylor, a drug dealer with whom he was familiar. Gardner met Taylor a block or two from his house and completed the purchase. Clemons, Waddell,

and Gardner smoked the marijuana that they had purchased, and then Gardner left to attend his younger brother's football game.

Shortly thereafter, Clemons and Waddell decided that they wanted more marijuana, so they called Gardner to get Taylor's telephone number. Clemons then called Taylor, who met them near Gardner's house and sold them more marijuana. While Clemons and Waddell were smoking the newly purchased marijuana, they walked to Palmer's house and discussed robbing Taylor. Lomax arrived at Palmer's house, and the four men discussed their plan to rob Taylor.

Clemons, Waddell, and Lomax left Palmer's house—leaving Palmer behind—and drove Lomax' car, a white Honda, to Harper's house to ask Harper if he would like to be involved in their planned robbery of Taylor. They found Harper outside on his porch with his cousin, the defendant. Harper and the defendant approached Lomax' vehicle, where they discussed the robbery. Clemons, Waddell, and Lomax first asked Harper if he wanted to participate in the robbery, but Harper declined. They then asked the defendant if he wanted to participate, and he agreed to do so. The defendant got into Lomax' vehicle, and the four men returned to Palmer's house.

When they arrived at Palmer's house, the five men spent forty-five minutes further discussing their plan to rob Taylor. They agreed that Clemons would call Taylor to set up a meeting and that the defendant would rob him using a nine millimeter handgun, while Waddell stood nearby. Lomax would drive the car to the place of the meeting, and Palmer would stay in the car with Lomax. They agreed that they would steal Taylor's drugs, car, and cell phone.

At some point after dark, the men went to meet Taylor. Taylor had told Clemons that he was running late

because he had a flat tire. Clemons parted company with the others to go home because he was late for his curfew. Meanwhile, as noted previously in this opinion, Taylor got a ride to the rendezvous with his friend, Soler, and Soler's girlfriend, LaBoy. Soler parked at the agreed upon location, and a person appeared; Soler and the person conversed because Soler had agreed to conclude the sale on Taylor's behalf. The other person then shot Soler. Taylor ran from the scene and dropped his cell phone; other shots were fired at Taylor.

Clemons later called Harper to try to get in touch with the defendant. Clemons testified that he called Harper's phone and the defendant answered. Clemons "asked him what happened, and he said he killed one of them and one of them tried to run and I guess he shot at them and that was it." The defendant also admitted to Pettway that he shot someone; and Waddell, who had been in the vicinity of the shooting but was not immediately with the defendant at the time, told Lomax and Palmer that the defendant had shot someone.

I

The defendant first claims that the evidence was insufficient to sustain his conviction of conspiracy to commit robbery in the first degree. We disagree.

"The two part test this court applies in reviewing the sufficiency of the evidence supporting a criminal conviction is well established. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Lewis*, 303 Conn. 760, 767, 36 A.3d 670 (2012).

"To establish the crime of conspiracy, it must be shown that an agreement was made to engage in conduct constituting a crime, that the conspirators intended that the conduct be performed and that the agreement was followed by an overt act in furtherance of the conspiracy. . . . Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Palangio*, 115 Conn. App. 355, 362, 973 A.2d 110, cert. denied, 293 Conn. 919, 979 A.2d 492 (2009); see also General Statutes § 53a-48.

A person is guilty of the crime of robbery in the first degree, as defined in § 53a-134 (a), when "in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (2) is armed with a deadly weapon. . . ." General Statutes § 53a-133 provides: "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: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

There can be no doubt that the evidence was more than sufficient to sustain the conviction. Clemons, Waddell, Palmer, and Lomax all testified that they, together with the defendant, devised the plan to rob Taylor. They testified about the steps that they took to execute the plan. The defendant was to be the gunman and Waddell

the backup. In this case, there was direct testimony about the planning to rob Taylor with the use of a firearm.

The defendant's sole attack on the sufficiency of the evidence appears to be limited to his assertion that by finding him not guilty of murder, felony murder and attempted robbery, the jury necessarily rejected the state's theory that he was the shooter. If evidence that he was the shooter was not credited, the defendant argues, there was no other evidence on which the conspiracy conviction could be based. He contends, then, that the evidence did not support the conviction of conspiracy. We are not persuaded.

Our Supreme Court in *State* v. *Arroyo*, 292 Conn. 558, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), held that verdicts that are factually, legally, and/or logically inconsistent are permissible. The court reviewed prior cases and resolved any prior uncertainty in the law by holding that courts reviewing claims of inconsistent verdicts should examine only whether the evidence provided sufficient support for the conviction, and not whether the conviction could be squared with verdicts on other counts. Id., 575–83. The court noted that its holding was entirely consistent with *United States* v. *Powell*, 469 U.S. 57, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). See *State* v. *Arroyo*, supra, 584–85.

The defendant argues that his claim is not an inconsistent verdict claim because he is claiming that the jury resorted to improper speculation and "necessarily found facts that are not supported by any evidence in the record . . . ." (Emphasis omitted.) He contends that the evidence suggests that he participated in the conspiracy only as the shooter; thus, he argues that, by finding him guilty of conspiracy to commit robbery but not guilty of the remaining offenses, the jury must have

based its verdict entirely on speculation. This argument, however, is simply another way to phrase a claim of inconsistency, and our Supreme Court in *Arroyo* specifically rejected the argument that a claim of inconsistency in verdicts may be considered on appeal under the alternative rubric that " 'the jury's conclusion was not reasonably and logically reached' "; *State* v. *Arroyo*, supra, 292 Conn. 580; because of inconsistency. See id., 580–83. The defendant concedes that there was evidence that he agreed to participate in the crime as the shooter; we agree. Because factually inconsistent verdicts are permissible, the claim is not reviewable. See id., 583.

II

The defendant next claims that the court erred by denying his request for a jury instruction regarding third-party culpability. The state argues that any error in refusing to instruct the jury on third-party culpability was harmless in the circumstances of this case. We agree with the state.

In *State* v. *Arroyo*, 284 Conn. 597, 935 A.2d 975 (2007), our Supreme Court addressed a similar scenario, in which evidence arguably supporting the defense of third-party culpability had been admitted, but the trial court had refused to instruct the jury on the defense of third-party culpability. Our Supreme Court noted that the rationale for providing an instruction was similar to the rationale for admitting such evidence initially: "In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court

has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . .

"It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." (Citations omitted; internal quotation marks omitted.) Id., 607–609.

The defendant filed a request for an instruction regarding third-party culpability.[3] During the charging conference, defense counsel suggested that Harper was the putative third-party culprit and that the following evidence justified the instruction: Lomax testified that there was telephonic activity between the coconspirators and Harper before and after the incident; Clemons testified that he had told the police that the gun used in the incident was probably provided by Harper; and the murder weapon was found under Harper's bed.

[3] The defendant's requested instruction was as follows: "There has been evidence that a third party, not the defendant, committed the crimes with which the defendant is charged. This evidence is not intended to prove the guilt of the third party, but is part of the total evidence for you to consider. The burden remains on the State to prove each and every element of the offense beyond a reasonable doubt. It is up to you, and to you alone, to determine whether any of this evidence, if believed, tends to directly connect a third party to the crimes with which the defendant is charged. If after a full and fair consideration and comparison of all the evidence, you have left in your minds a reasonable doubt indicating that a third party may be responsible for the crimes the defendant is charged with committing, then it would be your duty to render a verdict of not guilty as to the accused, [the defendant]."

The court ruled that the evidence did not warrant a third-party culpability instruction. Relying on authority including *State* v. *Delossantos*, 211 Conn. 258, 559 A.2d 164, cert. denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989), the court noted that the only significant evidence implicating Harper was the fact that the gun used in the crime was found under his mattress, and that the defendant slept in the same room. The court discounted the evidence regarding the phone call to Harper after the shooting because the conspirators used that phone to try to reach the defendant. Noting that the defendant's attorney was free to argue that Harper was in fact the shooter, the court stated that there was no direct evidence that Harper was the shooter, in its view, and it was exercising its discretion not to give the charge.

The following additional facts are relevant. None of the four coconspirators testified that Harper had agreed to participate in the robbery, that he was at Palmer's house when the robbery was being planned or that he was present at the shooting incident. Clemons testified that he went to Harper's house and that he thought "Harper would be up for doing a robbery," but when Harper was asked to participate, he refused. Lomax testified that Harper was not "in the mix" of robbery participants. Waddell testified that the gun used in the robbery was originally procured by Lomax, but that "everybody used it as a community gun." Lomax testified that he had informed police that the gun belonged to Palmer. The weapon was found under Harper's mattress in a room that he shared with his younger brother and the defendant. Clemons testified that during an interview with police, he told them in the beginning of the interview that the gun used in the robbery belonged to Lomax and was kept at Palmer's house. He further testified that, although at the end of that interview with police he had stated that he probably got the gun from

Harper's house, he had misspoken in so stating. Clemons testified that he went home before the shooting due to a curfew. Later that night he wanted to locate the defendant, who had not met with Lomax, Waddell and Palmer after the planned robbery, but, because he did not have the defendant's phone number, he called Harper's phone. He stated that the defendant answered Harper's telephone. Lomax testified on cross-examination that he "might have" called Harper's phone before and after the robbery, and on redirect examination testified that he had no recollection of making such calls.

The thrust of the defendant's argument in support of the requested charge at trial was that some evidence pointed to Harper's being the shooter. The defendant was found not guilty of all charges other than conspiracy, and there was neither evidence nor argument suggesting that the defendant could not have been a coconspirator if Harper had been the shooter.[4] Any error in refusing to give the charge, then, was harmless, because the jury's decision as to the conspiracy count logically could not have been affected by the giving of the requested charge. The issue is not constitutional in nature, and thus it is the defendant's burden to prove harmfulness. See *State* v. *Inglis*, 151 Conn. App. 283, 296–97, 94 A.3d 1204 (claim regarding denial of third-party culpability instruction not of constitutional magnitude), cert. denied, 314 Conn. 920, 100 A.3d 851 (2014), cert. denied, 575 U.S. 918, 135 S. Ct. 1559, 191 L. Ed. 2d 647 (2015).

We conclude that the standard for harmlessness was satisfied because we have "a fair assurance that the error did not substantially affect the verdict . . . ." (Citation omitted; internal quotation marks omitted.)

[4] The defendant suggested to the jury, in a series of rhetorical questions, that it was likely that Harper was the shooter, and that the four conspirators preferred to implicate the defendant rather than Harper, with whom the conspirators were more familiar.

State v. *Arroyo*, supra, 284 Conn. 614. The testimony of Clemons, Waddell, Palmer, and Lomax supported the proposition that the defendant played a role in the conspiracy to commit robbery. Clemons and Lomax testified that they went to Harper's house, where the defendant resided, and Harper declined to participate in the robbery, but the defendant agreed. Clemons, Waddell, Palmer, and Lomax all testified that they, along with the defendant, discussed at Palmer's house their plan to commit the robbery later that day. There was strong evidence that the defendant participated in some capacity in the robbery. Even if the evidence that the gun used in the robbery was found under Harper's bed, in a room he shared with the defendant, and that there was telephonic communication between some of the coconspirators and Harper before and after the robbery, was believed to have linked Harper to the conspiracy, the defendant would not be exculpated from being a conspirator, nor would evidence that Harper was the shooter exculpate the defendant from being found guilty of conspiracy. Accordingly, any error was harmless.

III

The defendant last claims that the court erred in declining to instruct the jury according to the principles set forth in *State* v. *Pond*, 138 Conn. App. 228, 50 A.3d 950 (2012), aff'd, 315 Conn. 451, 108 A.3d 1083 (2015); see *State* v. *Pond*, 315 Conn. 451, 466, 108 A.3d 1083 (2015) (Appellate Court properly determined that trial court should have instructed jury that "to find the defendant guilty of conspiracy to commit robbery in the second degree in violation of [General Statutes] §§ 53a-135 [a] [2] and 53a-48 [a], it had to find that the defendant specifically intended that the robbery would involve the display or threatened use of . . . a deadly weapon or dangerous instrument"). We are not persuaded.

"[W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011).

The defendant's claim that the court erred by not giving the jury a *Pond* instruction was waived. The defendant was given a meaningful opportunity to review the instructions, the court solicited comments from both counsel, and the defendant's counsel agreed with the instructions. Almost one week before its final instructions to the jury, the court provided counsel with a copy of its proposed instructions to the jury. Thereafter, the defendant filed his request to charge wherein he made no mention of *State* v. *Pond*, supra, 138 Conn. App. 228. During the charging conference the court noted that it had not made any changes to the instructions on the charge of attempted robbery and asked counsel if there were any concerns as to that instruction; the defendant's counsel responded, "[n]o." Regarding the charge of conspiracy to commit robbery in the first degree, the prosecutor suggested one minor change, to which defense counsel stated he had no objection. The court asked if counsel had any objection to the remainder of its proposed instruction to which defense counsel responded, "[n]o, Your Honor." Following the court's instructions to the jury, defense counsel did not object on the ground that the instructions did not comply with *State* v. *Pond*, supra, 228.

The defendant contends, however, that counsel did not knowingly and intelligently waive this claim pursuant to *Kitchens* because our Supreme Court did not affirm this court's judgment in *State* v. *Pond*, supra, 138 Conn. App. 228, until after the trial of his case. The trial in this case, however, began nearly one year after this court's decision in *Pond*. An instruction pursuant to *State* v. *Pond*, supra, 228, certainly could have been requested; the fact that certification to our Supreme Court had been granted on that case does not affect the waiver of that claim.[5]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMES E. CUNNINGHAM, SR.
(AC 38322)

Sheldon, Prescott and West, Js.

Syllabus

Convicted of murder, carrying a pistol without a permit and criminal possession of a firearm as a result of an altercation that led to the shooting death of the victim, the defendant appealed to this court. He claimed that the trial court violated his sixth amendment right to present a complete defense to the charge of murder by precluding his attorney during closing argument to the jury from delineating the elements of

[5] In the alternative, the defendant requests plain error review and review under our supervisory authority. The defendant cannot prevail under the plain error doctrine. "[A] valid waiver . . . thwarts plain error review of a claim. [The] Plain Error Rule may only be invoked in instances of forfeited-but-reversible error . . . and cannot be used for the purpose of revoking an otherwise valid waiver. This is so because if there has been a valid waiver, there is no error for us to correct." (Internal quotation marks omitted.) *State* v. *Rosado*, 147 Conn. App. 688, 702, 83 A.3d 351, cert. denied, 311 Conn. 928, 86 A.3d 1058 (2014). This is not an extraordinary situation in which exercise of our supervisory authority is warranted. See *State* v. *Fuller*, 158 Conn. App. 378, 392, 119 A.3d 589 (2015) ("[s]upervisory authority is an extraordinary remedy that should be used sparingly" [internal quotation marks omitted]).

the lesser included offense of manslaughter in the first degree with a firearm in order to highlight the mental state required for murder. The defendant had alleged that the shooting occurred after the victim attacked him and was kicking him while he was on the ground. He claimed that he then reached for the gun he had been carrying and shot the victim. He further claimed that it was not until after the victim had run across the street that he noticed that the victim had been shot. The defendant offered two theories of defense at trial. He claimed that he had not intended to kill the victim, but, rather, shot him in self-defense after the altercation. He also claimed that he had acted with recklessness, the mental state required for manslaughter in the first degree, a crime with which he had not been charged. During closing argument, defense counsel used a slide to project onto a screen for the jury the elements of manslaughter in the first degree. When he began to explain the elements of that offense, the prosecutor objected, and the trial court sustained the objection. Defense counsel then proceeded with his argument to the jury in which he discussed the mental states that differentiate murder and manslaughter in the first degree. Defense counsel did not ask to be heard by the court with regard to the prosecutor's objection or ask the court to clarify the scope of its ruling. After the defendant and the prosecutor concluded their closing arguments, the court stated its reasons for having sustained the prosecutor's objection. The court explained, inter alia, that it was inappropriate for defense counsel to use the slide and screen to attempt to show the jury the elements of manslaughter in the first degree when the defendant had not been charged with that crime, and that neither the state nor the defendant had requested a jury instruction on manslaughter in the first degree as a lesser offense included within the crime of murder. The defendant did not thereafter take further action with regard to the court's ruling. *Held* that the trial court did not abuse its discretion by precluding the defendant from listing, orally or by slide, all of the elements of manslaughter in the first degree during closing argument to the jury: the defendant's claimed violation of his constitutional right to present a complete defense did not exist, as the court's ruling permitted defense counsel a fair opportunity to present his theory that the defendant lacked the mental state for the crime of murder because he did not intend to kill the victim, and defense counsel was permitted to present to the jury a definition of manslaughter and to argue that the defendant had committed that crime; furthermore, although the court did not explain its ruling until after the conclusion of closing arguments, neither party appeared to believe that the ruling prevented them from addressing the topics of intent and manslaughter.

Argued May 23—officially released September 27, 2016

Procedural History

Substitute information charging the defendant with the crimes of murder, carrying a pistol without a permit

and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield, where the charges of murder and carrying a pistol without a permit were tried to the jury before *Kahn*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court on a plea of guilty to the charge of criminal possession of a firearm; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to this court. *Affirmed.*

Glenn W. Falk, assigned counsel, with whom, on the brief, was *John Boeglin*, law student intern, for the appellant (defendant).

Ryan Coyne, certified legal intern, with whom were *Harry Weller*, senior assistant state's attorney, and, on the brief, *John C. Smriga*, state's attorney, and *Joseph J. Harry*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, James E. Cunningham, Sr., appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The defendant subsequently pleaded guilty to a charge of criminal possession of a firearm in violation of General Statutes § 53a-217 (a), as charged in a part B information. On appeal, the defendant claims that the trial court violated his sixth amendment right to present a complete defense to the charge of murder by precluding defense counsel during closing argument from delineating the elements of the lesser included offense of manslaughter in the first degree with a firearm in order to highlight the mental state required for murder.[1] We affirm the judgment.

[1] On appeal, the defendant does not raise any claims that challenge his conviction of carrying a pistol without a permit in violation of § 29-35 and criminal possession of a firearm in violation of § 53a-217 (a).

The jury reasonably could have found the following facts. The victim, Daniel Speller, and the defendant were friends who had lived together for several weeks at a house in Bridgeport. On the night of August 5, 2012, an altercation concerning money arose between the defendant, who was wearing his .45 caliber pistol, and the victim. Sometime after midnight on August 6, the defendant shot the victim three times—in the chest, arm, and leg—outside of the house in which they lived. The fatal shot struck the victim in his chest and caused him to bleed to death within minutes. The defendant then dragged the victim down some porch stairs and enlisted the help of a neighbor to wrap the victim's body in a white tarp and strap it to a metal rack mounted to the back of the defendant's motor vehicle, a Hummer.

The defendant drove the Hummer with the victim's body on it to his grandmother's house, throwing the murder weapon into a nearby river on his way.[2] When he arrived at his grandmother's house, the defendant drove the Hummer into her backyard and concealed it in a hedge bordering a large, wooded area. At some time during the night, he returned to the Hummer and further covered the victim's body with two plastic garbage bags. Police ultimately discovered the concealed Hummer and the victim's body the next morning, at which point the defendant told the officers, "You got me," and, "I'm not gonna give you any trouble."

On August 16, 2013, in a substitute information, the defendant was charged with murder in violation of § 53a-54a (a),[3] and carrying a pistol without a permit in violation of § 29-35 (a).[4] At his jury trial, the defendant

[2] The murder weapon was never recovered.

[3] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception . . . ."

[4] General Statutes § 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person

admitted that he had shot the victim, loaded him onto the back of his Hummer, thrown the gun into a river, and concealed the victim's body in his grandmother's backyard, but repeatedly testified that he had shot the victim in self-defense. Neither the state nor the defendant requested a jury instruction on any lesser included offense.

The defendant offered two theories of defense: (1) that he had acted in self-defense and (2) that he had not intended to kill the victim, but that he had acted with the requisite mental state for the crime of manslaughter in the first degree.[5] According to the defendant, the shooting arose out of an altercation he had with the victim concerning money. In the defendant's version of events, the victim attacked him and tried to grab his gun, which fell to the ground. At this point, the defendant was on the ground as the victim kicked him. The defendant reached for the gun and shot at the victim, who proceeded to run away across the street. It was not until the victim was across the street that the defendant noticed that the victim was shot. Thus, according to the defendant, he did not intend to kill the victim and his conduct constituted self-defense.

Defense counsel began his closing argument by arguing that the defendant did not have the requisite intent to kill the victim, but rather acted with the requisite mental state for the crime of manslaughter, recklessness: "If two of us get in an altercation and we're friends and we wrestle or tussle, and there is a gun

is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ."

[5] The elements of manslaughter in the first degree by reckless indifference are set forth in General Statutes § 53a-55 (a), which provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

involved and someone gets shot, it's a manslaughter. The intent isn't to kill your friend, but you're in a fight. If I wait for you outside and you come around the corner, and I am waiting for you and I shoot you, it's a murder. . . . And therein lies the issue in this case because he is not charged with manslaughter; he is charged with murder. So, the only issue, the narrow issue, that you have to figure out is what his intent was." Defense counsel argued that the defendant "didn't intend to kill [the victim]. He intended to get him off of him."

Later in his closing argument, defense counsel sought to explain to the jury the elements of murder, self-defense, and manslaughter in the first degree by reckless indifference, and to supplement his explanation with a visual presentation listing the elements, as codified by statute, via an overhead monitor. Defense counsel argued to the jury: "I typically during closing argument don't go [into] the law with specificity, but I think in this case it is somewhat important. It will be brief and I'll go through it quickly, and Her Honor will actually direct you on what [that] is. And Her Honor's interpretation and statement of law is what governs this trial, but at the same time I want everyone to understand exactly what it is the state has to prove beyond a reasonable doubt. The first thing—the first count that you are going to consider is the murder count. And what I have done is, I have basically taken what the murder count is. And I'll read it to you because I know from there you really can't see with the overhead [monitor].

* * *

"Now, when we start talking about self-defense, and you have that claim, and you'll have to determine whether or not he used—he was justified in using the force that he used. . . . And like I said, this thing [on

the overhead monitor] was just taken straight from the judge's charge. . . .

"And the last thing I'll read to you because I actually think that it's true during this process, is the manslaughter in the first degree with a firearm. With intent to cause serious physical—"

At this point in the proceedings, the state objected, and the court sustained the objection, although no basis for the objection was stated. Defense counsel did not ask to be heard with respect to the objection or request that the court clarify the scope of its ruling. Rather, he proceeded with his closing argument:[6] "As I said, manslaughter is something that happens when two people get in an argument, in a fight, a gun is drawn, and someone gets hurt—and friends get hurt, and that is what this case is.

* * *

"[T]here's a reasonable doubt and a reasonable hypothesis between what happened between [the victim and the defendant]. It is reasonable to think they got into an argument and he was shot because he got into an argument. That makes it a manslaughter. Your problem is going to be that you can't find him guilty of manslaughter because the state chose not to charge him, so you're stuck. The state chose not to add lesser includeds, and the state chose not to give you the option of what he is actually guilty of. So, you have to make the tough decision to find him not guilty because you can't find what his intent is."

In response, the state argued in its rebuttal closing argument that the defendant chased the victim and shot him from behind, and, thus, intended to kill the victim: "First of all, it's murder; it's not manslaughter. . . .

[6] The state did not object to any other further reference to manslaughter by counsel for the defendant during the remainder of the argument.

What counsel just told is, my guy is guilty, but what the state charged with was wrong. He didn't intend to kill him. But if you believe that he intended to kill him, we're claiming self-defense. Does that make sense?[7] It's manslaughter, but if you don't find it is manslaughter, then here is a defense I can use—it's self-defense . . . .

"The state proved murder, not manslaughter. He intended to kill him. That is what the intent is of firing a .45 caliber handgun at somebody. Your intent was not to warn him." (Footnote added.)

After closing argument, the court elaborated on its ruling outside the presence of the jury: "There was only one objection during the defense's argument, and that was to a—so, there is a record of it. Counsel put up on the screen a slide with the elements of the offense of manslaughter in the first degree by reckless indifference. I sustained the objection. That is not appropriate.

"In this case neither side requested a lesser included offense charge. Typically, those requests come from the defense and not the state, and the defense didn't request it. It would be confusing to the jury and completely inappropriate to instruct them on the elements of an offense which has not been charged. And so those are the reasons why I sustained the objection on that ground.

"Now, I understand the defense may not have wanted a lesser included and to give the jury that option, and that is your call, strategically. But you can't be instructing them about something that is not part of this case and has not been charged or an element of

[7] We note that contrary to the state's contention, these two theories are not necessarily inconsistent with each other. The defense of self-defense may be used as a defense to the charge of murder and to the charge of manslaughter in the first degree. *State* v. *King*, 24 Conn. App. 586, 590–91, 590 A.2d 490 (self-defense is valid defense to manslaughter in first degree), cert. denied, 219 Conn. 912, 593 A.2d 136 (1991).

this offense. So, for those reasons, I sustain the objection." The defendant did not take further action with respect to the court's ruling or seek to have the slide that listed the elements of manslaughter marked for identification.

Following the court's elaboration, the jury began deliberating, and on August 23, 2013, found the defendant guilty of both counts. The defendant subsequently pleaded guilty to criminal possession of a firearm in violation of § 53a-217 (a). On February 18, 2014, the court imposed a total effective sentence of sixty years of incarceration. This appeal followed.

The defendant claims on appeal that the court violated his sixth amendment right to present a defense by precluding defense counsel during closing argument from delineating the elements of the lesser included offense of manslaughter in the first degree with a firearm. Although the defendant concedes that he did not preserve this claim properly at trial, he seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Specifically, he argues that his claim satisfies the first prong of *Golding* because, although he did not have the slide marked for identification, the court described the contents of the slide on the record. He also argues that his claim satisfies the second and third prongs of *Golding* because the court violated his sixth amendment right to argue to the jury that the state had not satisfied its burden of proving beyond a reasonable doubt an essential element of the offense, namely, that he intended to cause the death of the victim. Finally, he argues that the state cannot prove beyond a reasonable doubt that this error was harmless.

The state responds that the defendant's claim is not entitled to review under *Golding* because the defendant's claim is not constitutional in nature and, therefore, fails under the second prong of *Golding*. The state

contends that the claim is not of a constitutional magnitude because it arises out of the common-law doctrine regarding lesser included offenses. Even if this claim satisfies the second prong of *Golding*, the state argues that the defendant has failed to establish that his sixth amendment right to present a defense was violated because he was not precluded from making the argument that he did not have the requisite intent to commit murder, but rather had the requisite intent to commit manslaughter. Last, the state argues that any error was harmless beyond a reasonable doubt. We agree with the state that the defendant's claim fails under the third prong of *Golding*.

"As we recently have noted, [u]nder *Golding* review . . . a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Polanco*, 165 Conn. App. 563, 572, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 360, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). "Because a defendant cannot prevail under *Golding* unless he meets each of those four conditions, an appellate court is free to reject a defendant's unpreserved claim upon determining that any one of those

conditions has not been satisfied." *State* v. *Brunetti*, 279 Conn. 39, 54, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

The defendant first argues that the record is adequate for review because the court stated on the record the basis for its ruling and described the content of the excluded slide as having listed the elements of manslaughter in the first degree. Although the defendant failed to have the slide marked for identification purposes, the state concedes that the record is adequate for review of this claim because the court described its content on the record. We agree with both parties.

Although "[i]t is incumbent upon the [defendant] to take the necessary steps to sustain [his] burden of providing an adequate record for appellate review"; (internal quotation marks omitted) id., 63; the record independently may be adequate to establish the substance of an excluded exhibit if its content is stated on the record. See *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 151, 124 A.3d 501 (2015). Thus, in the present case, to the extent that the defendant's claim requires this court to consider the contents of the slide, the record is adequate for review because the trial court described its content on the record.

Although the state concedes that the record is adequate for review, the state, nevertheless, contends that the defendant's claim is not reviewable because it is not of a constitutional nature, and, thus, fails under the second prong of *Golding*. Specifically, the state contends that the defendant's claim implicates his common-law right to a jury instruction on a lesser included offense.[8] According to the state, to be entitled to a

[8] There is no constitutional requirement that a trial court instruct the jury on a lesser included offense. *State* v. *Ortiz*, 217 Conn. 648, 659, 588 A.2d 127 (1991) ("a lesser included offense instruction is purely a matter of common law, and therefore does not implicate constitutional rights").

jury instruction on a lesser included offense, the party seeking the instruction must satisfy the four-pronged test established in *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980),[9] and because the defendant did not satisfy these four prongs, he could not argue the elements of manslaughter, which is a lesser included offense of murder, to the jury in his closing argument.

The state misinterprets the defendant's claim. The defendant's claim does not implicate his common-law right to a jury instruction on a lesser included offense because he did not ask for one. Rather, the defendant argues that the court violated his sixth amendment right to argue that the state had failed to satisfy its burden to prove an essential element of the crime charged beyond a reasonable doubt, namely, that he had the requisite intent to kill the victim. The defendant contends that the prohibited argument bore directly on his theory of the defense. Such a claim is constitutional in nature.

The sixth amendment, which is applicable to the states through the fourteenth amendment, guarantees to the accused in all criminal prosecutions the right to the assistance of counsel, which includes the opportunity to participate fully and fairly in the adversary process. *Herring* v. *New York*, 422 U.S. 853, 856–58, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). "The opportunity for the defense to make a closing argument in a criminal

[9] "A [party] is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." *State* v. *Whistnant*, supra, 179 Conn. 588.

trial has been held to be a basic element of the adversary process and, therefore, constitutionally protected under the sixth and fourteenth amendments. . . . Closing argument is an integral part of any criminal trial, for it is in this phase that the issues are sharpened and clarified for the jury and each party may present his theory of the case. Only then can [counsel] . . . argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. . . .

"The right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue before the court or the jury after all the evidence has been admitted, but also when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence. This is particularly so [if] . . . the prohibited argument bears directly on the defendant's theory of the defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Arline*, 223 Conn. 52, 63–64, 612 A.2d 755 (1992).

In the present case, the defendant claims that by prohibiting him from listing the elements of manslaughter in the first degree, the court deprived him of the opportunity to raise a significant issue bearing directly on his theory of defense, which was that he did not have the requisite intent to commit murder because he had the requisite intent to commit manslaughter. The state is correct that a defendant has no constitutional right to a jury instruction on a lesser included offense. There is, however, no Connecticut precedent that precludes a defendant from referring to a lesser included offense, on which the jury is not instructed, during closing argument as a means by which to undermine

an element of the charged offense.[10] Although this claim involves the elements of a lesser included offense, it does not implicate the defendant's common-law right to a jury instruction on a lesser included offense, but rather implicates his sixth amendment right to argue during closing argument that the state had failed to prove beyond a reasonable doubt an element of the charged crime. Accordingly, the defendant's claim is of a constitutional magnitude, and, thus, satisfies the second prong of *Golding*.

Although we agree with the defendant that his claim satisfies the second prong of *Golding*, we do not agree that the court violated his sixth amendment right to present a closing argument, and, therefore, the defendant's claim fails under the third prong of *Golding*. In support of his claim, the defendant argues that his right to present a closing argument was violated because, by precluding him from listing the elements of manslaughter in the first degree, the court prohibited him from arguing a significant issue that bore directly on his theory of defense, which was that he did not possess the requisite intent for murder because he had the requisite intent for manslaughter. The state counters that, although he was precluded from listing the elements of manslaughter, the defendant was allowed to argue

[10] Other states hold that a defendant may refer to a lesser included offense or a lesser related offense, with which the defendant is not charged and the jury not instructed, during closing arguments as part of the defendant's theory of defense. See, e.g., *People* v. *Valentine*, 143 Cal. App. 4th 1383, 1388, 49 Cal. Rptr. 3d 948 (2006) (although defendant was not entitled to jury instruction on lesser included offense, he could "argue to the jury [during closing argument] that his culpability was as one who was in possession of stolen property but not one who committed a robbery"), review denied, 2007 Cal. LEXIS 617 (Cal. January 24, 2007). We need not decide whether a court may preclude any and all reference to an uncharged lesser included offense, because we conclude, in this case, that the court did not preclude the defendant from arguing his theory of defense that he did not have the requisite intent to commit murder, but may have had the requisite intent to commit manslaughter.

his theory of defense—that he did not intend to kill the victim, but rather that he recklessly killed the victim and, thus, may have committed manslaughter. We agree with the state.

We review the limits that the trial court imposes on a defendant's closing argument for an abuse of discretion. "The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." *Herring* v. *New York*, supra, 422 U.S. 862. "It is within the discretion of the trial court to limit the scope of final argument to prevent comment on facts that are not properly in evidence, to prevent the jury from considering matters in the realm of speculation and to prevent the jury from being influenced by improper matter that might prejudice its deliberations." (Internal quotation marks omitted.) *State* v. *Joyce*, 243 Conn. 282, 305–306, 705 A.2d 181 (1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998). Additionally, a trial court retains the discretion to prevent the presentation to the jury of a matter that poses an undue risk of confusing the jury. See *Crane* v. *Kentucky*, 476 U.S. 683, 689–90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) ("judges . . . [have] wide latitude to exclude evidence that is [repetitive . . . only] marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues" [internal quotation marks omitted]).

"[Although] we are sensitive to the discretion of the trial court in limiting argument to the actual issues of the case, tight control over argument is undesirable when counsel is precluded from raising a significant issue." (Internal quotation marks omitted.) *State* v.

Joyce, supra, 243 Conn. 306. "The right to present a closing argument is abridged . . . [if] a defendant is deprived of the opportunity to raise a significant issue that . . . bears directly on the defendant's theory of the defense." *State* v. *Arline*, supra, 223 Conn. 64.

To the extent that a court's ruling concerning the restrictions imposed on a defendant's closing argument is ambiguous, the defendant bears the burden of obtaining clarification. See *State* v. *Ricardo R.*, 305 Conn. 581, 594, 46 A.3d 139 (2012) ("[i]f defense counsel believed that the trial court's ruling [concerning the scope of the limits placed on defense counsel's questioning on a certain subject] was unclear, it was defense counsel's obligation to seek further clarification" [internal quotation marks omitted]).

In the present case, the defendant argues that he was precluded from arguing his theory of defense, that theory being that he recklessly killed the victim, because the court prohibited defense counsel from delineating and arguing the elements of manslaughter, and without a listing of the elements of manslaughter, the jury could not have understood the difference between murder and manslaughter. The defendant concedes, however, that the court's ruling permitted defense counsel to argue that he did not have the specific intent to murder and to present a definition of manslaughter, but alleges that his definition of manslaughter was not adequate without listing all of the elements of manslaughter.

The court's elaboration on its ruling establishes that it precluded the defendant from showing the slide listing the elements of manslaughter and from delineating to the jury, either through the slide or orally, all of the elements of manslaughter. Concerning the slide, the court explained: "[Defense] [c]ounsel put up on the

screen a slide with the elements of the offense of manslaughter in the first degree by reckless indifference. I sustained the objection. That is not appropriate." Concerning listing the elements of manslaughter generally, by slide or orally, the court explained: "It would be confusing to the jury and completely inappropriate to instruct them on the elements of an offense which has not been charged. . . . [Y]ou can't be instructing them about something that is not part of this case and has not been charged . . . ."

On the basis of the court's elaboration, it is clear that the court did not preclude defense counsel from arguing that the defendant lacked the requisite intent to commit murder because he may have had the requisite intent to commit manslaughter. The court merely precluded defense counsel from listing all of the elements of manslaughter in the first degree. Defense counsel was permitted to argue, and did argue, that the defendant did not intend to kill the victim, but rather had a different mental state, and, thus, did not commit the crime of murder. Specifically, following the court's sustaining the prosecutor's objection, defense counsel used the term "manslaughter" without objection three times. Defense counsel argued that the defendant's actions, such as shooting the victim in the shoulder, were proof that he did not intend to kill the victim. Additionally, he argued that absent the requisite intent to kill the victim, the defendant committed manslaughter, and, thus, could not be found guilty of murder.

Furthermore, at the beginning of defense counsel's closing argument, without objection, he argued that the defendant did not intend to kill the victim, but rather, at most, may have committed manslaughter. Specifically, defense counsel argued: "If two of us get in an altercation and we're friends and we wrestle or tussle, and there is a gun involved and someone gets shot, it's a manslaughter." From this argument, the jury reasonably

could have concluded that, although the defendant shot the victim, he did not do so with the intent to kill him.

On the basis of the arguments that defense counsel made during closing argument, despite the court's ruling, defense counsel was able to argue, or had a fair opportunity to argue, his theory of defense, which was that the defendant did not have the requisite intent to commit murder because he recklessly killed the victim and, thus, may have committed a different crime, manslaughter. Defense counsel may have been precluded from making this argument in the precise fashion that he wished by delineating all of the elements of manslaughter, but such a limitation was within the court's sound discretion. Despite this limitation, defense counsel was permitted to argue, and did argue or had a fair opportunity to argue, his theory of defense to the jury.[11]

We fully are aware that the court's explanation for its ruling was not stated until after the conclusion of closing arguments. Nevertheless, to the extent that defense counsel was confused as to whether the court's ruling precluded him from arguing that the defendant

[11] At oral argument before this court, the defendant also argued that his sixth amendment right to present a closing argument was violated because this right includes the right to an unimpeded, uninterrupted closing argument. Although the state's objection momentarily interrupted the natural flow of defense counsel's summation, such an interruption did not prevent defense counsel from presenting a closing argument or arguing his theory of defense. Additionally, we note that the defendant cites to no law in support of his contention that his sixth amendment right to present a closing argument encompasses the right to an uninterrupted closing argument. Rather, parties are obligated to object to closing arguments that they deem improper. See *State* v. *Francione*, 136 Conn. App. 302, 316, 46 A.3d 219 (if defendant believes that prosecutor's closing argument is improper, defendant should object to improper argument during closing argument), cert. denied, 306 Conn. 903, 52 A.3d 730 (2012). Just as a defendant may object to a prosecutor's improper closing argument, a prosecutor likewise may object to an improper closing argument by the defendant. Accordingly, the interruption caused by the prosecutor's objection during defense counsel's closing argument did not violate the defendant's sixth amendment right to present a closing argument.

had the requisite mental state to commit manslaughter, not murder, it was his duty to seek clarification from the court regarding the precise nature of its ruling and any limitations placed on him regarding the scope of closing argument. See *State* v. *Ricardo R.*, supra, 305 Conn. 594. Additionally, on the basis of our review of both parties' arguments following the court's ruling, neither party appeared to believe that the court's ruling prevented them from addressing the topics of intent and manslaughter, as both parties did in fact make such arguments.[12] Thus, although the court explained its ruling after the conclusion of closing arguments, we can infer from both parties' subsequent arguments that they understood the court's ruling to mean, as it later clarified, that the parties could not list, orally or by slide, the elements of manslaughter in the first degree.[13]

In sum, although the court precluded the defendant from listing, orally or by projecting on a slide, all of the elements of manslaughter in the first degree, the defendant was not deprived of the opportunity to raise a significant issue that bore directly on his theory of defense. Rather, defense counsel was allowed to present, and had a fair opportunity to present, his theory of defense, which was that the defendant lacked the requisite mental state for the crime of murder because he did not intend to kill the victim when he shot him. Accordingly, we conclude that the trial court did not abuse its discretion by precluding the defendant during his closing argument from listing for the jury, orally or

[12] We note that, contrary to the defendant's contention, the prosecutor did not list the specific elements of manslaughter in the first degree during his rebuttal closing argument, and, thus, the state was not permitted to make the argument that the defendant was precluded from making.

[13] Moreover, we note that the defendant in his brief on appeal does not contend that defense counsel was confused as to the scope and meaning of the court's ruling. The only argument that the defendant alleges that he was precluded from making was listing all of the elements of manslaughter in the first degree.

by slide, all of the elements of manslaughter in the first degree. Therefore, a constitutional violation does not exist, and the defendant's claim fails under the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE SYDNEI V.*
(AC 38627)

Lavine, Mullins and Harper, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights as to her minor child. The petitioner was the child's paternal uncle who had been appointed as one of the child's guardians by the Probate Court five years earlier, after the child's father was killed in an accident. The petitioner sought to terminate the respondent's parental rights on the grounds of abandonment and no ongoing parent-child relationship pursuant to statute (§ 45a-717 [g] [2] [A] and [C]). In the adjudicatory phase of the termination proceedings, the trial court found that the petitioner had proven both grounds alleged in the petition by clear and convincing evidence. In the dispositional phase of the termination proceedings, the trial court determined that termination of the respondent's parental rights was in the child's best interests as required by § 45a-717 (h). On appeal to this court, the respondent claimed that the trial court violated her right to due process by failing to determine, during the dispositional phase, that there would be some adverse effect to the child by failing to terminate her parental rights, and that the trial court erred in its best interests determination. During oral argument before this court, the respondent also claimed that the trial court committed plain error because it improperly failed to conduct a pretrial canvass of her in accordance with the rule set forth by our Supreme Court in *In re Yasiel R.* (317 Conn. 773), which required a trial court to canvass a parent prior to the start of a termination of parental rights trial to ensure that she fully understands

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

the trial process and her rights. Thereafter, this court permitted supplemental briefing on the latter claim. *Held*:

1. This court rejected the respondent's claim that due process required the trial court to determine, in the dispositional phase of a termination of parental rights trial, that there were adverse effects on the child that outweighed the respondent's constitutionally protected parental rights before those rights can be terminated; the trial court must consider and make written findings concerning the six guidelines set forth in § 45a-717 (h) in order to determine the child's best interests, and nothing in that statute required the trial court to find a detriment to the child if termination of the respondent's parental rights was not granted.
2. This court found unavailing the respondent's claim that because she did not seek to jeopardize the child's stable and permanent placement with her guardians, termination of her parental rights was not in the child's best interests; the trial court properly determined that there was clear and convincing evidence that terminating her parental rights was in the child's best interests as, at the time of the trial, the child was ten years old and had had no relationship with the respondent for more than half of her life, she had post-traumatic stress disorder as a result of events that occurred while she was in the respondent's care, she was anxious whenever the respondent was mentioned, and she was in need of stability and permanency.
3. Although our Supreme Court issued the decision in *In re Yasiel R.* prior to the trial on the petition in the present case and the trial court should have conducted the required canvass, the fact that the respondent merely demonstrated that the trial court violated a supervisory mandate was not sufficient by itself to warrant reversal of that court's judgment; the respondent did not demonstrate that failure to reverse the trial court's judgment terminating her parental rights would result in manifest injustice and erode the public's confidence in the integrity of the judicial system as required to prevail under the plain error doctrine, the record having demonstrated that the respondent was represented by counsel at trial, that she exercised all of the rights of which the canvass required by *In re Yasiel R.* was intended to inform her, and that she did not explain how she would have proceeded differently at trial or how the outcome of the trial would have been different had she received the canvass prior to the commencement of trial.

Argued April 5—officially released September 15, 2016**

Procedural History

Amended petition by the guardian of the minor child to terminate the parental rights of the respondent

** September 15, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

mother with respect to the minor child, brought to the Probate Court in the district of Danbury and transferred to the Superior Court in the judicial district of Danbury, where the matter was transferred to the judicial district of Middlesex, Child Protection Session at Middletown, and tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; judgment terminating the respondent's parental rights, from which the respondent appealed to this court. *Affirmed.*

David J. Reich, for the appellant (respondent).

Benjamin M. Wattenmaker, assigned counsel, for the appellee (petitioner).

George Jepsen, attorney general, *Gregory T. D'Auria*, solicitor general, and *Benjamin Zivyon* and *Carolyn A. Signorelli*, assistant attorneys general, filed a brief for the Commissioner of Children and Families as amicus curiae.

Opinion

LAVINE, J. The respondent mother appeals from the judgment of the trial court terminating her parental rights as to her daughter (child) pursuant to General Statutes § 45a-717 (g) (2) (A), abandonment, and § 45a-717 (g) (2) (C), no ongoing parent-child relationship.[1] On appeal, the respondent claims that the court (1) violated her right to due process by failing to determine, during the dispositional phase of the termination of parental rights proceeding, that there would be some adverse effect to the child by failing to terminate her parental rights in the child, (2) erred in finding that it was in the child's best interests to terminate the respondent's parental rights as to the child, and (3) committed plain error by failing to canvass her prior to trial as required

[1] The Commissioner of Children and Families (commissioner) filed a motion for permission to file a brief as amicus curiae in the present matter. This court granted the commissioner's motion.

by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015) (*Yasiel* canvass), and *In re Daniel N.*, 163 Conn. App. 322, 135 A.3d 1260, cert. granted, 323 Conn. 928, 149 A.3d 495 (2016).[2] We disagree and, therefore, affirm the judgment of the trial court.

In its memorandum of decision, the court, *Hon. Barbara M. Quinn*, judge trial referee, made the following findings of fact. J.V. and his wife, K.V., are the child's legal guardians (guardians).[3] In December, 2014, in the Court of Probate for the District of Danbury, the petitioner, J.V., filed an application to terminate the respondent's parental rights, pursuant to § 45a-717. The application alleged that the respondent's parental rights should be terminated on the ground of abandonment; General Statutes § 45a-717 (g) (2) (A); and no ongoing parent-child relationship; General Statutes § 45a-717 (g) (2) (C).[4] Pursuant to a motion filed by counsel for the child, the matter was transferred to the Superior Court for Juvenile Matters. See General Statutes § 45a-715. The trial was conducted between October 5 and October 8, 2015.

The respondent and the child's father had dated one another while they were in high school. They later married and had one child who is the subject of the present

[2] *In re Yasiel R.*, supra, 317 Conn. 773, was decided by our Supreme Court in August, 2015. The respondent filed her initial brief in this court in January, 2016, but did not raise a claim concerning the lack of a *Yasiel* canvass. Subsequent to oral argument in this court, however, the respondent filed a motion requesting permission to file a supplemental brief to address "[w]hether the termination of [her] parental rights should be reversed because [this court] in *In re Daniel N.*, 163 Conn. App. 322, [135 A.3d 1260, cert. granted, 323 Conn. 928, 149 A.3d 495] (2016), [held] that the canvass requirement in *In re Yasiel R.*, [supra, 773], must be applied retroactively, and the trial court in this case did not canvass [the respondent] as required." We granted the motion permitting supplemental briefing. As we explain in part III of this opinion, however, *In re Daniel N.* does not control the respondent's claim.

[3] The child's father, J.V.'s brother, is deceased.

[4] The petitioner also alleged that the respondent had failed to achieve a sufficient degree of rehabilitation; General Statutes § 45a-717 (g) (2) (D); but subsequently withdrew that allegation.

termination proceeding. The child was born in 2005. The couple's relationship was marked by domestic violence and alcohol abuse. In 2006, they were living apart from one another. Despite their differences, the couple tried to "patch things up." One evening they went out to dinner and were involved in a serious motor vehicle crash. The child's father was killed at the scene, and the respondent suffered serious injuries. The accident investigation concluded that the respondent and the child's father were intoxicated with blood alcohol levels in excess of the legal limit.

The respondent subsequently married G.U. with whom she has a son, Z. The respondent's relationship with G.U. also was characterized by domestic violence, and drug and alcohol abuse. The child and Z were exposed to a great deal of turbulence. As a consequence of their domestic violence, the respondent and G.U. were arrested on numerous occasions. Although the respondent reported that G.U. instigated the violence, the court found that the respondent was the primary aggressor. In January, 2010, the respondent was so angry that she attacked G.U. with a knife and tried to cut his face. The child, who was five years old at the time, was awakened from sleep by the fracas. She still recalled the incident at the time of trial.

On January 17, 2010, the Department of Children and Families (department) obtained an order of temporary custody and removed both children from the care of the respondent and G.U. and placed them with the guardians. The child was adjudicated neglected on November 22, 2010, and placed in the guardians' care.[5] When the child entered the guardians' home, she was terrified of knives, including the mere mention of them. She was shy, withdrawn, anxious, and suffered night terrors. When she was traveling in a motor vehicle, the

[5] Z also was adjudicated neglected and was placed with his father, G.U.

child became nervous and fearful that the respondent was following and would take her away. The guardians placed her in therapy, which was of some benefit to her.

At the time of the neglect proceedings, the court, *Sommer*, *J.*, ordered once-a-week visitation between the respondent and the child and joint counseling for them. The therapist was to work with the respondent and the child to improve their relationship and expand visitation and was authorized to make recommendations regarding the progress, duration, and frequency, as well as the supervision, of the visits between the respondent and the child. The hoped-for normalization of the parent-child relationship between the respondent and the child did not take place due to the trauma the child had suffered as a result of the constant violence in her parental home. The child did not want to talk about her life with the respondent, even five years later at the time of the termination of parental rights trial.

The respondent and the child had scheduled visitation during the first year and one-half following the transfer of guardianship. The child was anxious, however, and her symptoms increased prior to each visit. It was difficult to schedule the time and location of the visits. The guardians asked the respondent to provide adequate notice so that they could prepare the child emotionally to be ready for the visit. The respondent often gave notice at the last minute, after the child had gone to bed for the night, which made it difficult for the guardians to prepare her for the visit, which took place at restaurants, in the community, and in parks. Sometimes Z or the court-appointed guardian ad litem attended the visits. On the way to the visits, the child complained of having a stomach ache and that she needed to throw up. The visits lasted for approximately one hour, sometimes longer. Often the child wished the visits to be shortened. Occasionally, the respondent brought the child a gift. Once, the respondent took the

child to a "Build-a-Bear" store, where she purchased a teddy bear for the child. When the child returned to the guardians' home, she wanted to throw out the bear. By early 2012, the visits between the respondent and the child were sporadic and far between. The two were no longer were engaged in joint therapy, and the therapist did not recommend increasing the amount of time the respondent spent with the child.

In March, 2012, the respondent filed a motion for increased visitation. The parties reached an agreement that, after three individual therapy sessions, the respondent could have therapeutic visits with the child. The respondent, however, failed to attend the three required therapy sessions, and all visits ceased. The respondent last visited the child on April 9, 2012. The respondent and child have had no contact since then.

The respondent claimed that she failed to continue therapy and engage in therapeutic visits with the child for financial reasons. She had no insurance and inadequate income from her employment. The court found no evidence that the respondent made any attempt to seek therapy on a sliding pay scale or to ask for help from others, such as the guardian ad litem, to find affordable therapy. She made only a minimal effort to comply with the court-ordered conditions for increased access to the child.

In addition to failing to find means by which she could increase her access to the child, the respondent did not take advantage of other avenues open to her that would demonstrate her commitment to the child. The respondent provided no financial support for the child nor did she send the child letters or gifts. She failed to inquire about the child's school progress, medical appointments, or her life in general. The court found that whatever her level of concern may have been, the

respondent failed to manifest it in a concrete manner to inform herself about the child's daily life and progress.

The respondent filed another motion for visitation in December, 2013. The department investigated and filed a visitation report dated July 7, 2014. After reviewing the history and the child's relationship with the respondent, the department did not recommend visitation.

Court-ordered psychological evaluations of both the respondent and the child were performed in October, 2014, by Deborah Gruen, a clinical and forensic psychologist. The guardians also were interviewed. On the basis of Gruen's testimony at trial, the court found that the respondent was an emotionally sensitive person who has a propensity for unstable relationships. She can be irritable, demanding, and charming at the same time, is manipulative in her relationships, and exercises poor judgment. Although Gruen did not provide a diagnosis, she found that the respondent exhibits antisocial behavior and borderline personality traits. She recommended that the respondent receive intensive psychotherapy with a seasoned clinician to deal with the trauma the respondent herself has experienced, both as a child and in her adult relationships.[6] Without intensive treatment, Gruen's prognosis for the respondent is guarded. Because the respondent was pregnant in November, 2014, Gruen recommended that the respondent wait at least six months before entering therapeutic intervention. This period of time was needed to give the respondent time to adjust to all of the significant changes that were coming to her life.

The court asked Gruen to answer additional questions, which she did in August, 2015. Gruen summarized the treatment the respondent had received and results

[6] Gruen recommended intensive therapy twice a week for at least six consecutive months and ongoing individual treatment if reunification sessions with the child begin.

of the conversation she had with the respondent's clinician. By the end of July, 2015, the respondent had had twenty-two sessions of therapy and had made substantial strides to address her long-standing trauma related issues. The respondent has stable employment with considerable management responsibilities and has custody of her youngest child. Z is in her care several times a week, but his father is his primary caretaker. The respondent is beginning the difficult introspection and emotional work that she needs to improve herself for the sake of her children as well as herself. The court found that the respondent's changes came about after the child had been out of the respondent's primary care for five years.

According to Gruen, the child has only bad memories of life with the respondent, and she does not wish to see or interact with her. The child suffers underlying anxiety and needs to strengthen her ability to acknowledge her anxieties and address her fears on a more realistic basis. The therapist did not recommend that the child visit with the respondent until the respondent had undertaken intensive therapy. In the spring of 2015, the child was in therapy, having been diagnosed with post-traumatic stress, as a result of the trauma she has witnessed. The child's therapist echoed Gruen's concern about the child's building a relationship with the respondent. Children in her situation are very cautious, hostile, and estranged. The therapist could not predict what would happen if the child and respondent met, as there could be widely different outcomes. As the child grows, however, the therapist opined that she will need some access to the respondent; children who are in the child's situation grow up "missing a part of themselves," which is necessary for their stable, balanced, and mature adult development.[7]

[7] On January 14, 2015, the court, *Randolph*, *J.*, ordered the department to complete a termination of parental rights study. The study, which is dated April 6, 2015, states in relevant part: "[The child] stated that she is doing

The court found, according to the guardian ad litem, that in 2011, the child was very anxious and uncomfortable whenever the respondent was mentioned. The child wanted to remain with the guardians, and her attitude was unchanged in 2015. She is settled in the guardians' home where she is a happy and loving ten year old, who is enthusiastic about school and the things that she does with her family. In the opinion of the guardian ad litem, termination of the respondent's parental rights is in the best interest of the child.

The court analyzed the facts and the grounds alleged for termination of the respondent's parental rights as to the child in the adjudicatory phase of the proceedings. As to the ground of abandonment alleged pursuant to § 45a-717 (g) (2) (A),[8] the court noted that the appellate courts of this state have held that "[t]he commonly understood general obligations of parenthood entail these minimum attributes: (1) [the expression of] love and affection for the child; (2) [the expression of] personal concern over the health, education and general well-being of the child; (3) the duty to supply the necessary food, clothing, and medical care; (4) the duty to

well with her uncle, aunt and cousins. She stated she wants to be adopted because this [is] her permanent home and she feels 'safe here.' This social worker explained that in order for her to be adopted her mother's parental rights will have to be terminated; explaining what this means. She stated she is in agreement with her mother's parental rights being terminated. This social worker told [the child] that since she knows her mother, when she gets older she could still visit her if she wanted to. [The child] shook her head no and said she will not want to visit. This social worker asked her why and she stated 'because it brings back bad memories.' [The child] became tearful as she talked about this."

[8] General Statutes § 45a-717 (g) provides in relevant part: "[T]he court may approve a petition terminating the parental rights and may appoint a guardian of the person of the child . . . if it finds, upon clear and convincing evidence, that (1) termination is in the best interest of the child, and (2) (A) the child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child . . . ."

provide an adequate domicile; and (5) the duty to furnish social and religious guidance." (Internal quotation marks omitted.) *In re Kezia M.*, 33 Conn. App. 12, 18, 632 A.2d 112, cert. denied, 228 Conn. 915, 636 A.2d 847 (1993).

Abandonment has been defined as a parent's failure to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child, and maintain implies a continuing, reasonable degree of interest, concern, or responsibility and not merely a sporadic showing thereof. See *In re Paul M.*, 148 Conn. App. 654, 664, 85 A.3d 1263, cert. denied, 311 Conn. 938, 88 A.3d 550 (2014).

On the basis of the clear and convincing evidence before the court, it found that the respondent had not demonstrated the minimum attributes of parenthood as they are understood in the law. She has not expressed love and affection toward the child in any meaningful way and has failed to inquire about the child's health, education, and general well-being, and has not made any effort to provide financial support for the child. Although the court did not doubt that in her heart, the respondent loves the child and wishes that she could visit with her, the respondent is aware that the child does not wish to have contact with her. The court found that the respondent is wise enough not to force contact with the child.

The court credited the respondent with good intentions, but noted that thoughts and wishes are insufficient to sustain a child. The court found that the respondent had choices to make in the five years since the child left her care. On three separate occasions, in 2010, 2012, and 2014, the respondent was offered visits with the child if she entered therapy. It was not until 2014 that the respondent began the arduous process of making positive changes in her life. Although the

respondent has made sufficient progress to enable her to have her two younger children[9] in her care on a regular basis, that progress has been too little and too late for the child who is the subject of the present termination of parental rights petition.

The respondent failed to write to the child or to send her gifts. She failed to communicate with the guardians as to the child's well-being. Although the respondent believes that the guardians prevented her from doing so, she failed to reach out to take advantage of the resources available to her, such as the child's guardian ad litem and attorney. The court concluded that the clear and convincing evidence of the respondent's failures constitutes legal abandonment.

Although a court need find only one statutory ground to terminate parental rights as to a child; see *In re Alexander C.*, 67 Conn. App. 417, 427, 787 A.2d 608 (2001), aff'd, 262 Conn. 308, 813 A.2d 87 (2003); the court adjudicated the second reason alleged by the petitioner. To grant a termination of parental rights petition on the ground that there is no ongoing parent-child relationship pursuant to § 45a-717 (g) (2) (C),[10] the court must find that no parent-child relationship exists and that looking prospectively, it would be detrimental to the child's best interest to allow time for such a relationship to develop. See *In re Christian P.*, 98 Conn. App. 264, 269, 907 A.2d 1261 (2006). In the present case, the court

[9] The respondent has had a third child.

[10] General Statutes § 45a-717 (g) provides in relevant part: "[T]he court may approve a petition terminating the parental rights and may appoint a guardian of the person of the child . . . if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child, and (2) . . . (C) there is no ongoing parent-child relationship which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child . . . ."

found that there is no remaining parent-child relationship between the respondent and the child; it evaporated in the long period of time in which the respondent had no contact with the child. The critical issue, the court found, was whether it is detrimental to the child's best interest to permit more time for such a relationship to develop.

The court found that the child is happy and secure in the guardians' home and her school. The mere mention of the respondent upsets the child. The child has no positive memories of the respondent. Permitting more time in the child's young life for such a relationship to develop is detrimental to the child's best interest when the child has been out of the respondent's care for more than one half of her life. The court concluded from the clear and convincing evidence that the petitioner had proven that there was no ongoing parent-child relationship and that it was not in the child's best interest to permit more time for such a relationship to develop.

The court then made the statutory findings required in the dispositional phase of the proceedings. See General Statutes § 45a-717 (h). The court found that the dispositional factors all pointed toward a finding that termination of parental rights was in the child's best interest. The child is in crucial need of safety, stability, and permanency, which the respondent is not in a position to provide. The court concluded on the basis of the clear and convincing evidence that termination of the respondent's parental rights is in the child's best interest. Additional facts will be set out as necessary.

Before addressing the respondent's claims on appeal, we set forth "the well established legal framework for deciding termination of parental rights petitions. [A] hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the

trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in [§ 45a-717 (g)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Elijah G.-R.*, 167 Conn. App. 1, 18–19, 142 A.3d 482 (2016).

I

The respondent's first claim is that "procedural due process requires the court to determine in the dispositional phase that there are adverse effects on the child that outweigh the mother's constitutionally protected parental rights before those rights can be terminated."[11] This claim, which is in derogation of § 45a-717 (h), is made up of whole cloth, and we reject it.

Our legislature has created a constitutionally viable statutory scheme to be followed by our courts when adjudicating petitions to terminate the parental rights of parents as to their children. General Statutes §§ 45a-717 and 17a-112,[12] which are applicable in the Probate Court and Superior Court, respectively, consist of "two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights . . . exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional

[11] The respondent does not dispute the court's findings made during the adjudicatory stage of the proceedings that the respondent abandoned the child and that there is no ongoing parent-child relationship.

[12] The best interest factors to be considered in the probate statute; General Statutes § 45a-717 (h); and the juvenile statute; General Statutes § 17a-112 (k); are substantially similar.

phase. In the dispositional phase, the trial court determines whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Trevon G.*, 109 Conn. App. 782, 788, 952 A.2d 1280 (2008). In the present case, the court found that the petitioner had proved by clear and convincing evidence the grounds alleged for termination of the respondent's parental rights as to the child. On appeal, the respondent does not challenge the court's findings and conclusions in the adjudicatory stage of the termination proceeding. Rather, the respondent claims that her right to procedural due process was violated because the court failed to perform a balancing test pursuant to *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine the adverse effects of the failure to terminate her parental rights on the child against her constitutionally protected right to raise her child. Such an analysis in this case is unwarranted as the statutory scheme passes constitutional muster. See *In re Nevaeh W.*, 317 Conn. 723, 740, 120 A.3d 1177 (2015); *In re Eden F.*, 250 Conn. 674, 690–91, 741 A.2d 873 (1999).

Section 45a-717 (h) sets forth six guidelines that the court must consider and on which it must make written findings, and our Supreme Court has determined that this statutory provision is the guide to determining the best interest of the child. The statutory scheme "carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent." (Internal quotation marks omitted.) *In re Eden F.*, supra, 250 Conn. 689. Nothing in § 45a-717 (h), which relates to the best interest of the child in the dispositional phase of the termination proceeding, requires the court to engage in a *Mathews* balancing analysis or to find a detriment to the child if termination of parental rights is not granted.

The respondent relies on *Santosky* v. *Kramer*, 455 U.S. 745, 754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). *Santosky* does not support her position. "After the State has established parental unfitness at the initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge." (Emphasis omitted.) Id., 760. In the dispositional phase of a termination proceeding, the emphasis shifts "from the conduct of the parent to the best interest of the child." *In re Romance M.*, 229 Conn. 345, 356–57, 641 A.2d 378 (1994). As the commissioner has pointed out in her brief, the respondent's claim, in actuality, is not related to procedural due process. Rather, the respondent seeks to add a substantive requirement to the statutory scheme enacted by our legislature. In other words, the respondent's claim is related to substantive, not procedural, due process. See *In re Azareon Y.*, 309 Conn. 626, 640, 72 A.3d 1074 (2013) (our Supreme Court observed that similar claim was one of substantive, not procedural, due process). For the foregoing reasons, the respondent's claim fails.

II

The respondent's second claim is that the trial court erred by finding that there was clear and convincing evidence that it was in the child's best interest to terminate the respondent's parental rights.[13] We do not agree.

The substance of the respondent's claim is that the evidence presented as to the dispositional phase of the termination proceeding was marginal. She correctly notes that the child has been in a safe and stable home since 2010, and that the respondent has done nothing

[13] The respondent raised this second claim as an alternative argument, if we determined that her constitutional right to due process was not violated. See part I of this opinion.

to jeopardize the placement and is not seeking reunification. She argues, therefore, that because the child is in a stable, permanent placement and the respondent is not negatively affecting that placement, there is no clear and convincing evidence that her parental rights should be terminated because it is in the best interest of the child. To support her claim, the respondent points to Gruen's testimony that the child, at some time in the future, may benefit from contact with the respondent. The respondent's argument is unavailing.

"The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of its environment." (Internal quotation marks omitted.) *In re Shyina B.*, 58 Conn. App. 159, 167, 752 A.2d 1139 (2000). "In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child." (Internal quotation marks omitted.) *In re Jermaine S.*, 86 Conn. App. 819, 835, 863 A.2d 720, cert. denied, 273 Conn. 938, 875 A.2d 43 (2005). In making that determination, the court must consider the factors delineated in § 45a-717 (h).[14]

[14] General Statutes § 45a-717 (h) provides: "Except in the case where termination is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by a child-placing agency to facilitate the reunion of the child with the parent; (2) the terms of any applicable court order entered into and agreed upon by any individual or child-placing agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (3) the feelings and emotional ties of the child with respect to the child's parents, any guardian of the child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (4) the age of the child; (5) the efforts the parent has made to adjust such parent's circumstances, conduct or conditions to make it in the best interest of the child to return the child to the parent's home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child

The court made the following findings of fact with respect to the dispositional phase of the proceedings. The department was involved with the respondent, the child, and Z at the time the children were removed from her care. The department's involvement terminated when the child's guardianship was transferred to the guardians. The department saw no child protection issues following the transfer of guardianship. Thereafter, the department had no obligation to offer the respondent services.

At the time the child's guardianship was transferred, the court ordered visits between the respondent and the child, but the respondent did not comply with the order. The guardians did comply by offering the respondent visits with the child.

At the time of the termination hearing, the child was ten years old and had no relationship with the respondent. She is an anxious child and becomes concerned whenever the respondent is mentioned. The child has no fond memories of the respondent and wishes to remain permanently in the guardians' home and to be adopted by them.

The respondent failed to make adequate efforts to have the child returned to her home. She abandoned the child and failed to communicate with the guardians in any meaningful way. At the time of the termination of parental rights proceeding, the respondent was engaged in therapy and had made significant strides, but those strides were too late for the child, who had

as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (6) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

grown deeply attached to others. A child's sense of time is not the same as an adult's. Most of the child's conscious life has been spent with her guardians, not the respondent.

The court found that, although the respondent believes that the guardians have prevented her from having reasonable visits with the child, the evidence demonstrates that the respondent failed to take the steps she should have taken to maintain access to the child. Although the respondent's past economic circumstances have made her life more challenging, those circumstances, in and of themselves, did not prevent her from maintaining a reasonable relationship with the child.

"It is axiomatic that a trial court's factual findings are accorded great deference. Accordingly, an appellate tribunal will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous. . . . A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . [E]very reasonable presumption is made in favor of the trial court's ruling. . . . Additionally, in reviewing the court's findings under the dispositional phase of the proceedings, it is appropriate to read the trial court's opinion as a whole, including its findings in the adjudicatory phase." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Elijah G.-R.*, supra, 167 Conn. App. 29–30.

We carefully have reviewed the court's memorandum of decision, including its factual findings in the adjudicatory phase of the proceedings, and reviewed the record. We conclude that the court's finding that termination of the respondent's parental rights is in the best interest of the child is not clearly erroneous. At the time of trial,

the child had resided with her guardians for approximately five years, she is anxious and fearful of the respondent, and she does not want to visit with her. In fact, there have been no visits between the respondent and the child for an extended period of time. The underlying facts support the court's conclusion that the anxious child who is the subject of the termination petition is in need of stability and permanency and that termination of the respondent's parental rights is in her best interest. The respondent's claim therefore fails.

III

The respondent's third claim, which she raised for the first time during oral argument in this court, is that the court committed plain error by failing to canvass her prior to trial as required by *In re Yasiel R.*, supra, 317 Conn. 773. She argues that we should reverse the judgment of the trial court pursuant to *In re Daniel N.*, supra, 163 Conn. App. 322.[15] We decline to grant the relief requested because this case is procedurally distinguishable from *In re Daniel N.*,[16] and on appeal, the respondent has not demonstrated that failure to reverse the court's judgment terminating her parental rights in the child will result in manifest injustice and erode the public's confidence in the integrity of the judicial system. The record demonstrates that at trial, the respondent exercised all of the rights of which the *Yasiel* canvass was intended to inform her.

[15] Our Supreme Court certified the following issue in *In re Daniel N.*, 323 Conn. 928, 149 A.3d 495 (2016): "Did the Appellate Court correctly reverse the trial court's judgment ordering termination of parental rights by concluding that this court's decision in *In re Yasiel R.*, 317 Conn. 773 (2015), controlled the result of this case?"

[16] The termination of parental rights trial in *In re Daniel N.*, supra, 163 Conn. App. 322, took place prior to our Supreme Court's issuing its decision in *In re Yasiel R.* The issue in this court, therefore, was whether *In re Yasiel R.* applied retroactively. Moreover, on appeal, the respondent in *In re Daniel N.* did not seek reversal of the judgment terminating his parental rights pursuant to the plain error doctrine, as the respondent in the present case does.

We briefly review the history of the pretrial canvass of respondent parents in termination of parental rights cases as established in *In re Yasiel R.*, supra, 317 Conn. 773. In that case, the respondent mother waived her right to a trial and did not contest the allegations of the petition to terminate her parental rights as to her children, challenge the evidence presented against her, or present evidence of her own.[17] Id., 775–76. After the trial court terminated the mother's parental rights as to her children, she appealed to this court, which affirmed the judgments of the trial court. *In re Yasiel R.*, 151 Conn. App. 710, 721, 94 A.3d 1278 (2014), rev'd, 317 Conn. 773, 120 A.3d 1188 (2015). Our Supreme Court granted her petition for certification to appeal from the judgment of this court. *In re Yasiel R.*, 314 Conn. 907, 99 A.3d 1169 (2014).[18] In resolving the appeal, our Supreme Court

[17] The relevant procedural history of *In re Yasiel R.* follows. "Due to the respondent's various arrests and her mental health and substance abuse issues, the petitioner [the commissioner] filed petitions to terminate [the respondent's] parental rights in November, 2012. According to the petitioner, the court, on December 11, 2012, advised the respondent of her trial rights, entered denials to the petitions on her behalf, and appointed her an attorney. A contested hearing then was scheduled for November 12, 2013. At that hearing, the respondent's counsel stated that although [the respondent is] not in agreement with the [termination of parental rights], she cannot bring herself to consent today. That being said, she's in agreement with the court taking the case on the papers. She's in agreement to the exhibits that . . . have been entered. Her counsel then stated that the respondent wants the court to be aware that things have significantly changed for her over the last two years and continued to explain those changes. At no time did the court canvass the respondent personally to question her decisions not to contest the petitioner's exhibits and to waive her right to a full trial. It stated only that I think I understand your position, and I will certainly consider that [you've made great progress] when I'm reviewing all the material . . . ." (Footnotes omitted; internal quotation marks omitted.) *In re Yasiel R.*, supra, 317 Conn. 777.

[18] Our Supreme Court granted certification as to the following relevant issue: "Does the due process clause of the fourteenth amendment to the United States constitution require that a trial court canvass a parent personally about his or her decision not to contest the exhibits presented to the court against him or her in a parental termination proceeding?" (Internal quotation marks omitted.) *In re Yasiel R.*, supra, 314 Conn. 907. Our Supreme

concluded pursuant to its analysis under *Mathews* v. *Eldridge*, supra, 424 U.S. 335, that due process "does not require that a trial court canvass a respondent who is represented by counsel when the respondent does not testify or present witnesses and the respondent's attorney does not object to exhibits or cross-examine witnesses." *In re Yasiel R.*, supra, 317 Conn. 787–88.

The court, however, considered whether it should exercise its supervisory authority to require a canvass prior to a termination of parental rights trial. Id., 788. The court concluded that "the lack of a canvass of all parents in a parental rights termination trial may give the appearance of unfairness insofar as it may indicate a lack of concern over a parent's rights and understanding of the consequences of the proceeding. Therefore, [it] conclude[d] that public confidence in the integrity of the judicial system would be enhanced by a rule requiring a brief canvass of all parents immediately before a parental rights termination trial so as to ensure that the parents understand the trial process, their rights during the trial and the potential consequences." Id., 793–94. The court, therefore, invoked its "supervisory powers to enunciate a rule that is not constitutionally required but that [it thought] is preferable as a matter of policy." (Internal quotation marks omitted.) Id., 793.

The court outlined the following canvass of a respondent in a termination of parental rights proceeding to be undertaken prior to a termination of parental rights trial. "In the canvass, the respondent should be advised of: (1) the nature of the termination of parental rights proceeding and the legal effect thereof if a judgment is entered terminating parental rights; (2) the respondent's right to defend against the accusations; (3) the

Court determined that due process does not require a *Yasiel* canvass. See *In re Yasiel R.* supra, 317 Conn. 787–88.

respondent's right to confront and cross-examine witnesses; (4) the respondent's right to object to the admission of exhibits; (5) the respondent's right to present evidence opposing the allegations; (6) the respondent's right to representation by counsel; (7) the respondent's right to testify on his or her own behalf; and (8) if the respondent does not intend to testify, he or she should also be advised that if requested by the petitioner, or the court is so inclined, the court may take an adverse inference from his or her failure to testify, and explain the significance of that inference. Finally, the respondent should be advised that if he or she does not present any witnesses on his or her behalf, object to exhibits, or cross-examine witnesses, the court will decide the matter based upon evidence presented during trial. The court should then inquire whether the respondent understands his or her rights and whether there are any questions." Id., 795.

Our Supreme Court issued its decision in *In re Yasiel R.* on August 18, 2015. Trial in the present termination of parental rights case was held on October 5, 6 and 8, 2015, a bit more than a month after *In re Yasiel R.* was decided. The court in the present case, therefore, should have canvassed the respondent before the commencement of trial, but did not. Neither of the parties brought the omission to the attention of the court,[19]

[19] The parties are presumed to know the law; *Provident Bank* v. *Lewitt*, 84 Conn. App. 204, 209, 852 A.2d 852, cert. denied, 271 Conn. 924, 859 A.2d 580 (2004); and could have brought the matter to the attention of the trial court. See *JPMorgan Chase Bank, N.A.* v. *Georgitseas*, 149 Conn. App. 796, 798, 89 A.3d 992 (2014) ("[w]e have repeatedly indicated our disfavor with the failure, whether because of mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal" [internal quotation marks omitted]); cf. *In re Leilah W.*, 166 Conn. App. 48, 53, 141 A.3d 1000 (2016) (after close of evidence assistant attorney general informed court it omitted canvass of respondent; court asked parties to return to court and canvassed respondent prior to issuing its decision).

and the respondent did not file a motion for nonsuit or a motion to open the judgment. The respondent also did not raise a claim concerning a *Yasiel* canvass in her appeal or initial brief in this court. Rather she waited until the time of oral argument before this court to request supplemental briefing on the issue. See footnote 2 of this opinion.

In her supplemental brief, the respondent tacitly acknowledged that her claim regarding the lack of a *Yasiel* canvass was unpreserved by requesting that the termination judgment be reversed pursuant to the plain error doctrine and *In re Daniel N.*, supra, 163 Conn. App. 322. *In re Daniel N.*, however, is distinguishable in that the trial court in that case terminated the respondent's parental rights prior to our Supreme Court's decision in *In re Yasiel R.*[20] This court decided the *In re*

[20] *In re Daniel N.*, supra, 163 Conn. App. 322, is further distinguishable from the present case because the issues claimed on appeal are different and this court decided the cases on different legal theories. *In re Daniel N.* was decided on the basis of retroactivity and also our Supreme Court's supervisory authority. The respondent in *In re Daniel N.*, did not seek reversal pursuant to the plain error doctrine and therefore this court performed no analysis of the harm caused by the failure to give the *Yasiel* canvass. In the present case, the respondent claims that the judgment terminating her parental rights as to the child should be reversed pursuant to the plain error doctrine, which requires us to perform a harm analysis.

The present case is not the first time this court has considered a claim of plain error with respect to the *Yasiel* canvass. See *In re Raymond B.*, 166 Conn. App. 856, 142 A.3d 475 (2016). In that case, the respondent claimed that the termination of her parental rights should be reversed because the trial court failed to conduct the canvass "at the very start of the termination trial." (Internal quotation marks omitted.) Id., 865. Rather, trial commenced without the court canvassing the respondent, but on the second day of trial before the commissioner rested her case, the court, *Hon. Francis J. Foley III*, judge trial referee, sua sponte canvassed the respondent. Id., 860. The respondent acknowledged that she understood her rights, did not object to the timing of the canvass or file a posttrial motion for a mistrial or to open the evidence or seek any additional relief. Id., 861. In resolving the claim of the respondent in *In re Raymond B.*, the court looked to the recent decision of *In re Leilah W.*, 166 Conn. App. 48, 141 A.3d 1000 (2016), for guidance.

In *In re Leilah W.*, this court concluded "that canvassing a respondent at the conclusion of the termination of parental rights trial was harmless

Daniel N. appeal on which the respondent relies after our Supreme Court issued its decision *In re Yasiel R.* The question in the *In re Daniel N.* appeal in this court was whether *In re Yasiel R.* should be applied retroactively to reverse the termination of parental rights of the respondent in that case.[21] That is not the situation in the present case in which trial took place after *In re Yasiel R.* was decided. The question before us is not whether *In re Yasiel R.* should be applied retroactively, but whether the judgment terminating the respondent's parental rights should be reversed on the basis of plain error. This court did no harmful error analysis in *In re Daniel N.* See footnote 20 of this opinion. We conclude that the judgment terminating the respondent's parental rights should not be reversed because the respondent has failed to demonstrate that a failure to do so would result in manifest injustice.

We begin with the well established legal framework for claims of plain error. "[The plain error] doctrine,

error. In doing so, this court addressed the contours of what constitutes compliance with the canvass rule: Although this was not the procedure envisioned by our Supreme Court, and, accordingly should be avoided, if any concerns arose regarding the respondent's understanding of his trial rights, the trial court could have reopened the evidence to allow for additional proceedings if necessary. . . . This court also stated that *the burden is on the respondent to show the harm of a noncompliant canvass*." (Citation omitted; emphasis added; internal quotation marks omitted.) *In re Raymond B.*, supra, 166 Conn. App. 867.

In applying the second prong of the plain error doctrine to the facts of *In re Raymond B.*, this court concluded that failing to conduct the *Yasiel* canvass prior to the commencement of trial was not "so significant as to affect the fairness and integrity of and public confidence in the judicial proceedings" to require reversal. (Internal quotation marks omitted.) Id., 868. In the present circumstance, we have performed a harm analysis pursuant to the plain error doctrine, and therefore, this case is further distinguishable from *In re Daniel N.*

[21] We note that the question of whether the supervisory rule announced in *In re Yasiel R.* should be applied to other, then pending cases was before our Supreme Court in *In re Egypt E.*, SC 19643 and SC 19644. The court, however, declined to answer that question, and thereby declined to provide guidance for other pending appeals, when it remanded that case to the trial court. See *In re Egypt E.*, 322 Conn. 231, 233 n.1, 140 A.3d 210 (2016).

codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"[Our Supreme Court has] clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the [respondent] simply to demonstrate that his position is correct. Rather, [to prevail] the party [claiming] plain error [reversal] must

demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . .

"In addition, although a clear and obvious mistake on the part of the trial court is a prerequisite for reversal under the plain error doctrine, such a finding is not, without more, sufficient to warrant the application of the doctrine. Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Internal quotation marks omitted.) *Zuberi* v. *Commissioner of Correction*, 140 Conn. App. 839, 843–44, 60 A.3d 337, cert. denied, 308 Conn. 931, 64 A.3d 330 (2013).

The substance of the respondent's claim on appeal is that because the court failed to canvass her prior to the termination of parental rights trial, a manifest injustice occurred; but she has failed to demonstrate that such an injustice occurred. Although it was error for the court to fail to conduct a *Yasiel* canvass of the respondent prior to trial, the respondent has provided no analysis as to how that failure deprived her of the trial rights to which she was entitled. "[M]erely demonstrating that a trial court has violated a supervisory mandate is not alone enough to warrant a reversal." *In re Leilah W.*, 166 Conn. App. 48, 63, 141 A.3d 1000 (2016); see *State* v. *Sanchez*, 308 Conn. 64, 77–78, 60 A.3d 271 (2013); see also *State* v. *Smith*, 275 Conn. 205, 237, 881 A.2d 160 (2005) (whether trial court's failure to obey supervisory authority of Supreme Court results in manifest injustice must be considered on case specific, fact-based inquiry).

State v. *Smith*, supra, 275 Conn. 205, is instructive "because it demonstrates that a trial court's failure to comply with a supervisory rule does not automatically require reversal and a new trial in all cases. In *Smith*, the defendant raised an unpreserved claim that he was entitled to a new criminal trial because the trial court utilized language in its instructions to the jury that our Supreme Court, pursuant to its supervisory powers, previously had instructed courts to refrain from using. . . . The Supreme Court determined, consistent with its decision in [*State* v. *Aponte*, 259 Conn. 512, 522, 790 A.2d 457 (2002)], that the trial court's use of the prohibited language did not implicate the defendant's constitutional rights, and, thus, he was not entitled to [review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)]. . . . Further, despite the trial court having clearly violated a supervisory rule, the Supreme Court concluded that the defendant was not entitled to a reversal either under the plain error doctrine . . . or pursuant to the court's supervisory authority. . . .

"With respect to whether the trial court's action amounted to plain error, the Supreme Court explained that although it had directed trial courts to discontinue use of the challenged jury instruction language because it was concerned about the danger of misleading the jury, it was unconvinced in the case before it that any such danger actually existed or that the trial court's error in using the language was so significant as to affect the fairness and integrity of or the public confidence in the proceeding. . . . Similarly, the Supreme Court declined to reverse the judgment on the basis of its supervisory authority, stating: The trial court's failure to heed our direction to discontinue the use of the challenged jury instruction was not such an extraordinary violation that it threatened the integrity of the trial, and it certainly did not rise to the level of implicating

the perceived fairness of the judicial system as a whole. The defendant does not suggest that the trial court deliberately disregarded this court's mandate. Nor do we consider a new trial necessary to emphasize the importance of our direction in *Aponte* to the trial courts of this state. . . . In other words, merely demonstrating that a trial court has violated a supervisory mandate is not alone enough to warrant a reversal. The party raising the issue of noncompliance also must demonstrate actual harm." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Leilah W.*, supra, 166 Conn. App. 62–63.

The undisputed fact is that the respondent was represented by counsel at the termination of parental rights trial. Our Supreme Court recognized that, prior to *In re Yasiel R.*, "[w]hen the respondent is represented by counsel, the current procedures in place adequately protect the respondent from any claimed constitutional deficiencies." *In re Yasiel R.*, supra, 317 Conn. 785. "It has frequently been recognized, albeit in other contexts, that we strongly presume that counsel's professional assistance was reasonable, and the [respondent] has the burden to overcome the presumption that [her] attorney was employing sound trial strategy. . . . We evaluate the conduct from trial counsel's perspective at the time. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) Id. In the present appeal, the respondent does not claim error on the part of her counsel.

Quite recently, this court has had occasion to address claims that the judgments terminating the appellants' parental rights should be reversed because the trial courts canvassed them after, rather than prior to, the presentation of evidence but prior to the courts issuing their decisions. See *In re Elijah G.-R.*, supra, 167 Conn.

App. 1; *In re Leilah W.*, supra, 166 Conn. App. 48. In both *In re Elijah G.-R.* and *In re Leilah W.*, the respondents were represented by counsel. Although there were some differences in the way in which the canvasses were conducted in those cases, this court concluded that the stated purpose underlying the *Yasiel* canvass was met even though the respondents were not canvassed prior to the termination trial. In coming to that conclusion in each case, this court considered the factors the *Yasiel* canvass was intended to address and the actual trials of the subject cases.[22] This court found in both of those cases that on appeal, the respondents failed to explain how they were harmed by the timing of the *Yasiel* canvass, whether they would have moved for a new trial or asked that the evidence be opened and what additional evidence they might offer that would have made a difference in the trial. The respondents in each case argued only that the timing of the canvass itself was harmful. See *In re Elijah G.-R.*, supra, 18 (noting that claim had been expressly rejected in *In re Leilah W.*). Although the trial court in the present case did not canvass the respondent, she has failed to explain what she did not know or understand about the termination of her parental rights without the court's canvass. She has not explained what

[22] "On the basis of our review of the trial court's canvass, we conclude that the court reasonably could have concluded that the respondent fully understood the trial process, the rights he had during the trial, and the potential consequences of the termination of his parental rights. The stated purpose underlying our Supreme Court's supervisory rule appears to have been effectuated in the present case. The respondent has failed to demonstrate that he was harmed by the trial court's failure to canvass him prior to the start of trial, and we do not believe that it is necessary to reverse the judgment simply to emphasize the importance of compliance with our Supreme Court's holding in *In re Yasiel R.*" *In re Leilah W.*, supra, 166 Conn. App. 65–66.

"[T]he respondent argues only that the time of the *In re Yasiel R.* canvass after the end of trial, but prior to the court deciding the case, amounts to structural error, and, thus, if the canvass is not conducted prior to the start of trial, a new trial always is required. This contention, however, expressly was rejected by this court in *In re Leilah W.*" *In re Elijah G.-R.*, supra, 167 Conn. App. 18.

she would have done differently if the court had canvassed her and how the outcome of the case would be different. In other words, the respondent has failed to explain how the court's failure to canvass her was harmful per se.

Moreover, the respondent has failed to meet her burden as to the second prong of the plain error doctrine: that a failure to reverse the trial court's judgment will result in manifest injustice. The record discloses that the respondent was represented by counsel, who cross-examined the petitioner's witnesses, and objected to evidence. She presented her own witnesses and evidence and argued in opposition to the termination of her parental rights. The respondent testified on her own behalf. It appears, as our Supreme Court has said, that the "[w]hen the respondent is represented by counsel, the current procedures in place adequately protect the respondent from any claimed constitutional deficiencies." *In re Yasiel R.*, supra, 317 Conn. 785. The question we must therefore address is whether the absence of a canvass in the present case is likely to cause the public to lose faith in the integrity of our judicial system. On the basis of our review of the proceedings in the trial court, we conclude that such an outcome would surely not occur. Although the court's failure to give a *Yasiel* canvass is clear, obvious and indisputable, the respondent has failed to demonstrate that the failure has resulted in a fundamentally unfair termination proceeding that would cause the public to lose faith in the judicial system.[23] She therefore cannot prevail on her

[23] In the recent case of *State* v. *Gould*, 322 Conn. 519, 534–35, 142 A.3d 253 (2016), our Supreme Court reasoned that the "defendant's argument that the improper exclusion of a prospective juror even without a showing of prejudice to avoid undermining public confidence in the fairness and integrity of our judicial system, is effectively an argument for structural error. See *Arizona* v. *Fulminante*, 499 U.S. 279, 309–10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). We have observed, however that there is a very limited class of cases involving error that is structural, that is to say, error that transcends the criminal process. *Johnson* v. *United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)." (Internal quotation marks

plain error claim that the judgment terminating her parental rights as to the child should be reversed.

In concluding that the judgment terminating the respondent's parental rights as to the child should not be reversed, we are mindful that our Supreme Court repeatedly has addressed the need for permanency in the life of a child. See, e.g., *In re Nevaeh W.*, supra, 317 Conn. 732 ("[v]irtually all experts, from many different professional disciplines, agree that children need and benefit from continuous, stable home environments" [internal quotation marks omitted]). The child at issue here has been living with her guardians since 2010; she is eleven years old, has no relationship with the respondent, and wishes to be adopted by her guardians. It is now 2016. To reverse the judgment at this point in the child's life, we believe, would in and of itself undermine the public's confidence in the integrity of our judicial system in that the child would be left in limbo for an indeterminate period of time until a new trial can be held. We conclude that the respondent has not carried her burden to demonstrate that the judgment should be reversed to avoid a manifest injustice.

The judgment is affirmed.

In this opinion the other judges concurred.

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omitted.) "Structural errors have not been recognized outside the realm of constitutional violations except in extraordinary circumstances. See, e.g., *Nguyen* v. *United States*, 539 U.S. 69, 79–83, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003) (structural error when appeals panel was improperly constituted in violation of statutory requirement and thus did not have authority to decide appeal)." *State* v. *Gould*, supra, 535.

BARRY GRAHAM *v.* COMMISSIONER OF TRANSPORTATION (AC 37975)

Sheldon, Prescott and West, Js.

Syllabus

The plaintiff sought to recover damages from the defendant Commissioner of Transportation, pursuant to the state defective highway statute (§ 13a-144), for personal injuries he sustained when his pickup truck was involved in an accident in the early morning hours due to untreated black ice on a bridge over a public highway. Prior to the plaintiff's accident, another ice related motor vehicle accident had occurred on the bridge. The state police notified the Department of Transportation about that prior accident, and the department implemented its standard protocol for responding to off-hours calls by sending a two man work crew to salt the bridge. The garage had two crew leaders at that time, and it was the garage supervisor's general practice to alternate off-hour call-outs between the two crew leaders. The crew leader, who was called out and who had the key to the department's garage where the salt truck and deicing material was stored, lived thirty to thirty-five minutes away from the garage. As a result, the crew leader needed more than one hour to get to and open the garage, and to prepare, load and drive the salt truck to the bridge. By the time the work crew reached the bridge, the plaintiff's accident already had occurred, and the state police, who had been on the bridge since shortly after the first accident, had closed the bridge. On the basis of reports from the state police to the defendant about the first ice related accident and other such accidents on the bridge that morning, the plaintiff alleged that prior to his accident, the defendant had been aware that the surface of the bridge had become icy and unreasonably dangerous. The plaintiff further alleged that the cause of his accident and injuries was the defendant's breach of his duty under § 13a-144 to keep the bridge in a reasonably safe condition as a result of having failed to treat its icy surface, utilize signs to warn travelers of that dangerous condition, or to close the bridge until that condition could be remedied. The defendant filed a motion to dismiss in which he alleged that the plaintiff's written notice of intent to sue, as required by § 13a-144, was defective and, thus, deprived the trial court of subject matter jurisdiction. The defendant claimed that the location of the accident specified in the notice described an area so large on the more than one mile long bridge that he lacked notice of the specific ice patch that caused the plaintiff's accident. The court initially granted the defendant's motion to dismiss and rendered judgment for the defendant. Thereafter, the court granted the plaintiff's motion to reargue and to set aside the judgment, and then denied the

defendant's motion to dismiss. The court determined that certain language in the plaintiff's notice of intent to sue could have different meanings such that the adequacy of the notice was for a fact finder to decide. The defendant then filed a motion for summary judgment in which he claimed, inter alia, that he did not breach his duty under § 13a-144 to keep and maintain the bridge in a reasonably safe condition because he lacked actual notice of the specific ice patch that caused the plaintiff's accident. The defendant also alleged that even if he had constructive notice of that ice patch, he had insufficient time after receiving such notice to remedy that ice patch before it caused the plaintiff's accident. The court granted the defendant's motion for summary judgment and rendered judgment for the defendant. The court ruled that it could not conclude that the defendant had actual notice of the black ice condition that caused the plaintiff's accident before the report of that accident. The court further ruled that even if the defendant had constructive notice of the black ice condition, his response time was reasonable. On appeal to this court, the plaintiff claimed that the trial court erred in rendering summary judgment for the defendant because the evidence gave rise to a genuine issue of material fact as to whether the defendant had sufficient time, after receiving actual or constructive notice of the icing condition that caused the plaintiff's accident, to remedy that condition before the plaintiff's accident occurred. The defendant claimed as an alternative ground for affirming the judgment that the plaintiff's notice of intent to sue failed to satisfy the requirements of § 13a-144 and, thus, that the trial court should have dismissed the plaintiff's action for lack of subject matter jurisdiction. *Held*:

1. The trial court erred in rendering summary judgment for the defendant, the evidence having given rise to a genuine issue of material fact as to whether the defendant had sufficient time, after receiving notice of the icing condition that caused the plaintiff's accident, to treat or otherwise remedy that condition before the plaintiff's accident occurred:

   a. The plaintiff was entitled to have the finder of fact assess the reasonableness of the defendant's response to the notice he received, unless the defendant could prove that there was no genuine issue of material fact that he had insufficient time, after having received notice, to treat the ice or remove it from the bridge's surface, to warn travelers, or to close the bridge until the ice condition was remedied.

   b. The evidence left open disputed issues as to whether and when the defendant received actual notice of the specific defect that caused the plaintiff's accident, and therefore became responsible for taking reasonable measures to remedy that defect, as the black ice that caused the plaintiff's accident was the same black ice that caused the prior accident, and there remained a disputed issue as to whether the defendant received actual notice when the state police were first dispatched to respond to the prior accident or when they called the department to report that accident.

c. The defendant's evidence raised a genuine issue of material fact as to whether he failed to respond reasonably to the notice he received of the dangerous icing condition on the bridge by following his standard practice of alternating between crew leaders for off-hour call-outs such that, here, the crew leader who lived thirty to thirty-five minutes was called out, instead of using other options, such as calling out the other crew leader, so as to make it possible to treat the ice on the bridge before the plaintiff's accident occurred.

d. Genuine issues of material fact existed as to whether the defendant and the state police acted unreasonably by failing to close the bridge before the plaintiff's accident occurred, and whether an electronic warning sign, which was prepositioned just before the bridge, actually was illuminated after the defendant's employees had attempted to illuminate it prior to the plaintiff's accident.

2. The defendant could not prevail on his alternative ground for affirming the trial court's judgment, which was that the plaintiff's notice of intent to sue was patently defective, and that the trial court thus lacked subject matter jurisdiction because the plaintiff's claim was barred by the doctrine of sovereign immunity; the plaintiff's notice described the location of his accident as having occurred on the northbound lane of the bridge "between New London and Groton," and, contrary to the defendant's claim that under that description, the accident could have occurred anywhere on the more than one mile long bridge, the trial court correctly determined that the word "between" had several different, but reasonable, definitions and, thus, that the adequacy of the description of the accident's location was a question for the trier of fact.

Argued May 23—officially released October 4, 2016

Procedural History

Action to recover damages for personal injuries sustained as a result of alleged highway defects, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Devine*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon; thereafter, the court granted the plaintiff's motion to reargue and to set aside the judgment, and denied the defendant's motion to dismiss; subsequently, the court, *Cole-Chu*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court; thereafter, the court, *Cole-Chu*, *J.*, issued an

articulation of its decision. *Reversed; further proceedings.*

Ralph J. Monaco, with whom, on the brief, was *Eric J. Garofano*, for the appellant (plaintiff).

Lorinda S. Coon, for the appellee (defendant).

Opinion

SHELDON, J. The plaintiff, Barry Graham, appeals from the summary judgment rendered by the trial court in favor of the defendant, the Commissioner of Transportation, in this action to recover damages under the state defective highway statute, General Statutes § 13a-144.[1] The plaintiff commenced this action on July 9, 2012, to recover for injuries he claims to have suffered on December 12, 2011, in a motor vehicle accident allegedly caused by the sliding of the vehicle that he was then operating on untreated black ice in the northbound lanes of Interstate 95 as it crosses the Thames River between New London and Groton on the Gold Star Memorial Bridge. The trial court granted the defendant's motion for summary judgment on the ground that because his statutory duty to keep the bridge in a reasonably safe condition is purely reactive rather than anticipatory, he did not breach that duty to the plaintiff by failing to treat or otherwise remedy the icing condition that caused the plaintiff's accident because he had no actual notice of the specific patch of ice before the accident occurred, and even if he had constructive notice of that ice patch based upon prior reports to the

[1] General Statutes § 13a-144 provides in relevant part: "Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway, bridge or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages . . . . No such action shall be brought . . . unless notice of such injury and a general description of the same and of the cause thereof and of the time and place of its occurrence has been given in writing within ninety days thereafter to the commissioner. . . ."

Department of Transportation (department) from the state police about earlier ice related accidents on the bridge that morning, he had insufficient time after receiving such notice to remedy that ice patch before it caused the plaintiff's accident.

On appeal, the plaintiff claims that the trial court erred in rendering summary judgment in favor of the defendant because the evidence before it on the defendant's motion, when considered in the light most favorable to the plaintiff, gave rise to a genuine issue of material fact as to whether the defendant had sufficient time, after receiving actual or constructive notice of the dangerous icing condition that caused his accident, to remedy that condition before the accident occurred.

The defendant opposes this claim in two ways. First, he argues that the trial court ruled correctly, on the undisputed facts before it, that he had insufficient time, after receiving notice of the icing condition that later caused the plaintiff's accident, to remedy that condition before the accident occurred. Second, as an alternative ground for affirming the trial court's ruling, the defendant argues, as he did both in his summary judgment motion and in his prior, unsuccessful motion to dismiss, that the trial court lacked subject matter jurisdiction over this action because the plaintiff's written notice of intent to sue failed to satisfy the requirements of § 13a-144, upon which the state's statutory waiver of its sovereign immunity depends, insofar as the statute required him to disclose the location of his accident and resulting injuries. The plaintiff disputes the defendant's challenge to the legal sufficiency of his written notice of intent to sue insofar as it describes the location of his accident and resulting injuries.

We agree with the plaintiff that the trial court erred in rendering summary judgment in favor of the defendant because the evidence before it on the defendant's

motion gave rise to a genuine issue of material fact as to whether the defendant had sufficient time, after receiving notice of the icing condition that caused the plaintiff's accident, to treat or otherwise remedy that condition before the accident occurred. Therefore, because we also agree with the plaintiff that the adequacy of his written notice of intent to sue to apprise the defendant of the location of his accident and injuries cannot be decided on this record as a matter of law, we reverse the trial court's judgment and remand this case for further proceedings.

The following procedural history is relevant to our disposition of this appeal. In the plaintiff's original complaint dated July 5, 2012, as later revised on May 29, 2014, without substantive alteration as to the issues now before us, he alleged that the defendant has a statutory duty to keep and maintain all highways and bridges within the state highway system in a reasonably safe condition, and that that duty extends to Interstate 95, a public highway in that system. He further alleged that, in the early morning hours of December 12, 2011, employees, representatives and agents of the department became aware that the surface of Interstate 95 on the Gold Star Memorial Bridge had become icy and unreasonably dangerous, based upon reports they had received from the state police of numerous ice related accidents on the bridge that morning. The plaintiff alleged that later that morning, at 6:38 a.m., as he was driving his pickup truck in the northbound lanes of the bridge about one-tenth of one mile south of the New London-Groton town line, it slid on black ice, rolled over on its side and collided with a bridge structure, causing him serious injuries. The plaintiff alleged that the cause of his accident and resulting injuries was the defendant's breach of his statutory duty to keep the bridge in a reasonably safe condition by failing to take adequate measures, in response to the notice he had

received of its dangerous condition, either by treating its icy surface, placing or utilizing warning signs in the area to warn travelers of that dangerous condition, or closing the bridge entirely until that dangerous condition could be remedied. Finally, the plaintiff alleged that he had provided timely written notice to the defendant of his intent to sue in connection with his accident and injuries within ninety days of their occurrence, as required by § 13a-144.[2]

[2] The plaintiff's notice, which was attached to his original complaint, provides:

DATE AND TIME OF INJURY	December 12, 2011 at approximately 6:28 a.m.
LOCATION OF INJURY	Interstate 95 Northbound on the Gold Star Memorial Bridge between New London and Groton, Connecticut
DESCRIPTION OF EVENT	On December 12, 2011, Mr. Graham was traveling northbound on Interstate 95 in his Ford Ranger pick-up truck across the Gold Star Memorial Bridge between New London and Groton, Connecticut. This bridge is known to the Department of Transportation, State Police, and other State personnel to become icy if the temperature is below freezing when the bridge has any moisture on it. As Mr. Graham traveled over the said bridge at a reasonable rate of speed below the speed limit, his vehicle slid into the cement barricade separating the north and southbound lanes, and then flipped over causing injury and harm to him. As a direct and proximate result of the negligence and carelessness of the State by failing to treat the bridge with de-icing substances and other methods of creating a safe travel condition, Mr. Graham was seriously injured.
DESCRIPTION OF INJURY	As a direct and proximate result of the aforementioned accident, Mr. Graham sustained a concussion, post-concussive syndrome, right arm injury, right shoulder injury, neck injury, numbness in right arm, and loss of false teeth.

On September 12, 2012, the defendant moved to dismiss the plaintiff's original complaint on the ground that the location of the accident specified in the plaintiff's written notice of intent to sue described an area so large that it failed to satisfy the requirements of § 13a-144, in violation of the sovereign immunity doctrine.[3] This motion was initially granted by the trial court, *Devine*, *J.* Thereafter, however, upon reconsideration of its ruling, the court determined that the language of the plaintiff's written notice was subject to at least one reasonable interpretation that could be found to satisfy the requirements of § 13a-144. Concluding, on that basis, that the adequacy of the plaintiff's written notice to apprise the defendant of the location of his accident and injuries was a disputed issue of fact that should be decided by the finder of fact at trial, the court vacated its initial ruling and denied the defendant's motion to dismiss.[4]

Thereafter, on May 8, 2014, the defendant moved for summary judgment on three grounds: (1) that he did not breach his statutory duty to keep and maintain the bridge in a reasonably safe condition on the morning of the plaintiff's accident because he lacked actual notice of the specific ice patch that caused that accident, and even if he had constructive notice of that ice patch, he lacked sufficient time after receiving such notice to remedy that ice patch before the plaintiff's accident occurred; (2) insofar as the plaintiff's written notice of intent to sue described the location of his accident, it failed to satisfy the requirements of § 13a-144; and (3) that the plaintiff could not prove that the defendant's breach of statutory duty under § 13a-144, if any, was the sole proximate cause of his accident and resulting injuries.

[3] See part II of this opinion.

[4] Subsequent to the trial court's ruling, the defendant moved for reconsideration, which was denied by the court. The defendant did not file an interlocutory appeal from the trial court's denial of his motion to dismiss.

The defendant supported his motion with a memorandum of law and several attached exhibits, including: sworn affidavits from four employees of his department, Peter Silva, James F. Wilson, Jay D'Antonio and Theodore Engel; an excerpt from the certified transcript of the deposition of state police Trooper Robert D. Pierce, who responded to and investigated the plaintiff's accident; and copies of the plaintiff's written notice of intent to sue in connection with his accident, Trooper Pierce's police report concerning the accident, and the department's work log for the day of the accident.

The main thrust of the defendant's argument on the first of his three grounds for seeking summary judgment, to which the trial court ultimately limited its decision on his motion, was that he did not breach his statutory duty to remedy the ice patch that caused the plaintiff's accident and injuries because, although his employees responded promptly to the first report they received of an ice related accident on the bridge that morning, they could not have reached the bridge with the necessary equipment and materials to treat its icy surface and make it reasonably safe for travel before the plaintiff's accident occurred. The department's call log showed, more particularly, that the department first was notified of icing on the bridge at 5:49 a.m. that morning, in a call from the state police to its Bridgeport operations center, of which Silva was the supervisor. That call reported that an ice related accident had occurred on the bridge at 5:40 a.m. The operations center responded to the call by implementing its standard protocol for responding to off-hour calls for service by calling D'Antonio, the supervisor of the department's maintenance garage in Waterford, which services the Gold Star Memorial Bridge, with instructions to call out a crew to salt the bridge. The Waterford garage, which was then closed, routinely dispatched two man work crews, with one crew leader and one helper, to respond

to off-hour calls for service. When crew members were called out to salt an icy bridge or highway, they had to drive in their own nonemergency vehicles to the garage, where the department's deicing equipment and materials were stored, open the garage with the crew leader's key, start and load the salting truck, then drive to the location where salting was to be performed. The garage had two crew leaders in December, 2011: Engel, who lived in Madison, approximately thirty to thirty-five minutes away from the garage when there was no traffic, and another unnamed person whose town of residence was not disclosed. D'Antonio assigned Engel to salt the bridge after the 5:40 a.m. accident was reported to him pursuant to his general practice of alternating off-hour call-outs between crew leaders so as not to "unduly burden" either one of them in the busy winter season.

After being called out at about 5:51 a.m. on December 12, 2011, Engel and his helper, William Grant, needed more than one hour to get to and open the garage, prepare and load a truck for salting operations and drive the truck to the bridge. By the time they reached the bridge, the plaintiff's accident had already occurred, and the state police, who had been on the bridge since before 6 a.m. responding to other accidents, had closed the bridge. On the basis of this evidence, the defendant argued that he could not be held liable for the plaintiff's accident or injuries because he lacked sufficient time after receiving constructive notice of ice on the bridge at 5:49 a.m. to reach and treat the bridge before the plaintiff's accident occurred.

Finally, the defendant presented evidence, through Silva's sworn affidavit, that in addition to attempting to treat the bridge with salt on the morning of the plaintiff's accident, his employees attempted, at 6:23 a.m., to warn motorists approaching the bridge of its

dangerous condition by illuminating electronic signboards positioned about one-tenth of one mile before the start of the bridge in both directions, which read: "Slippery Conditions. Use Caution." The plaintiff, he contended, had to drive by one such illuminated signboard when he drove his truck onto the bridge approximately fifteen minutes later.

The plaintiff opposed the defendant's motion for summary judgment with his own memorandum of law and accompanying exhibits, including: an excerpt from the certified transcript of the deposition of Diana Dean, the driver who had been involved in the first ice related accident reported to the defendant on the morning of the plaintiff's accident; the police report concerning the Dean accident, which was written by state police Trooper Christopher Sottile, who had responded to and investigated that accident before the plaintiff's accident that morning; an excerpt from the certified transcript of the deposition of Engel, the crew leader who had been called out to treat the bridge after the Dean accident; the sworn affidavit of Silva, the supervisor of the department's operations center in Bridgeport, who described the department's standard protocol for responding to off-hour calls and averred that the previously described electronic signboards had been illuminated before the plaintiff's accident; the plaintiff's own sworn affidavit describing his accident and the events leading up to it; another excerpt from the certified transcript of the deposition of Trooper Pierce, as to his investigation of the plaintiff's accident; the police report of Trooper Pierce concerning the plaintiff's accident; and work logs for the Waterford garage on the day of Dean's and the plaintiff's accidents.

The plaintiff relied on these submissions to raise issues of fact as to several aspects of the defendant's initial ground for seeking summary judgment. First, Dean testified and Sottile wrote in his police report that

when her accident occurred at 5:40 a.m. on the morning of the plaintiff's accident, the entire surface of the roadway on the northbound side of the bridge was covered with black ice, which caused her vehicle to spin out of control in the right lane of the five lane bridge and continue spinning all the way across the bridge until it crashed into the cement barrier on the opposite side of the roadway. Second, the plaintiff averred in his affidavit and Trooper Pierce confirmed in his police report that when the plaintiff's accident occurred almost one hour after the Dean accident, the entire surface of the roadway on the northbound side of the bridge was still completely covered with black ice. Third, Engel testified, based upon his three years of experience working at the Waterford garage in the winter, that when the outside temperature falls below freezing, the surface of the Gold Star Memorial Bridge, unlike those of other nearby bridges, is prone to freezing over completely, with black ice of the kind he saw on the morning of December 12, 2011, due to the recurring presence of ice fog in the area. The department's work logs confirmed that the air temperature at 6 a.m. on that date was 27 degrees Fahrenheit, and the surface temperature of the roadway was 24 degrees Fahrenheit. Fourth, although Silva averred in his affidavit that electronic signboards warning of slippery conditions on the bridge had been illuminated before the plaintiff drove onto the bridge on the morning of his accident, both the plaintiff and Engel swore that they had not seen any such warning signs when they drove onto the northbound lanes of the bridge several minutes later. Fifth, shortly after the plaintiff's accident took place, the state police closed the northbound lanes of the bridge entirely until its icy surface could be treated by department personnel.

In light of the foregoing evidence, the plaintiff claimed that the defendant was not entitled to summary

judgment on the first ground raised in his motion because the reasonableness of a defendant's response to notice he receives of ice on a bridge or highway is a multifactorial factual issue that must typically be decided by the finder of fact at trial. Here, in particular, the plaintiff claimed that he had presented evidence raising several genuine issues of material fact about factors upon which the ultimate resolution of that issue in this case depends. Those issues included: whether the defendant had actual notice of the dangerous icing condition that caused his accident and injuries based upon the reported observations by the state police of black ice covering the entire northbound surface of the bridge from almost one hour before the plaintiff's accident until the state police responded to it well after it occurred; whether, in light of the magnitude of the danger presented by the pervasive icing condition of which the defendant had notice, as evidenced by the numerous ice related accidents it had caused in sub-freezing weather conditions known to cause icing due to ice fog, it was reasonable for the defendant to call out a work crew that predictably could not reach the bridge and treat it until more than one hour after they were first called out; whether, if a work crew called out to treat the bridge could not reasonably be expected to treat it for more than one hour after they were first called out, adequate measures were taken in the interim to warn motorists still using it of its dangerous icing condition before that condition was remedied; and whether, if the bridge could not be treated more quickly and the motoring public could not be warned more effectively of its dangerous condition before it was treated, the bridge should have been closed to all traffic before, not after, the plaintiff's accident. In light of those open, contested issues, the plaintiff insisted that the reasonableness of the defendant's response to the black ice condition reported to the department before the

plaintiff's accident presented a genuine issue of material fact that should be decided by the finder of fact at trial.

On January 12, 2015, the trial court, *Cole-Chu*, *J.*, heard oral argument on the defendant's motion for summary judgment, at which the foregoing arguments were presented. Thereafter, on May 12, 2015, the trial court granted the defendant's motion for summary judgment. In its memorandum of decision, the trial court held that "despite . . . the drawing of inferences in the light most favorable to the nonmoving party . . . the court concludes that the defendant is entitled to judgment as a matter of law. The court cannot conclude that the defendant had actual notice of the black ice condition which caused the plaintiff's accident before the report of that accident. Even treating the black ice on the bridge in general as the defect which caused the plaintiff's accident and treating the black ice accident on the same bridge fifty minutes before the plaintiff's accident as constructive notice to the defendant of that defect, the court finds as a matter of law that the defendant's response time was reasonable. Indeed, the plaintiff does not contend otherwise, other than by claiming that the defendant should have anticipated the black ice condition."[5] (Citation omitted.) Thereafter, the plaintiff filed this appeal.

I

We begin by noting that our standard of review as to a trial court's decision to grant a motion for summary judgment is plenary. "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

[5] On October 14, 2015, the plaintiff filed a motion for articulation, asserting that he never conceded that fifty minutes was a reasonable response time. Two weeks later, the trial court, *Cole-Chu*, *J.*, issued a memorandum stating that regardless of any such concession, the court would have ruled the same way on the defendant's motion based upon the evidence before it.

fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 198, 931 A.2d 916 (2007). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 46–47, 881 A.2d 194 (2005).

"To prove a breach of statutory duty under this state's defective highway statutes, the plaintiff must prove by a preponderance of the evidence: (1) that the highway was defective as claimed; (2) that the defendant actually knew of the particular defect or that, in the exercise

of its supervision of highways in the city, it should have known of that defect; (3) that the defendant, having actual or constructive knowledge of this defect, failed to remedy it having had a reasonable time, under all the circumstances, to do so; and (4) that the defect must have been the sole proximate cause of the injuries and damages claimed, which means that the plaintiff must prove freedom from contributory negligence." (Footnote omitted; internal quotation marks omitted.) *Ormsby* v. *Frankel*, 255 Conn. 670, 675–76, 768 A.2d 441 (2001). In granting the defendant's motion for summary judgment, the trial court concluded that even if the evidence before it, when construed in the light most favorable to the plaintiff, supported a finding that "black ice on the bridge in general" was the defect that caused both his accident and the other, earlier accidents of which it had received notice before his accident occurred, the plaintiff could not establish the third element of his cause of action, namely, that the state failed to remedy that icing condition after having had a reasonable amount of time to do so after receiving notice thereof.

On appeal, the plaintiff challenges the propriety of the trial court's conclusion that the defendant responded reasonably, as a matter of law, to the notice he received of the black ice that caused the plaintiff's accident and resulting injuries. Specifically, the plaintiff argues that the trial court erroneously determined that the defendant's response to the icing condition on the bridge was reasonable as a matter of law because, under Connecticut law, the question of whether the defendant reasonably responded to a highway defect of which he had notice is a question of fact that must be decided by the finder of fact at trial. In response, the defendant contends that any issue of fact, including what constitutes a reasonable amount of time in particular circumstances for the defendant to respond to notice he receives of a highway defect, may be resolved by sum-

mary judgment when the evidence supports only one fair and reasonable conclusion. The defendant asserts that, on the undisputed facts of this case, the only rational conclusion to be drawn is that he acted reasonably because he had no more than forty-nine minutes to remedy the defect at issue, the department followed its standard protocol in responding to the defect, and under the circumstances then existing, it had insufficient time to reach and treat the bridge before the plaintiff's accident occurred.

We agree with the plaintiff that, as a general matter, Connecticut case law dictates that the question of whether the defendant reasonably responded to the report of a highway defect is a multifactorial determination that must be made by the finder of fact at trial. See id., 693 (holding that "[t]he response time of the defendant to react to a dangerous condition is a fact-specific determination"). Here, however, even if we accept the defendant's argument that summary judgment may appropriately be rendered in particular circumstances where the only rational conclusion to be drawn from the evidence before the trial court is that the defendant had insufficient time to remedy the complained-of defect after receiving notice of it before it caused the plaintiff's injuries, we conclude that the record before the trial court in this case gave rise to several genuine issues of material fact that precluded the rendering of summary judgment on that ground.

A

Reasonableness of Defendant's Response to Notice of Highway Defect is Fact-Specific Determination That Must Typically Be Made By Trier of Fact

Under the state defective highway statute, it is well established that "[t]he state is not an insurer of the safety of travelers on the highways which it has a duty to repair. Thus, it is not bound to make the roads abso-

lutely safe for travel. . . . Rather, the test is whether or not the state has exercised reasonable care to make and keep such roads in a reasonably safe condition for the reasonably prudent traveler." (Internal quotation marks omitted.) *Hall* v. *Burns*, 213 Conn. 446, 462–63, 569 A.2d 10 (1990). The defendant's "statutory obligation under § 13a-144 to keep the highway safe from defects is a reactive obligation, not an anticipatory obligation." *Ormsby* v. *Frankel*, supra, 255 Conn. 676. Thus, "[l]iability imposed on the defendant under § 13a-144 for a defective highway is based on proof of the existence of a defect *and* on the defendant's failure to remedy the defect within a reasonable time after receiving actual or constructive notice of the defect where that defect is the sole proximate cause of a plaintiff's injury." (Emphasis in original; internal quotation marks omitted.) *Hall* v. *Burns*, supra, 462.

Although the present case involves a claim under § 13a-144, our courts have held that the defendant's duty to maintain the safety of state bridges and highways under § 13a-144 mirrors a municipality's duty to maintain the safety of municipal sidewalks, bridges and highways under the parallel provisions of General Statutes § 13a-149. Therefore, our courts frequently have relied on case law under one of those statutes to resolve common issues arising under the other, such as whether the defendant or the municipality owed the plaintiff a duty of care under particular circumstances, whether the defendant received either actual or constructive notice in those circumstances of a defect on a bridge or highway it had the duty to maintain, and whether the defendant, in responding to such notice, breached the statutory duty of care.[6]

[6] "In interpreting [the terms of § 13a-144] we have on many occasions looked to and applied the rationale in cases involving statutory actions against municipalities under what is now General Statutes § 13a-149 since there is no material difference in the obligation imposed on the state by § 13a-144 and that imposed on municipalities by § 13a-149 . . . and cases cited." (Citation omitted.) *Donnelly* v. *Ives*, 159 Conn. 163, 167, 268 A.2d 406

Furthermore, our analysis under the two statutes is often guided by the general principles applicable to negligence actions. While it is well settled that "the liability of the defendant under § 13a-149 is purely for breach of statutory duty and does not arise from negligence . . . [t]his does not mean, however, that negligence principles are wholly inapplicable" to the court's analysis. (Citation omitted; internal quotation marks omitted.) *Prato* v. *New Haven*, 246 Conn. 638, 645, 717 A.2d 1216 (1998); see also *White* v. *Burns*, 213 Conn. 307, 322, 567 A.2d 1195 (1990) ("There can be no question but that the nature of the duty resting upon the state . . . is to exercise reasonable care to keep the state highways in a reasonably safe condition for public travelers whether by pedestrians or vehicles. . . . That duty is that of reasonable care, that is, that degree of care which the ordinarily prudent person would exercise under similar circumstances." [Citation omitted.]). The availability and effectiveness of the state's chosen course of action for remedying a known highway defect will invariably depend on the facts and circumstances presented in each case. For this reason, our courts have insisted that the determination of whether the state acted reasonably must be made by a trier of fact apprised of all of the facts and circumstances of the case.

It is noteworthy that the state defective highway statute, now § 13a-144, has existed in Connecticut for more than 100 years. See *Cloughessey* v. *Waterbury*, 51 Conn. 405 (1884). Despite countless opportunities to do so, our courts have refrained from setting a bright line rule for what constitutes a reasonable response time, by either the state or a municipality, when responding to

(1970). "Because [t]here is no substantial difference in the duties imposed by those statutes . . . we treat them as identical . . . ." (Citation omitted; internal quotation marks omitted.) *McIntosh* v. *Sullivan*, 274 Conn. 262, 266 n.4, 875 A.2d 459 (2005).

notice of a defective highway condition. See, e.g., *Hall* v. *Burns*, supra, 213 Conn. 474–75 (holding that "in order for the jury to determine whether the commissioner exercised reasonable care . . . it is only fair that the jury be made aware of all of the circumstances surrounding the commissioner's statutory duty"); *Goldstein* v. *Hartford*, 144 Conn. 739, 740, 131 A.2d 927 (1957) (holding that "[w]hether [the commissioner's] duty has been performed is ordinarily a question of fact"); *Nicefaro* v. *New Haven*, 116 Conn. App. 610, 615–16, 976 A.2d 75 ("What constitutes reasonable care [under the statute] is a fact specific inquiry. . . . For that reason, the circumstances of each case must be examined." [Citation omitted; internal quotation marks omitted.]), cert. denied, 293 Conn. 937, 981 A.2d 1079 (2009).

In *Carl* v. *New Haven*, 93 Conn. 622, 625, 107 A. 502 (1919), our Supreme Court held that, under the municipal defective highway statute, now § 13a-149, "our municipalities, [with regard to] conditions produced by fallen snow or formed ice upon streets and walks, are under no obligation to make them absolutely safe, and much less to make them safe under all circumstances. What the law requires of them, and all that it requires, is the exercise of such efforts and the employment of such measures—directed to the end that their streets and walks be maintained in a reasonably safe condition, all the circumstances of the situation considered—as, in view of the circumstances and conditions, are in themselves reasonable." The court further stated that "[t]he circumstances to be taken into account, and the considerations to be weighed, in determining what is reasonable to be done, and what is a reasonable condition to be sought after and attained, if reasonably attainable, are many. . . . They involve, as prominent elements in the decision, the location, extent and character of the use made of the street or walk, the practicability and efficiency of possible remedial measures, the

size of the problem which the municipality is called upon to face in the existing emergency, the expenditure involved in dealing with that problem in the several possible ways, the physical resources that the municipality has at command which it can utilize to deal with it, and so forth and so forth. *It follows naturally and necessarily from the variety of the elements which may exist in different situations as they arise, that our courts have never undertaken to lay down a rule defining with particularity and precision the duty owed* by our towns, cities and boroughs in their dealings with the manifold problems which, in our climate, are presented by formed ice or fallen snow upon public highways or walks. *They have realized, and frequently expressed, the impossibility of framing one of universal application in other than general language which is elastic in that it embodies the qualification of reasonableness under all the circumstances at every turn of the definition.* The accepted general rule looks constantly to the ever changing circumstances of situations, and its key-note throughout is reasonableness in view of the circumstances as they appear upon each occasion." (Emphasis added.) Id., 625–26.

In the present case, the defendant has repeatedly argued that, because the department followed its standard response protocol in responding to an off-hour call for service after the Dean accident, its response was reasonable as a matter of law. Our case law demonstrates, however, that assessing whether the defendant's response to notice he received of a highway defect was reasonable involves the consideration of many different factors, some of which may be unique to each case. Here, the defendant was required to respond reasonably to notice of a dangerous black ice condition that had caused numerous accidents on the bridge. In responding to notice of a dangerous icing condition on a bridge or highway, the defendant can obviously

consider taking several different courses of action. First, he can attempt to fix the dangerous icing condition by treating the ice or removing it from the bridge's surface, although that might take too much time to alleviate its immediate danger to travelers who are still using the bridge. As a temporary response to a dangerous icing condition that cannot be treated or removed immediately, the defendant can also take steps to warn travelers still using the bridge of its dangerous condition so they can avoid using it or minimize the danger arising from continuing to use it, provided, of course, that the warning is sufficiently prominent and pointed to inform travelers of the true nature and extent of that danger, and thus to induce them to use appropriate caution if they choose to drive upon it. Finally, if warnings of the dangerous condition would not suffice to warn travelers still using the bridge of the danger arising from its use before it is treated, the defendant could require travelers to avoid it altogether by closing the bridge until the dangerous condition is remedied.

The plaintiff is entitled to have the finder of fact assess the reasonableness of the defendant's response to the notice he received of the dangerous icing condition on the bridge on the morning of the plaintiff's accident unless the defendant can prove, based upon the evidence before the trial court on his motion, that there is no genuine issue of material fact that he had insufficient time after receiving such notice to use any of these measures, alone or in combination, to make the bridge reasonably safe for travelers before the plaintiff's accident occurred.

B

Genuine Issues of Material Fact that Bore Upon Reasonableness of Defendant's Response to Notice he Received of Icy Condition That Caused Plaintiff's Accident and Injuries

Here, the plaintiff contends that there are genuine issues of material fact as to several factors that could

have affected the finder of fact's ultimate determination as to whether the defendant had sufficient time, after receiving notice of the dangerous condition that caused the plaintiff's accident and injuries, to remedy that condition before the accident occurred. We agree, concluding that alone or in combination, these open factual questions should have precluded the trial court from rendering summary judgment in favor of the defendant in this case.

1

Whether and When Defendant Received Actual Notice of Specific Defect That Caused Plaintiff's Accident and Injuries

One critical factor in determining the reasonableness of the defendant's response to any notice he received of a highway defect is how much time he had to respond to that notice after he first became chargeable with having received it. The trial court agreed with the defendant's claim that he never received actual notice of the specific patch of ice that caused the plaintiff's accident, but at most became chargeable with constructive notice of that ice patch upon receiving earlier reports from the state police about black ice and other ice related accidents on the bridge that morning. By that logic, since the first report by the state police to the defendant's Bridgeport operations center concerning an ice related accident on the bridge that morning did not come in until 5:49 a.m., the defendant could not be charged with having constructive notice of that condition until that time, leaving him at most forty-nine minutes before the plaintiff's accident to remedy that dangerous condition. Although the defendant now accepts both aspects of the trial court's ruling, both as to his own lack of actual notice of the specific ice patch that caused the plaintiff's accident and as to a maximum forty-nine minute time period he had to remedy that

ice patch after receiving constructive notice of it, the plaintiff disagrees. He argues, to the contrary, that the record before the trial court gives rise to genuine issues of material fact as to whether the defendant received actual notice of the black ice that caused his injury, and whether he did so as early as 5:40 a.m., when Trooper Sottile was first dispatched to the scene of the Dean accident. There are two basic reasons why we find this claim persuasive.

First, although both the defendant and the trial court have suggested that the plaintiff was injured when his pickup truck slid on an "ice patch" on the morning of his accident, every eyewitness who observed the bridge that morning, both before and after the Dean accident, and before and after the plaintiff's accident, described it as covered with black ice. The latter description, unlike the former, connotes a single, continuous sheet of thin, invisible ice coating the entire roadway, rather than a mottled, irregular surface dotted in isolated places with individual "patches" of ice. So understood, the evidence presented on the defendant's motion gives rise to a genuine issue of material fact as to whether the "specific ice patch" that caused the Dean accident was actually the same specific ice patch that later caused the plaintiff's accident. Testimony from Engel suggested that pervasive icing of the sort that he and the other witnesses observed on the bridge that morning was the very sort of icing that the bridge regularly experienced in subfreezing weather due to ice fog. The department's work records confirmed that both the outside air temperature and the roadway temperature that morning were well below freezing, and thus conducive to the ice fog and the formation of black ice. Finally, considering those facts in a light most favorable to the nonmoving party, both the invisible appearance of the ice on the roadway and the manner in which both Dean and the plaintiff lost control of their vehicles and spun

or slid to the cement barrier on the left side of the roadway were consistent with the presence of a single sheet of black ice covering the northbound lanes of the bridge.

Second, the evidence established that the defendant and the department routinely rely upon the state police to respond to and report to them about highway defects on state roads and bridges. For that reason, our Supreme Court has held that actual notice to the state police of a highway defect constitutes actual notice to the defendant, which occurs when the state police first learn of the defect, not the later time when they report that defect to the defendant or the department. See *Lamb* v. *Burns*, 202 Conn. 158, 173, 520 A.2d 190 (1987). In *Lamb*, the plaintiff brought suit against the defendant under § 13a-144 after she lost control of her car while driving over an ice patch and struck a guard post. Id., 159. At trial, the evidence showed that the state police had received a call about the same ice patch seventy-five minutes before the plaintiff's accident occurred and arrived on scene thirty-five minutes before the accident. Id., 160. Ten minutes after they arrived, the state police called the department. At that time, however, the department's local garage was closed. This, then, was an off-hour call about an icy road condition. Id. In an attempt to warn other motorists of the ice patch, the responding officer lit road flares in the immediate area, but then left the scene to check on another area. After the road flares went out, but before the department's sand truck arrived to treat the ice patch, the plaintiff drove over the ice patch, lost control of her vehicle, and struck the guard post. Id. On appeal, our Supreme Court held that, "[a]lthough the state police are not statutorily charged with duties that concern the repair or maintenance of state highways . . . the evidence in the present case indicates that by custom the commissioner of transportation has availed himself of the assistance of the state police and that the state police have

assumed such duties. There was testimony that it is a state trooper's duty and usual procedure to report defects found in the highway. There was further testimony that the [department] relies on the state police to call about highway problems." (Citation omitted; internal quotation marks omitted.) Id., 171. On the basis of this evidence, the court upheld the trial court's instruction that the jury "may consider that notice to [the state police] is notice to the defendant . . . ." (Internal quotation marks omitted.) Id., 173.

Against this background, we conclude that, when the evidence before the trial court is viewed in the light most favorable to the plaintiff, there is a genuine issue of material fact as to whether the pervasive black ice that caused his accident was the same pervasive black ice that caused the Dean accident fifty-eight minutes earlier, and thus as to whether the defendant received actual notice of that condition as of 5:40 a.m., when Trooper Sottile was first dispatched to respond to the Dean accident, rather than 5:49 a.m. when the state police called the Bridgeport operations center to report the Dean accident to the department.

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." *Nolan* v. *Borkowski*, 206 Conn. 495, 500, 538 A.2d 1031 (1988). The trial court erred in this case in deciding, adversely to the plaintiff, the disputed issues left open by the foregoing evidence as to whether and when the defendant received actual notice of the specific defect that caused the plaintiff's accident and thus became responsible for taking reasonable measures to remedy that defect.

2

Whether Defendant Acted Unreasonably in Responding to Notice of Icing Condition

The plaintiff also argues that the defendant acted unreasonably in responding to initial reports of black

ice covering the northbound lanes of the Gold Star Memorial Bridge by calling out a crew leader who lived at least thirty to thirty-five minutes away from the Waterford garage to respond to the dangerous icing condition on the bridge. When viewing the evidence in the light most favorable to the plaintiff, we conclude that there is a genuine issue of material fact as to whether the defendant's decision to dispatch an employee who lived at that distance from the garage was unreasonable under the circumstances, particularly in light of the possible availability of at least one other crew leader and the extreme danger posed to travelers by invisible black ice completely coating a five lane bridge on a major state thoroughfare at the start of the morning commute.

The relevant evidence is as follows. In his motion for summary judgment, the defendant argued that, despite his employees' reasonable efforts to reach the bridge before the plaintiff's accident occurred, it was physically impossible for them to do so because the assigned crew leader, Engel, lived in Madison, thirty to thirty-five minutes away from the garage, without traffic. Engel had been dispatched on this occasion because it was his turn under the alternating call-out system used by garage supervisor, D'Antonio, so as not to unduly burden either crew leader in the busy winter season. No information about the location or potential availability of the other crew leader was presented. In his affidavit, Engel stated that he lives in Madison and that it takes him between thirty to thirty-five minutes of driving, without traffic, to reach the Waterford garage. Engel also stated that, of the two workers responding to the bridge that morning, he was the only one who had keys to the garage; therefore, even if his coworker had arrived there first, he would have been forced to wait until Engel arrived before accessing the truck and preparing it to treat the icing on the bridge.

During oral argument before this court, the plaintiff argued that it was unreasonable for the defendant to simply say, "well, the guy who is supposed to get all of this going to fix it lives all the way down in Madison, so don't blame us that we couldn't respond within forty-five minutes." We agree. On the basis of the defendant's evidence, we conclude that there was and is a genuine issue of material fact as to whether calling out the other crew leader, if he was then available, would have made it possible to reach and treat the bridge before the plaintiff's accident occurred, thus potentially making the defendant's failure to do so unreasonable under all of the circumstances then existing. There is nothing in the record to show that there was a departmentwide policy of alternating between available crew leaders on off-hour call-outs, and even if there was such a policy, however fair and appropriate it might be to follow it under other circumstances, there would at least have been a genuine issue of material fact as to whether deviating from it would be required under circumstances if it was necessary to do so to ensure that travelers would not be injured by an especially dangerous highway defect.

Although it is certainly possible that Engel lived closer to the Waterford garage than the other crew leader, the moving party on a summary judgment motion bears the heavy burden of removing "any real doubt as to the existence of any genuine issue of material fact." (Internal quotation marks omitted.) *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 46. The defendant failed to meet that burden with respect to this issue, thus raising a genuine issue of material fact as to whether the defendant, by following its standard practice of alternating between crew leaders for its off-hour call-outs instead of using other, more expeditious options, failed to respond reasonably to the

notice it received of the dangerous icing condition on the bridge on the morning of the plaintiff's accident.

3

Whether Defendant Failed to Make Adequate Use of Available Temporary Remedies to Protect Travelers While Icy Condition of Bridge Was Being Remedied

Even if the defendant's employees could not have reached the bridge in time to treat it before the plaintiff's accident occurred, there is still a genuine issue of material fact as to whether the defendant could have responded to the notice he received of its dangerous icy condition in some manner other than physically reaching it and applying deicing materials to it in no less than fifty-eight minutes. In the present case, the plaintiff argues, the defendant either could have placed or utilized warning signs in the area to warn travelers still using the bridge of its dangerously icy condition or, if no such warnings would be sufficient to warn motorists of its true dangers to the point of inducing them not to drive on the bridge without using appropriate caution, closed the bridge altogether before it was properly treated. We agree with the plaintiff that any decision to use or forgo the use of such temporary measures could have been considered by the finder of fact in assessing whether the defendant acted reasonably in responding to the report of ice on the bridge after the Dean accident.

From the outset of this action, the plaintiff has alleged that the defendant breached his duty under § 13a-144 because, having received notice of the dangerous icing condition on the bridge, he unreasonably failed to warn travelers of that danger.[7] The trial court did not address

[7] In his reply memorandum on the motion for summary judgment, the defendant argued that the plaintiff's allegation that the defendant breached his statutory duty by failing "to place or utilize warning signs in the area to warn approaching travelers of the existing hazardous and dangerous condition" was not an actionable defect under Connecticut law. The present

this argument in its memorandum of decision, instead focusing its entire analysis on the amount of time that was required to reach the bridge with a work crew and apply deicing materials to it. We conclude that there are genuine issues of material fact as to whether the defendant had sufficient time before the plaintiff's accident occurred to respond to the danger posed by the dangerous icing condition on the bridge by warning travelers of it by remotely illuminating its prepositioned electronic signboards with a suitable warning message.

The evidence before the court is as follows. In his deposition, Trooper Pierce testified that there are two electronic signs that are located approximately one-tenth of one mile before the bridge in either direction. Pierce also stated that, although the state police are not notified when the signs are illuminated, he is aware that the department has the ability to activate the signs. The defendant presented evidence that the electronic signboard located before the bridge in the northbound lane of the highway was illuminated at 6:23 a.m. to warn travelers to "use caution" due to "slippery conditions" on the bridge. The defendant's claim in this regard rests entirely on the affidavit of Silva, who so averred, adding that "[the plaintiff] had to have driven past that sign on his way over the bridge."

Notwithstanding such evidence, however, two witnesses who drove over the bridge that morning near the time of the plaintiff's accident did not see the electronic signboard illuminated. First, the plaintiff's affidavit

case, however, is distinguishable from the cases cited by the defendant. *Stotler* v. *Dept. of Transportation*, 313 Conn. 158, 168–75, 96 A.3d 527 (2014). In *Stotler*, the plaintiff alleged that the lack of adequate warning signs coupled with the steep grade of the road rendered the road defective. Id., 169–70. In the present case, the plaintiff is not alleging that the lack of warning signs is a defect. Instead, the allegations in the complaint are fairly interpreted to mean that the failure to use available warning signs rendered the defendant's response unreasonable under the circumstances.

states that he did not see any warning signs that morning. Second, and perhaps more importantly, Engel, the department's crew leader who responded to the bridge approximately ten to fifteen minutes after the plaintiff's accident, stated that he did not see the electronic signboard illuminated when he arrived at the bridge after the plaintiff's accident.

On the basis of Pierce's deposition and Silva's affidavit, it clearly appears that the defendant had the ability to illuminate remotely the electronic signboard to warn travelers of the dangerous condition on the bridge at least fifteen minutes before the plaintiff's accident. The fact that the defendant's employees attempted to do so in that time frame also demonstrates that, in their view at least, taking such a measure to warn travelers of the dangerous condition of the bridge was appropriate in the existing circumstances. The defendant, however, failed to demonstrate the absence of any genuine issue of material fact as to whether the warning sign was actually illuminated that morning, for evidence from two persons that they did not see the sign that morning, including one of the defendant's employees who regularly works on the bridge when it ices over in subfreezing conditions, puts that claim in dispute. Moreover, even if the signboard was illuminated and worded as Silva averred, a genuine issue of material fact might still exist as to whether it was so positioned and worded to give reasonably prudent travelers sufficient warning of a dangerous black ice condition that lay ahead of them.[8] For these additional reasons, we conclude that the trial court should not have granted the defendant's motion for summary judgment on the ground that he

[8] Several factors could be considered by a jury when assessing the adequacy of the electronic sign in question, such as the physical dimensions of the sign, how prominently it is displayed along the highway, and whether it has a standard message or whether such message can be tailored to address specific dangerous conditions.

had insufficient time after receiving notice of the bridge's dangerous condition to respond to it and remedy that condition.

In addition to warning travelers of the danger caused by black ice on the bridge, the plaintiff also claimed that the defendant could have met his statutory duty of care by closing the bridge before the plaintiff drove over it. Preventing travelers from encountering a defect on the highway is a remedy that the defendant could have utilized, and the record demonstrates that this could have been accomplished in much less time than it took to reach the bridge and treat it with deicing materials. Accordingly, a genuine issue of material fact exists as to whether the defendant acted unreasonably by failing to close the bridge after discovering it was covered in black ice and receiving numerous reports of accidents on it before the plaintiff's accident occurred.

With respect to the conduct of the state police, our courts have held that "[t]he words the legislature employed in § 13a-144 unambiguously support the conclusion that the statute waives sovereign immunity for defective highway claims based upon the neglect or default *not merely of the commissioner of transportation, but of the state or any of its employees*, at least when performing duties related to highway maintenance." (Emphasis added; internal quotation marks omitted.) *Lamb* v. *Burns*, supra, 202 Conn. 169. Furthermore, the court in *Lamb* held that "[t]here are no words in § 13a-144 limiting or restricting the scope of the phrase the state or any of its employees to [department] employees only." (Internal quotation marks omitted.) Id., 170.

The record thus demonstrates that there is a genuine issue of material fact as to whether the state police responded unreasonably to the icing condition of the bridge by failing to close the road before the plaintiff's

accident.[9] In his affidavit, Silva noted that the state police have the authority to close the road if they believe it is in the interest of public safety to do so. As previously discussed, the police report prepared by Trooper Sottile stated that "[t]he entire surface of the bridge was covered with black ice." In support of his motion for summary judgment, the defendant submitted a call log showing that calls were made from the state police to the department at 5:48, 5:49, 5:51, and 6:01 a.m. that morning, all reporting ice related accidents in the northbound lanes of the Gold Star Memorial Bridge. In his affidavit, the plaintiff stated that state police officers arrived at the scene less than five minutes after his accident, and that department workers were on the bridge five or ten minutes after the police arrived. During his deposition, Engel stated that by the time the department's truck reached the bridge, the state police had already closed the northbound lanes of the bridge.

On the basis of the foregoing evidence, there is a genuine issue of material fact as to whether the defendant should have utilized the available alternative remedy of closing the bridge to prevent the plaintiff and others like him from driving on it and encountering the dangerous black ice condition that caused his accident. The plaintiff's affidavit, coupled with Engel's deposition, demonstrates that it takes approximately ten to fifteen minutes to close the northbound lanes of the Gold Star Memorial Bridge, a much shorter time than it took the department to physically respond to the

[9] The facts of *Lamb* are analogous to the facts in this case in all but one respect. In *Lamb*, the evidence at trial proved that the officer who responded to an earlier accident used flares to warn travelers of the ice that ultimately caused the plaintiff's accident. *Lamb* v. *Burns*, supra, 202 Conn. 160. At this stage of the present case, there is no evidence that the state police used road flares on the Gold Star Memorial Bridge prior to the plaintiff's accident. Nonetheless, the *Lamb* court suggests that a jury may consider the conduct of the state police when assessing the reasonableness of the state's conduct in responding to reports of defective conditions.

bridge with a work crew and apply deicing materials to it. Therefore, there is a genuine issue of material fact as to whether the failure of the state police to close the bridge before the plaintiff's accident occurred was unreasonable and whether the conduct of the state police can provide a basis for finding the defendant liable under § 13a-144. See *Lamb* v. *Burns*, supra, 202 Conn. 171.

In conclusion, our case law demonstrates that the determination of what constitutes a "reasonable response" by the defendant is a fact-specific determination. The plaintiff was entitled to have a trier of fact consider whether the standard response protocol could have prevented his accident if the department had called other employees to treat the bridge that morning and, in the event that the response time would not thus have been materially reduced, whether the defendant breached his statutory duty by failing to use available temporary remedies to warn travelers of the bridge's dangerous icing condition or prevented them from encountering that dangerous condition by closing the bridge until it could properly be treated.

On the basis of the foregoing analysis, we conclude that the trial court erred in ruling that the defendant's response to the black ice condition that caused the plaintiff's accident and resulting injuries was reasonable as a matter of law. Several genuine issues of material fact still exist, and these issues must be resolved by the finder of fact at trial.

II

In the alternative, the defendant claims on appeal that the trial court lacked subject matter jurisdiction over this action because the plaintiff's written notice of intent to sue was patently defective.[10] The defendant

[10] The location of injury provided by the plaintiff stated that the accident occurred on "Interstate 95 Northbound on the Gold Star Memorial Bridge between New London and Groton, Connecticut." See footnote 2 of this opinion.

argues, therefore, that the plaintiff's claim is barred by the doctrine of sovereign immunity. We disagree.

The following additional procedural history and evidence are relevant to the court's disposition of this alternative claim. After service of process was made upon him, the defendant filed a motion to dismiss the action for lack of subject matter jurisdiction. In support of his motion to dismiss, the defendant submitted the affidavit of Wilson, who stated that the northbound lanes of the Gold Star Memorial Bridge are approximately 5931 feet long and have approximately 500,000 square feet of deck area. The defendant argued that simply identifying the northbound lane of this bridge in the plaintiff's notice was not enough, and that the description provided by the plaintiff was so vague that it prevented the defendant from conducting an intelligent investigation of the plaintiff's claim.[11]

The plaintiff objected to the motion to dismiss, arguing that the notice provision of § 13a-144 does not demand precision and that his description of the northbound side of the Gold Star Memorial Bridge between New London and Groton allowed the defendant to identify the location of the accident and conduct an intelligent investigation. He further argued that the defendant could have relied on additional information within the notice, such as the date and time of the accident, the plaintiff's name and vehicle information, and the description of events provided by the plaintiff. The plaintiff argued, therefore, that the notice was not patently defective and thus that the trial court had subject matter jurisdiction over this action.

[11] The gravamen of the defendant's argument throughout these proceedings is that the Gold Star Memorial Bridge is more than one mile long and has 500,000 square feet of deck area—therefore, the plaintiff's description, "Northbound on the Gold Star Memorial Bridge between New London and Groton," was so vague that it could not supply the defendant with sufficient information to intelligently investigate the claim.

On March 21, 2013, the trial court, *Devine*, *J.*, granted the defendant's motion to dismiss. In doing so, the trial court held that "there [were] no facts set out in the notice that would allow the defendant to determine where on the bridge the alleged defect was located" because the defendant's supporting affidavit demonstrated that the "northbound portion of the bridge is over one mile long consisting of multiple lanes and . . . has more than 500,000 [square] feet of deck area."

On April 1, 2013, the plaintiff moved for reconsideration. In his motion, the plaintiff argued that the notice provided was not patently defective because the phrase, "between New London and Groton, Connecticut," refers to a specific location on the bridge, namely, the boundary line between the two municipalities. Additionally, the plaintiff argued that the defendant had access to several police reports that would have further detailed the location of his accident.

The defendant objected to reconsideration, arguing that the plaintiff's new interpretation of the word "between" was disingenuous because he had not raised this interpretation at any time prior to moving for reconsideration. Additionally, the defendant argued that the words, "between New London and Groton," referred to the location of the bridge itself, not to the location where the plaintiff claimed that the injury occurred. Last, the defendant argued that, because the notice must provide sufficient information on its face, it did not matter whether the defendant could contact police officers to get accident reports.[12]

[12] The defendant correctly asserted that the location of injury must be furnished by the plaintiff or his representative and cannot be provided by third parties. See *Warkentin* v. *Burns*, 223 Conn. 14, 17–19, 610 A.2d 1287 (1992). The defendant is also correct that police reports cannot cure defects in the notice. See id., 17. Our Supreme Court, however, has concluded that Practice Book § 10-31 allows parties opposing motions to dismiss to submit supporting documentation as to facts not apparent on the record. See *Lussier* v. *Dept. of Transportation*, 228 Conn. 343, 357–58, 636 A.2d 808 (1994). The court in *Lussier* further held that the trial court may rely on police reports

Upon reconsideration, the trial court, *Devine*, *J.*, reversed its ruling, holding that "the use of the term 'between' is not patently defective because the term 'between' may refer to the entire Gold Star Memorial Bridge or it may refer to the boundary line of New London and Groton." The trial court held, therefore, that "the adequacy of the notice is a question for the fact finder . . . ."[13] (Citation omitted.)

As mentioned in the preceding paragraphs, the defendant claims that the words, "between New London and Groton, Connecticut," could not reasonably be said to describe the towns' boundary line on the bridge. The defendant further argues that the plaintiff could easily have referenced the town boundary line, but failed to do so. Last, the defendant argues that the plaintiff's description of "Interstate 95 Northbound on the Gold Star Memorial Bridge between New London and Groton, Connecticut," references an area so large that it could not conduct an intelligent investigation and, therefore, the notice was patently defective. We disagree and conclude that the word "between" precludes this court from concluding that the notice was patently defective as a matter of law. Accordingly, we reject the defendant's alternative ground for affirmance.

Before addressing the defendant's argument, we note that our standard of review is plenary. Questions as to whether the doctrine of sovereign immunity bars a claim necessarily implicate the court's subject matter jurisdiction. See *Filippi* v. *Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005). "This court has often stated that the question of subject matter jurisdiction, because it

to provide context when the court determines whether the notice was so vague that it was patently defective. Id.

[13] The defendant raised this issue again in his motion for summary judgment and argued a substantially similar position to the trial court, *Cole-Chu*, *J.* The trial court rendered summary judgment in favor of the defendant, but declined to rule on this particular issue.

addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time. . . . [T]he court has a duty to dismiss, even on its own initiative, any appeal that it lacks jurisdiction to hear. . . . Moreover, [t]he parties cannot confer subject matter jurisdiction on the court, either by waiver or by consent." (Citations omitted; internal quotation marks omitted.) *Webster Bank* v. *Zak*, 259 Conn. 766, 774, 792 A.2d 66 (2002); see also *Kozlowski* v. *Commissioner of Transportation*, 274 Conn. 497, 502, 876 A.2d 1148 (2005) (same). "[W]hether subject matter jurisdiction exists is a question of law, and our review of the court's resolution of that question is plenary. . . . Likewise, whether the plaintiff's notice was patently defective and, thus, failed to meet statutory requirements also is a question of law requiring our plenary review." (Citation omitted; internal quotation marks omitted.) *Tyson* v. *Sullivan*, 77 Conn. App. 597, 601, 824 A.2d 857, cert. denied, 265 Conn. 906, 831 A.2d 254 (2003); see also *Filippi* v. *Sullivan*, supra, 8 ("A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." [Internal quotation marks omitted.]).

"It is well established law that the state is immune from suit unless it consents to be sued by appropriate legislation waiving sovereign immunity . . . . Section 13a-144 creates a legislative exception to this common law rule and therefore must be strictly construed. . . . The statutorily required notice is a condition precedent to maintaining a cause of action, and if this requirement is not met, no cause of action exists." (Citations omitted; internal quotation marks omitted.) *Bresnan* v. *Frankel*, 224 Conn. 23, 25–26, 615 A.2d 1040 (1992); see also *Warkentin* v. *Burns*, 223 Conn. 14, 17–18, 610 A.2d 1287 (1992). "The notice requirement is not intended merely

to alert the commissioner to the occurrence of an accident and resulting injury, but rather to permit the commissioner to gather information to protect [the state] in the event of a lawsuit." (Internal quotation marks omitted.) *Lussier* v. *Dept. of Transportation*, 228 Conn. 343, 354, 636 A.2d 808 (1994). At the same time, however, "[t]he requirement as to notice was not devised as a means of placing difficulties in the path of an injured person." (Internal quotation marks omitted.) Id.; see also *Filippi* v. *Sullivan*, supra, 273 Conn. 9 (same); *Bresnan* v. *Frankel*, supra, 29 (same). As such, "[t]he plaintiff is not required to be a cartographer" in order to satisfy the requirements of § 13a-144. *Lussier* v. *Dept. of Transportation*, supra, 358. Rather, the plaintiff must provide "sufficient information as to the injury and the cause thereof and the time and place of its occurrence to permit the commissioner to gather information about the case intelligently." (Internal quotation marks omitted.) *Serrano* v. *Burns*, 70 Conn. App. 21, 25, 796 A.2d 1258, cert. denied, 261 Conn. 932, 806 A.2d 1066 (2002).

"Unless a notice, in describing the place or cause of an injury, patently meets or fails to meet this test, the question of its adequacy is one for the jury and not for the court, and the cases make clear that this question must be determined on the basis of the facts of the particular case." *Morico* v. *Cox*, 134 Conn. 218, 223, 56 A.2d 522 (1947). "[T]here are two categories of cases in which the written notice is patently defective because of a problem with the description of the place of injury. The first category consists of situations [in which] a court has found that the notice stated a location different from the [actual] place of . . . injury. . . . The second category consists of situations [in which] the description is so vague in its breadth that the [commissioner] could not be reasonably expected to make a

timely investigation based on the information provided." (Citations omitted; internal quotation marks omitted.) *Filippi* v. *Sullivan*, supra, 273 Conn. 10 n.6.

In the present case, the defendant claims that the plaintiff's notice falls within the second category of patently defective notices. The notice supplied by the plaintiff on December 28, 2011, described the location of injury as on the northbound lane of the Gold Star Memorial Bridge "between New London and Groton . . . ." The notice also states that the injury occurred when the plaintiff's "vehicle slid into the cement barricade separating the north and southbound lanes . . . ." On this description alone, we disagree with the defendant that this accident could have happened "anywhere on the more than one mile long bridge." Rather, even considering the language of the notice in its broadest terms, the location of the injury was on the left side of the bridge along the cement barricade separating the north and southbound lanes. Therefore, the area in question is statistically smaller than the 500,000 square feet stated by Wilson in his affidavit. Even so, the leftmost lane of Interstate 95 northbound on the Gold Star Memorial Bridge measures more than one mile in length. If the plaintiff's notice only stated that the accident occurred "on the northbound lane of the bridge along the cement barricade separating the north and southbound lanes," the defendant's argument would be more persuasive. The plaintiff, however, did not describe it in this manner; instead, the plaintiff described the location of injury as "Northbound on the Gold Star Memorial Bridge between New London and Groton, Connecticut."

The trial court, *Devine*, *J.*, correctly determined that the word "between" has several definitions that, when applied to the facts of this case, could produce very different results. Definitions of the word "between" include, inter alia: "an intermediate position in relation

to two other objects . . . in the interval . . . in the space that separates." Webster's Third New International Dictionary (2002). Applying these definitions to the phrase, "[n]orthbound on the Gold Star Memorial Bridge between New London and Groton, Connecticut," the notice could reasonably be interpreted as referencing the leftmost side of the northbound lane at the point where the towns meet, i.e., the town line. Therefore, an alternate—but equally reasonable—interpretation of the notice would place the location of injury at a specific side and at a specific point in the northbound lanes of the bridge. This description would satisfy the purpose of the notice requirement and would not be patently defective. See *Serrano* v. *Burns*, supra, 70 Conn. App. 28 ("[T]he defendant has offered no proof that the 'rear lot' of a particular rest stop encompasses such an expansive area that it fails to guide him in making an intelligent inquiry into the case. Given the record before us, the defendant is not being asked to range over a six mile stretch of roadway or check a score of manhole covers or several rest areas to try to locate where it was that the plaintiff fell and was injured."); see also *Lussier* v. *Dept. of Transportation*, supra, 228 Conn. 357 ("The notice involved herein did not patently . . . [fail] to meet this test. . . . The road in question is only three-tenths of one mile long. The notice recites that the car landed in the Shunock River and that the river crosses under route 617 at only one place." [Citation omitted; internal quotation marks omitted.]).

Still, the defendant argues that the only reasonable interpretation of the phrase, "between New London and Groton," is that the plaintiff was trying to describe the bridge itself. This argument, however, begs the question: if the plaintiff was trying to describe the location of the bridge itself, why not simply state, "Northbound on the Gold Star Memorial Bridge?" We are mindful that the plaintiff could have referenced the town boundary

in his notice and, had he done so, he would have provided the defendant with a more precise location. The requirements of § 13a-144, however, do not demand such precise language from the plaintiff. See *Lussier* v. *Dept. of Transportation*, supra, 228 Conn. 358. Rather, what is required of the plaintiff is sufficient information to allow the defendant to conduct an intelligent investigation of his highway defect claim. *Serrano* v. *Burns*, supra, 70 Conn. App. 25–26; *Tedesco* v. *Dept. of Transportation*, 36 Conn. App. 211, 214, 650 A.2d 579 (1994). Due to the inconsistent results of applying different—yet reasonable—interpretations to the words, "between New London and Groton, Connecticut," this court cannot rule as a matter of law that the plaintiff's written notice of intent to sue was patently defective. As such, the question of adequacy is reserved for the trier of fact.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for summary judgment and for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JULIO TORRES
(AC 38571)

Keller, Mullins and Lavery, Js.

Syllabus

Convicted of the crime of murder, the defendant appealed. The defendant claimed that the trial court abused its discretion by admitting evidence of his prior misconduct, that the trial court provided an incorrect jury instruction regarding the standard of proof beyond a reasonable doubt, that the prosecutor engaged in impropriety during closing and rebuttal arguments, and that the trial court erred in failing to disclose certain portions of a witness' psychiatric records following an in camera review. *Held*:

1. The trial court did not abuse its discretion in admitting evidence of the defendant's prior misconduct through the testimony of a witness, C,

who testified that the defendant had possessed a revolver three months prior to the murder:

a. Although the evidence did not establish a definitive connection between the revolver C had observed and the firearm used to kill the victim, C's testimony was relevant to establishing that the defendant had the means to commit the murder, as the revolver C observed in the defendant's possession was suitable to carry out the murder, the absence of a spent shell casing at the scene was consistent with the use of a revolver, and another witness testified that the defendant had made statements on the night of the murder consistent with his possession of a revolver.

b. The trial court did not abuse its discretion in determining that the prejudicial effect of C's testimony did not outweigh its probative value, as the weapon C observed was suitable for the commission of the charged crime and, therefore, that evidence was relevant and probative; furthermore, C's testimony was not cumulative of other testimony at trial, as C was the only witness who provided direct evidence that the defendant had access to a revolver prior to the crime, and C's testimony was not overly prejudicial because the trial court limited the prejudicial effect of his testimony by permitting him to testify only that he saw the defendant in possession of a revolver, not that the defendant had used the revolver to shoot C in a prior drive-by shooting.

2. The defendant could not prevail his challenge to the trial court's reasonable doubt jury instructions, a review of the record having indicated that the defendant waived that claim; the defendant did not object to the reasonable doubt instruction after the trial court had provided him with a copy of the proposed jury instructions and a meaningful opportunity to review them, and then reviewed the proposed instructions page by page and solicited the parties' comments and objections during a charging conference on the record.

3. This court found unavailing the defendant's claim that the prosecutor engaged in impropriety during closing and rebuttal arguments:

a. The prosecutor's comment that the defendant's girlfriend was present when his electronic monitoring bracelet was installed was a reasonable inference based upon the evidence elicited at trial and, therefore, was not improper; furthermore, the prosecutor's comment that people in the area were familiar with electronic monitoring bracelets was not improper, as that fact could reasonably have been inferred from an electronic monitoring report that the state admitted into evidence, which indicated that the defendant's monitoring unit had detected eight other electronic bracelets in close proximity to the defendant's residence.

b. The prosecutor's comments encouraging the jury to determine the credibility of the state's witnesses on the basis of the evidence presented at trial rather than their own speculation were not improper, as none of those remarks improperly misstated the law regarding reasonable doubt.

4. The trial court properly exercised its discretion by refusing to disclose to the defense certain portions of a witness' mental health records after an in camera review; this court's independent review the records confirmed the trial court's conclusion that the material that was not disclosed to the defendant was not relevant to that witness' credibility or capacity as a witness.

Argued May 18—officially released October 4, 2016

Procedural History

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Bruce R. Lockwood, 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

LAVERY, J. The defendant, Julio Torres, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a. On appeal, the defendant claims (1) the court improperly admitted evidence of his prior misconduct, (2) the court provided an incorrect jury instruction regarding the standard of proof beyond a reasonable doubt, (3) the prosecutor engaged in impropriety during closing and rebuttal arguments, and (4) the court erred in failing to disclose the psychiatric records of a state's witness following the court's in camera inspection of the records. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the night of October 9, 2009, the defendant,

Jorge Zayas, Ricco Correa, and Jose Serrano were drinking alcohol on the porch behind the defendant's apartment in Hartford. At one point, the victim and Michael Rodriguez drove into the well lit parking lot adjacent to the defendant's apartment building. When the victim exited the car, the defendant, Zayas, Correa, and Serrano approached him, and an argument ensued. During the argument, Correa passed a gun to the defendant. After taking the gun, the defendant shot the victim once in the head at close range, killing him.[1]

Rodriguez, who was standing in the parking lot when the shooting took place, did not see who shot the victim, but heard the gunshot and immediately turned around and saw that the defendant was the only person close to the victim's body. Seeing Zayas, Correa, and Serrano standing twenty to twenty-five feet away, Rodriguez fled the scene on foot. Correa, who had taken back the gun used to shoot the victim, pursued Rodriguez while the defendant, Zayas, and Serrano stood in the parking lot yelling, "[k]ill him. Kill him."

The defendant's girlfriend, J.R.,[2] observed the whole incident from the doorway of the defendant's apartment. After witnessing the defendant shoot the victim, J.R. went back into the defendant's apartment and pretended to be asleep. The defendant ran into the apartment and stated to J.R., "I killed him. I killed him. Get up." The defendant told J.R. that the victim "came over there fighting for the turf and that he shot him." A few minutes later, the defendant received a phone call from

[1] The defendant was on parole at the time of the shooting and was required to wear an ankle bracelet to ensure that he complied with a 9 p.m. to 5 a.m. curfew. There was a monitoring unit inside the defendant's apartment that would indicate to the monitoring agency if the defendant exceeded a range of approximately 150 feet. Police determined that the victim's body was located approximately 125 feet from the monitoring unit.

[2] We refer to this witness by her initials because we discuss her privileged psychiatric records. See *State* v. *Santos*, 318 Conn. 412, 415 n.2, 121 A.3d 697 (2015).

Correa, who told the defendant that he had "mistakenly shot someone else thinking it was [Rodriguez], but that he was tossing the gun in the river." J.R. could not remember the type of gun the defendant used to shoot the victim.

At approximately 1:15 a.m. on October 10, 2009, police arrived at the scene of the shooting in response to a 911 call. Officers found the victim's body in the parking lot behind the apartment building, bleeding from the right side of his head. The victim was pronounced dead at the scene. Susan Williams, an associate medical examiner for the state, determined that the cause of death was a single gunshot wound to the right side of the head. Williams estimated that, on the basis of soot and stippling patterns around the entrance wound, the muzzle of the gun was approximately six to ten inches from the right side of the victim's head when it was fired.

On September 4, 2013, the state charged the defendant with murder in violation of § 53a-54a. On October 4, 2013, following a jury trial, the defendant was convicted of murdering the victim. On December 6, 2013, the court sentenced the defendant to a total effective sentence of fifty years incarceration. This appeal followed. Additional facts will be set forth as necessary to our assessment of the issues on appeal.

I

The defendant first claims that the court abused its discretion by admitting evidence of his prior misconduct, namely, that he had possessed a revolver approximately three months prior to the murder, for the purpose of establishing that he had the means to shoot the victim. In support of this claim, the defendant argues that the evidence was not relevant and that its prejudicial effect outweighed its probative value. In response, the state argues that the evidence was relevant because

it tended to show that the defendant had access to a weapon suitable for the commission of the murder and that this probative value outweighed the evidence's prejudicial effect. We agree with the state.

The following additional facts and procedural history are relevant to this claim. Prior to trial, the state indicated it was seeking to admit the testimony of Eduardo Colon, who had been the victim of a prior drive-by shooting allegedly perpetrated by the defendant. On September 27, 2013, the court held a hearing during which the prior misconduct evidence was discussed. The state represented that Colon would testify that on July 19, 2009, the defendant had shot him with a chrome revolver during a nonfatal drive-by shooting for which the defendant was charged with first degree assault. The state then argued that Colon's testimony was relevant "to show that [the defendant] had the means to commit th[e] crime." In support of this argument, the state contended that Colon's testimony regarding the defendant's prior access to a revolver was probative because the witnesses in the present murder had observed the defendant carrying a gun and the lab analyses of bullet fragments recovered from the victim's body suggested that the bullet was fired from a revolver.

In response, the defendant claimed that this evidence, "while potentially relevant, [was] more prejudicial than probative because of the credibility issues surrounding" the witnesses to the July 19, 2009 incident. The defendant explained that "some other witness has said that they saw [the defendant] . . . the evening of the [victim's shooting] in possession of a revolver," and "to . . . try and buttress that witness with this remote event where those witnesses have credibility issues themselves" would confuse the issues and may "portray [the defendant] . . . unfairly . . . not only in possession of a weapon, but using it for violent purposes." The defendant further emphasized that there was not an

established connection between the revolver previously observed in the defendant's possession and the shooting of the victim here, and that the prior incident was remote in time from the present murder.

The court ruled that the evidence was relevant, but placed limitations on its admission to alleviate the defendant's sole concern that undue prejudice could result from a detailed discussion of the prior possession. According to the court's ruling, the state could inquire only into whether Colon saw the defendant holding a revolver and could not probe into the circumstances and the assault surrounding that prior possession. Specifically, the court stated: "You don't have to mention what the event was or why they saw him [with the revolver], just that on a date there was a gun. Nothing about what the crime was. Nothing about any of that information. Just very simply, on that date. I'm going to allow that and that alone because it is probative."

At trial, and before the state called Colon as a witness, the defendant twice elicited testimony regarding the details of his prior possession of the revolver. First, through the cross-examination of Edwin Cardona, a state's witness and the defendant's parole officer, the defendant elicited testimony that Cardona had received a letter from Detective Andrew Jacobson of the Hartford Police Department that indicated that the defendant had been implicated in a nonfatal shooting that took place on July 19, 2009. The defendant again elicited evidence during his cross-examination of Jacobson that exceeded the bounds of the court's ruling limiting the admission of evidence regarding his prior possession of a revolver. Through Jacobson, the defendant brought out that he had been a suspect in the July 19, 2009 nonfatal shooting, and that the incident involved a drive-by shooting of two individuals who were selling heroin on the street.

Also at trial, the state called Iris Sterling, the victim's girlfriend, as a witness. Sterling testified that, on the night of the murder, she saw the defendant inside his apartment holding a gun and saying, "let's play Russian roulette"—an act that requires placing a single cartridge in the cylinder of a revolver. Similarly, J.R. testified that, on the night of the murder, she saw the defendant inside his apartment holding a gun, that he was "always around guns," but that he did not keep guns inside his apartment. Additionally, the state's firearms examiner, James Stephenson, testified that the bullet fragments recovered from the victim were consistent with eight different kinds of revolvers and one kind of semiautomatic pistol.

Following this evidence, the state represented that it intended to call Colon as a witness. In response, the defendant renewed his objection to Colon's testimony. The defendant argued that Colon's testimony was not relevant because the state had not established that the murder weapon had been a revolver. Specifically, the defendant argued that none of the state's witnesses at trial provided a description of the murder weapon, and J.R. could not recall the kind of gun the defendant used to shoot the victim. Given that the state's witnesses were unable to provide a description of the murder weapon, the defendant argued, Colon's testimony was not relevant because the state had failed to establish "a sufficient linkage" between the chrome revolver Colon observed the defendant carrying on July 19, 2009, and the murder weapon. The defendant also renewed his objection on prejudice grounds.

The court overruled the defendant's objection, finding that Colon's testimony was relevant and not unduly prejudicial because the defendant already had elicited testimony regarding the prior shooting, the very testimony that he claimed would have been unduly prejudicial. On the issue of prejudice, the court stated: "The

jury already knows, primarily through your cross-examination of [Jacobson] that you put out the information . . . that there was an accusation involving a gun. So I don't think it's going to be unduly prejudicial and it does—it is relevant. But the information was brought out several times to [Jacobson] that when he was—when you were attempting to challenge the letters, that your client was arrested for an assault involving a gun."

Thereafter, consistent with the court's ruling limiting Colon's testimony, Colon testified that on July 19, 2009, he saw the defendant carrying a "[c]hrome plated revolver." The court then instructed the jury as follows: "That testimony was offered by the state in an effort to establish an element of the offense. You can accept it, you can not accept it, but it's not [to] be used for any other reason including any indication of that character or propensity to do any type of act." The defendant did not object to this limiting instruction.

On appeal, the defendant claims that the court abused its discretion in admitting Colon's testimony that he previously had possessed a revolver because the evidence is not relevant and, alternatively, is more prejudicial than probative. We disagree.

"The standard of review regarding uncharged misconduct evidence is well established. Evidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime. . . . Exceptions to this rule have been recognized, however, to render misconduct evidence admissible if, for example, the evidence is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis.

. . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . . Since the admission of uncharged misconduct evidence is a decision within the discretion of the trial court, we will draw every reasonable presumption in favor of the trial court's ruling. . . . We will reverse a trial court's decision only when it has abused its discretion or an injustice has occurred." (Internal quotation marks omitted.) *State* v. *Franklin*, 162 Conn. App. 78, 96, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016).

A

In the present case, the defendant contends that Colon's testimony was not relevant because the state failed to establish that the revolver Colon previously saw the defendant possess and the murder weapon were the same gun. This specific argument is unavailing, however, because this court has already concluded that "[e]vidence indicating that an accused possessed an article with which the particular crime charged may have been accomplished is generally relevant to show that the accused had the means to commit the crime. . . . *The state does not have to connect a weapon directly to the defendant and the crime. It is necessary only that the weapon be suitable for the commission of the offense*." (Citation omitted; emphasis altered; internal quotation marks omitted.) Id.

In *Franklin*, a firearms examination determined that the gun used to kill the victim was a nine millimeter semiautomatic pistol. Id., 97. At trial, in order to establish that the defendant possessed the means to commit the crime, the state admitted the testimony of a witness that, approximately three months before the murder, she was confronted by the defendant who "point[ed]

at her what 'looked like a little gun' and threatened to shoot her." Id., 95. The witness testified that she could not tell whether the gun was a semiautomatic pistol or a revolver, and that "all that she saw was the small, skinny nozzle of the gun and part of the barrel." (Internal quotation marks omitted.) Id. On appeal, the defendant claimed that the witness' testimony was not relevant to the issue of whether he possessed the means to commit the murder because her description of the gun was not sufficiently similar to the semiautomatic pistol used to shoot the victim. Id., 97. In rejecting this claim, this court noted that the defendant's effort to establish that the evidence was not relevant was primarily based on "speculation that [the witness] only possibly could have seen a revolver, not a pistol." Id. Comparing the witness' description of the gun with the semiautomatic pistol used in the shooting, however, this court concluded that "[t]he jury reasonably could have inferred from [the witness'] testimony that she saw a handgun, and at that time, the defendant possessed a weapon suitable for the commission of the offense charged." Id., 97–98; see also *State* v. *Sivri*, 46 Conn. App. 578, 585, 700 A.2d 96 (rejecting claim that there was insufficient connection between large caliber handguns recovered from defendant's residence and murder of victim, where state presented evidence that victim lost large quantity of blood in defendant's family room and holes in victim's skull indicated she was killed by large caliber handgun), cert. denied, 243 Conn. 938, 702 A.2d 644 (1997).

Our review of the record in the present case persuades us that the court did not abuse its discretion in determining that Colon's testimony was relevant. Relevance, in this context, is satisfied by a showing that the prior weapon was "suitable for the commission" of the present crime. *State* v. *Franklin*, supra, 162 Conn. App. 97–98. Suitability is sufficient because "[t]he state does

not have to connect a weapon directly to the defendant and the crime. It is necessary only that the weapon be suitable for the commission of the offense." (Emphasis omitted.) Id. Here, the evidence adduced at trial established that the revolver that Colon previously observed in the defendant's possession was suitable for the murder. At trial, Stephenson testified that, after examining the bullet fragments recovered from the victim, he determined that the bullet was consistent with eight different kinds of revolvers and only one kind of semiautomatic pistol. The absence of a spent shell casing at the scene of the shooting was also consistent with the use of a revolver. Additionally, Sterling testified that she saw the defendant inside his apartment on the night of the shooting holding a gun and saying, "let's play Russian roulette." Although this evidence does not establish a definitive connection between the revolver previously observed in the defendant's possession and the firearm used to kill the victim, the jury could infer from this evidence that three months prior to the shooting the defendant possessed and had access to the same type of firearm used in the shooting.

We further note that the fact that Correa handed the murder weapon to the defendant moments before the victim was shot does not render Colon's testimony less relevant. Although the defendant argues that the murder weapon could have been Correa's gun and not the revolver Colon saw the defendant previously possess, that argument is unpersuasive in light of *Franklin*, which specifically rejects the need "to connect a weapon directly to the defendant and the crime." *State* v. *Franklin*, supra, 162 Conn. App. 96. Moreover, the evidence adduced at trial does not necessarily support the defendant's argument. To the contrary, J.R. testified that throughout the night of October 9, 2009, a group of individuals, including Correa, was inside the defendant's apartment and on the back porch drinking alcohol. J.R. and Sterling testified that, during that time

period, they saw the defendant carrying a gun, and circumstantial evidence supported the inference that the defendant's gun was a revolver. Specifically, the defendant stated, "let's play Russian roulette," no shell casing was recovered from the scene, and the state's firearms examiner testified that the bullet fragments recovered from the victim were consistent with eight different kinds of revolvers, but only one kind of semiautomatic pistol. Although Correa ultimately passed the defendant the murder weapon, the jury reasonably could have inferred that the murder weapon was the same revolver that J.R. and Sterling saw the defendant holding earlier that night. Additionally, J.R. testified that the defendant was "always around guns," but that he did not keep guns inside his apartment. Finally, no evidence was produced at trial that excluded the revolver Colon previously observed in the defendant's possession as the firearm used to commit the murder. Accordingly, Colon's testimony was relevant to the issue of whether the defendant had the means to commit the crime. See *State* v. *Franklin*, supra, 96.

B

We next turn to whether the prior misconduct evidence was more prejudicial than probative. Here, the defendant argues that the probative value of Colon's testimony was minimal because the state failed to connect the revolver to the shooting and because it was cumulative of other evidence. The defendant further contends that the prejudicial effect of Colon's testimony, including details that the defendant had been the perpetrator in a prior shooting, outweighed the testimony's minimal probative value, and that the court's curative instruction exacerbated the prejudicial effect of the evidence. We disagree.

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial

effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jur[ors]. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value. . . . Finally, [t]he trial court's discretionary determination that the probative value of evidence is not outweighed by its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown. . . . [B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Pena*, 301 Conn. 669, 675–76, 22 A.3d 611 (2011).

Our review of the record leads us to conclude that the court did not abuse its discretion in determining that the prejudicial effect of Colon's testimony did not outweigh its probative value. We do not agree with the defendant's contention that Colon's testimony lacked probative value because the two guns were not shown conclusively to be the same, or that the testimony was entirely cumulative of other evidence. As previously noted; see part I A of this opinion; evidence that the defendant previously possessed a weapon, introduced to show that he had the means to commit the crime alleged, is relevant and probative if the prior weapon is a type that is suitable for the commission of the charged crime. See *State* v. *Franklin*, supra, 162 Conn. App. 97–98. Further, Colon's testimony was not cumulative of other trial testimony. Although J.R. testified that

the defendant always was around guns, and both J.R. and Sterling testified that they saw the defendant in possession of a gun on the night of the crime, neither witness was able to specify that she saw the defendant in possession of a revolver. Thus, Colon was the only witness who provided direct evidence that, prior to the night of the crime, the defendant had access to a revolver. This was a contested issue as, during pretrial arguments, the defendant declined to stipulate that he was in possession of a revolver on the night of the murder. Viewed in conjunction with Stephenson's testimony that the bullet fragments recovered from the victim were consistent with the use of a revolver, and Sterling's testimony that, on the night of the murder, the defendant brandished a gun suitable for Russian roulette, Colon's direct testimony that the defendant previously had access to a revolver carried probative value.

Likewise, we disagree that Colon's testimony was overly prejudicial. First, we note that in the trial court the defendant's objection to the evidence on prejudice grounds was based on the danger that testimony regarding the circumstances of his prior possession of a revolver, specifically, that he shot Colon during a drive-by shooting, would be placed before the jury. The court, however, took care to limit this prejudicial effect by permitting Colon to testify only that he saw the defendant on July 19, 2009, in possession of a revolver. This ruling, therefore, precluded the portion of Colon's testimony that would have caused undue prejudice. See *State* v. *Pena*, supra, 301 Conn. 676 ("[A]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jur[ors]."

[Internal quotation marks omitted.]). Moreover, the defendant himself elicited testimony about the use of the revolver in a drive-by shooting before the state called Colon as a witness. The defendant did so knowing that the court's ruling forbade the state from presenting testimony regarding the drive-by shooting at any point during the trial. Accordingly, the defendant elicited the precise testimony he argued was unduly prejudicial without any prompting from the state and, as a result, was solely responsible for any undue prejudice that stemmed from Colon's limited testimony.[3] See *State* v. *Holley*, 160 Conn. App. 578, 631, 127 A.3d 221 ("[i]t is well settled that [a] defendant cannot rely upon the admission of evidence which he himself introduced as a basis for a reversal of his conviction" [internal quotation marks omitted]), cert. granted on other grounds, 320 Conn. 906, 127 A.3d 1000 (2015). Further, Colon's testimony that the defendant possessed a gun was not likely to evoke an emotional response from the jury in a case where the defendant was charged with murder. *State* v. *Collins*, 299 Conn. 567, 588, 10 A.3d 1005 ("[u]ncharged

[3] We further reject the defendant's claim that the court's pretrial ruling to admit Colon's testimony *compelled* him to cross-examine Jacobson and Cardona about the defendant's use of the revolver in a nonfatal shooting. In its pretrial ruling, the court explicitly stated, and then reiterated upon the defendant's request for clarification, that Colon could not testify as to the use of the revolver in the drive-by shooting or that the incident resulted in criminal charges against the defendant. The defendant thus made an unprompted strategic decision to elicit the potentially inflammatory evidence from Jacobson and Cardona in order to impeach their credibility and to prevent the jury from speculating about the details of the July 19, 2009 incident. That this tactic proved ineffective does not provide the defendant with grounds to overturn his conviction on appeal. See *State* v. *Gibson*, 270 Conn. 55, 67, 850 A.2d 1040 (2004) ("[t]o allow [a] defendant to seek reversal [after] . . . his trial strategy has failed would amount to allowing him to induce potentially harmful error, and then ambush the state [and the trial court] with that claim on appeal" [internal quotation marks omitted]); see also *State* v. *Clark*, 48 Conn. App. 812, 820 n.6, 713 A.2d 834 ("[a]n appellant cannot create a reviewable claim because his appellate counsel disagrees with the strategy of his trial counsel"), cert. denied, 245 Conn. 921, 717 A.2d 238 (1998).

misconduct evidence has been held not unduly prejudicial when the evidentiary substantiation of the vicious conduct, with which the defendant was charged, far outweighed, in severity, the character of his prior misconduct" [internal quotation marks omitted]), cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

Finally, we decline to review the defendant's argument that the limiting instruction provided by the court exacerbated the prejudicial effect of Colon's testimony. Overlooking the court's instruction that the evidence is "not [to] be used for any other reason including any indication of that character or propensity to do any type of act," the defendant argues that the court's limiting instruction improperly permitted the jury to consider the evidence as "an element" of the offense and, in that capacity, as propensity evidence. The defendant, however, did not object to the limiting instruction that the court issued directly after Colon testified and did not object to the uncharged misconduct instruction that the court gave in its final instructions to the jury. See also part II of this opinion (dismissing as waived defendant's challenge to jury instruction). Accordingly, we decline to review the defendant's unpreserved argument that the court's limiting instruction exacerbated the prejudicial effect of the prior misconduct evidence; see Practice Book § 60-5; *State* v. *William C.*, 103 Conn. App. 508, 520 n.6, 930 A.2d 753, cert. denied, 284 Conn. 928, 934 A.2d 244 (2007); and conclude that the court did not abuse its discretion in admitting the evidence.

II

The defendant next claims that the court provided an incorrect instruction to the jury regarding the state's burden of proof beyond a reasonable doubt. In response, the state argues that the defendant waived his challenge to the court's instructions under *State* v.

Kitchens, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). The defendant, however, argues that *Kitchens* does not apply to the present claim and, alternatively, requests that we overrule *Kitchens*. We agree with the state.

On October 3, 2013, prior to instructing the jury, the court held a charging conference on the record in which it stated that the parties had received a copy of the proposed jury instructions earlier that morning for review. The court then reviewed with counsel each individual page of the proposed instructions and solicited comments and objections. The defendant did not object or suggest any changes to the proposed instructions on reasonable doubt at the charging conference, and did not object to the reasonable doubt instruction when the charge was read to the jury.

In *State* v. *Kitchens*, supra, 299 Conn. 482–83, our Supreme Court concluded that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal."

Our careful review of the record in the present case indicates that the defendant waived his challenge to the reasonable doubt instructions under *Kitchens*. Here, the court provided the defendant with a copy of the proposed jury instructions, which included the instruction being challenged on appeal, as well as a meaningful opportunity to review them. The court then held a charging conference on the record where it reviewed the proposed instructions page by page and

solicited the parties' comments and objections. Nevertheless, the defendant did not object to the reasonable doubt instruction. Under these circumstances, the defendant waived his instructional claim.

Our review does not end here, however, because the defendant argues that *Kitchens* is not applicable to the present case because the court did not mark as an exhibit the proposed jury instructions that were provided to the defendant for review. We disagree with this argument. The court in *Kitchens* held that the defendant impliedly waives his or her constitutional right to challenge jury instructions on appeal "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given . . . ." Id. The record here clearly establishes that the defendant was provided with a copy of the proposed jury instructions, given a meaningful opportunity to review them, and failed to object to the instructions when the court read the same instructions to the jury. That the court did not mark the proposed instructions as a court exhibit does not alter this analysis.[4]

III

The defendant next claims that he was denied the right to a fair trial due to prosecutorial impropriety. Specifically, the defendant argues that, during closing and rebuttal arguments, the prosecutor (1) made statements that were speculative and not based on evidence in the record, and (2) misstated the law regarding the

[4] We also are unable to accept the defendant's invitation to overrule *Kitchens*. "[T]his court will not reexamine or reevaluate Supreme Court precedent. Whether a Supreme Court holding should be reevaluated and possibly discarded is not for this court to decide." (Internal quotation marks omitted.) *State* v. *Billie*, 123 Conn. App. 690, 706, 2 A.3d 1034 (2010).

standard of proof beyond a reasonable doubt. We conclude that none of the statements at issue was improper, and, consequently, we do not address the defendant's claim that the alleged improprieties violated his due process right to a fair trial.

As an initial matter, we note that the defendant did not object to any of the challenged statements at trial. "It is well established law . . . that a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . . Our Supreme Court has explained that the defendant's failure to object at trial to each of the occurrences that he now raises as instances of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his claims. . . . This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper . . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time. . . . With this maxim in mind, we proceed with our review of the defendant's claim[s]." (Citations omitted; internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 782, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

"[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step process. The two steps are separate and distinct: (1) whether [an impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived [the] defendant of his due process right to a fair trial. Put differently, [an impropriety

is an impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question . . . .'' (Internal quotation marks omitted.) *State* v. *Franklin*, supra, 162 Conn. App. 100. ''[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process.'' (Internal quotation marks omitted.) *State* v. *Maner*, supra, 147 Conn. App. 783.

''When reviewing the propriety of a prosecutor's statements, we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial. . . . Finally, when a prosecutor's potentially improper remarks are ambiguous, a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015).

A

We first address the defendant's claim that the prosecutor improperly engaged in speculation and commented on facts not in evidence when she argued to the jury during closing argument that ''[J.R.] was present at the installation [of the monitoring unit],'' and that ''people in that area are familiar with electronic bracelets . . . .'' See footnote 1 of this opinion.

''We long have held that a prosecutor may not comment on evidence that is not a part of the record and

may not comment unfairly on the evidence in the record. . . . However, the prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom . . . . Furthermore, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . While a prosecutor is not permitted to interject his own opinion generally, he must be permitted to speak to the cumulative evidence he has put forth during the course of trial. . . . Likewise, [w]e must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Citations omitted; internal quotation marks omitted.) *State* v. *Franklin*, supra, 162 Conn. App. 101.

We conclude that the prosecutor's comment to the jury that, "[m]aybe, [J.R.] was present at the installation," properly was based upon the evidence elicited at trial. At trial, J.R. testified that, prior to the shooting, she assisted the defendant in testing the range of his bracelet. Additionally, Matthew Kennedy, a manager from the electronic monitoring company, testified that range testing could only be conducted when the monitoring unit was initially installed. The prosecutor's comment, therefore, was a reasonable inference that reconciled both sets of testimony.

Likewise, we conclude that the prosecutor's comment that "the people in that area are familiar with the electronic bracelets," could reasonably have been inferred from evidence in the record. Kennedy testified that the monitoring unit in the defendant's residence

had a range of 150 feet. The state admitted an electronic monitoring report into evidence that revealed that from October 9 through October 12, 2009, the defendant's monitoring unit had detected eight other electronic bracelets in that range. Thus, during that three day period, there were at least eight other individuals in close proximity to the defendant's residence who were subject to electronic monitoring. The jury reasonably could have inferred from this evidence that people in the defendant's area were generally familiar with electronic monitoring bracelets. Accordingly, the prosecutor's comments to the jury were not improper.

B

We next address the defendant's claim that the prosecutor misstated the law regarding the standard for proof beyond a reasonable doubt during her closing argument. During her closing argument, the prosecutor made the following remark: "No one gave you any reason to believe that anyone other than the defendant killed [the victim]. And no one gave you a reason to believe the defendant couldn't have been the one to kill [the victim]." During rebuttal argument, the state argued: "And the last thing I want to leave you with is that reasonable doubt is not, I don't know, maybe it happened a different way. I don't know, maybe somebody else did it. I don't know, maybe we're not sure. Reasonable doubt is a real doubt . . . an honest doubt, a doubt which you can attach a reason to. *I don't believe that* [*J.R.*] *is telling the truth because. I don't believe* [*Rodriguez*] *is telling the truth because. A doubt that you can actually enunciate. A doubt that you can express*, *not some like oh*, *I don't know*, *maybe something else.* Not based on speculation. Not based on conjecture. If you believe [J.R.], then [the defendant] shot and killed [the victim]. And if you believe . . . Rodriguez, then [the defendant] shot and killed [the victim]. And if you look at their testimony in light of

everybody else's, and all the things that you know, and the fact that the electronic bracelet does not provide an alibi for him, then you have to find him guilty and that's what I'm asking you to do." (Emphasis added.)

On appeal, the defendant argues that the prosecutor's comments improperly suggested to the jury that reasonable doubt required the jurors to articulate a reason in order to find the defendant not guilty, which impermissibly shifted the burden to the defendant to prove his innocence. We disagree.

It is well established that "prosecutors are not permitted to misstate the law . . . and suggestions that distort the government's burden of proof are likewise improper . . . because such statements are likely to improperly mislead the jury." (Internal quotation marks omitted.) *State* v. *Herring*, 151 Conn. App. 154, 172, 94 A.3d 688, cert. granted on other grounds, 314 Conn. 914, 100 A.3d 849 (2014). However, "[w]e consistently have held that the definition of reasonable doubt as a real doubt, an honest doubt, a doubt which has its foundation in the evidence or lack of evidence, as a doubt for which a valid reason can be assigned, and as a doubt in which the serious affairs which concern you in every day life you would pay heed and attention to does not dilute the state's burden of proof when such definitions are viewed in the context of an entire [jury] charge." (Internal quotation marks omitted.) *State* v. *Ferguson*, 260 Conn. 339, 371, 796 A.2d 1118 (2002); see also *State* v. *Ellis*, 232 Conn. 691, 705, 657 A.2d 1099 (1995) (rejecting claim that state's burden of proof was diluted on basis of jury instruction that "[a] reasonable doubt is a doubt for which a valid reason can be assigned" [internal quotation marks omitted]).

In the present case, none of the prosecutor's remarks, viewed in conjunction with the entirety of the closing and rebuttal arguments, improperly misstated the law

regarding reasonable doubt. See *State* v. *Ferguson*, supra, 260 Conn. 371; *State* v. *Ellis*, supra, 232 Conn. 705. Moreover, the prosecutor did not misstate the law when she commented to the jury that, "I don't believe that [J.R.] is telling the truth because. I don't believe [Rodriguez] is telling the truth because." In view of the context in which these statements were made, it is clear that the prosecutor merely was encouraging the jury to determine the credibility of the state's witnesses on the basis of the actual evidence presented at trial rather than their own speculation. This court previously rejected a claim of prosecutorial impropriety where the comments "directed the jury to do exactly what it was supposed to do—weigh the credibility of the witness in accordance with all of the evidence put before it in the courtroom and not engage in speculation. . . . Asking the jury to believe a witness unless there is evidence to discredit the witness is a proper request and in no way shifts the burden of [proof] from the state to the defendant." (Citation omitted.) *State* v. *Betancourt*, 106 Conn. App. 627, 641, 942 A.2d 557, cert. denied, 287 Conn. 910, 950 A.2d 1285 (2008). Because the prosecutor's comments did no more than discourage speculation, they were not improper.

IV

The defendant's final claim is that the trial court abused its discretion in failing to release all of J.R.'s psychiatric records to the defense following an in camera review of the records. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the state subpoenaed J.R.'s mental health records from Capital Region Mental Health Center, where she had been a patient from June, 2008, to March, 2009, and Hartford Behavioral Health, where she had been a patient from August, 2011, to September, 2013. On

September 27, 2013, the defendant filed a motion requesting that the court review J.R.'s mental health records in camera and turn over to the defense any material from the records that would be relevant to J.R.'s testimonial capacity. On September 27, 2013, the court held a hearing on the defendant's motion, where it determined that the defendant had made the requisite preliminary showing to support an in camera review of the records. The court then reviewed the records in camera. On September 30, 2013, after reviewing the records, the court stated on the record that "[it had] go[ne] over [J.R.'s] files from both Hartford Behavioral Health and the Capital Region, and gave to [defense] counsel anything that was relevant concerning credibility, ability to testify, anything in that regard, and that would be needed for trial."

"Upon inspecting the records in camera, the trial court must determine whether the records are especially probative of the witness' capacity to relate the truth or to observe, recollect and narrate relevant occurrences. . . . If the court determines that the records are probative, the state must obtain the witness' further waiver of his privilege concerning the relevant portions of the records for release to the defendant, or have the witness' testimony stricken. If the court discovers no probative and impeaching material, the entire record of the proceeding must be sealed and preserved for possible appellate review. . . . Once the trial court has made its inspection, the court's determination of a defendant's access to the witness' records lies in the court's sound discretion, which we will not disturb unless abused." (Internal quotation marks omitted.) *State* v. *Slimskey*, 257 Conn. 842, 855–56, 779 A.2d 723 (2001). On appeal, the appellate tribunal reviews the confidential records to determine whether the trial court abused its discretion in concluding that no information contained therein is "especially probative of the

victim's ability to know and correctly relate the truth so as to justify breaching their confidentiality in disclosing them to the defendant." *State* v. *Storlazzi*, 191 Conn. 453, 460, 464 A.2d 829 (1983). "We are mindful that the restriction of a defendant's access to a witness' confidential records implicates the defendant's constitutional right to impeach and discredit state witnesses." (Internal quotation marks omitted.) *State* v. *Francis*, 267 Conn. 162, 172, 836 A.2d 1191 (2003).

Our independent review of J.R.'s mental health records, viewed in conjunction with the entire trial transcript, confirms the court's conclusion that the material contained therein that was not disclosed by the court is not relevant to J.R.'s credibility or capacity as a witness. Accordingly, we conclude that the court properly exercised its discretion by refusing to disclose certain portions of the records to the defense.

The judgment is affirmed.

In this opinion the other judges concurred.

TOMEY REALTY COMPANY, INC. *v.* BOZZUTO'S, INC.
(AC 38057)

Alvord, Keller and Pellegrino, Js.

Syllabus

The plaintiff landlord sought to recover damages from the defendant tenant for, inter alia, breach of a commercial lease agreement. The lease, which was originally between the plaintiff and S Co., provided that the base rent for the first four years of the lease would be $216,000 per year, and that in the fifth year of the lease S Co. was obligated to pay the plaintiff the base rental amount, plus the cumulative increase in the consumer price index over the previous four year period. In the fifth year of the lease, the plaintiff, S Co., and the defendant executed an assignment of the lease, pursuant to which the defendant replaced S Co. as the plaintiff's tenant under the lease. In the preamble of the lease assignment, there was a "whereas" clause that specified that the annual base rent under the lease was $216,000. Contemporaneously with the execution of the assignment, the plaintiff and the defendant executed

an amendment of the lease that modified the base rent beginning in the sixth year of the lease. Although the agreement provided that the rental increases after the fifth year of the lease would no longer track the consumer price index, the amendment did not alter the fifth year cumulative rent increase. The plaintiff brought this action alleging that the defendant breached the lease due to its failure to pay any portion of the fifth year cumulative rent increase. The trial court, relying primarily on the "whereas" clause in the preamble of the lease assignment, granted the defendant's motion for summary judgment, concluding that, under the terms of the lease, the assignment, and the amendment, there was no genuine issue of material fact that the amount of base rent due in the fifth year of the lease remained at $216,000 per year. The court also determined that there was no genuine issue with respect to whether the parties to the assignment had intended to eliminate, from the calculation of the base rent due for the sixth year of the lease and thereafter, the fifth year cumulative rent increase. The plaintiff thereafter appealed to this court. *Held* that the trial court improperly granted the defendant's motion for summary judgment, there having remained a genuine issue of material fact as to whether the parties intended to eliminate, from the calculation of the base rent due for the sixth year of the lease and thereafter, the fifth year cumulative rent increase, as neither the amendment nor the assignment expressly deleted the lease provision modifying the fifth year cumulative rent increase; moreover, although the "whereas" clause in the preamble of the assignment suggested that the annual base rent for the fifth year of the lease was $216,000, that did not negate the obligation set forth in the lease nor modify the operative provisions of the amendment and the assignment, as it is a fundamental contract principle that recitals in a contract are not binding obligations unless referred to in the operative provisions of the contract, which was not the case here.

Argued April 6—officially released October 4, 2016

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the defendant filed a counterclaim; thereafter, the court, *Roraback*, *J.*, denied the plaintiff's motion for summary judgment, and granted the defendant's motion for summary judgment as to the complaint and rendered judgment thereon; subsequently, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Eric M. Grant, with whom, on the brief, were *Joseph P. Yamin* and *Melissa A. Scozzafava*, for the appellant (plaintiff).

John P. Santucci, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff in this breach of contract action, Tomey Realty Co., Inc., appeals from the judgment of the trial court granting summary judgment on the plaintiff's complaint in favor of the defendant, Bozzuto's, Inc.[1] On appeal, the plaintiff claims that the court erred in granting the defendant's motion for summary judgment because, in doing so, it ignored the operative language of the parties' integrated contractual agreement regarding the lease of commercial property and determined the amount of base rent owed under the lease, as amended, by improperly relying on a "whereas" clause in the preamble of the lease assignment. We reverse the judgment of the trial court.

The following procedural history and facts, which the parties do not appear to dispute, are relevant to this appeal. In August, 2007, the plaintiff entered into a ten year commercial lease agreement (lease) with its tenant, Southbury Food Center of Connecticut, Inc. (Southbury Food). In the first paragraph of section 4 of the lease, the plaintiff and Southbury Food agreed that the base rent for the first four years of the lease would be $216,000 per year, payable in equal monthly installments of $18,000. In the second paragraph of section 4 of the lease, the plaintiff and Southbury Food further agreed that for the fifth year of the lease, the base rent would increase, and Southbury Food would pay as annual base rent the sum of $216,000, plus the

[1] The court's summary judgment disposed of all counts brought against the defendant by the plaintiff. After the court's decision in favor of the defendant on its motion for summary judgment, however, the defendant's counterclaim against the plaintiff remained pending.

cumulative increase in the Consumer Price Index (CPI) over the previous four year period as issued by the United States Department of Labor (fifth year cumulative rent increase).[2]

On May 14, 2012, which was nine months into the fifth year of the lease, the plaintiff, Southbury Food, and the defendant executed a lease assignment (assignment) pursuant to which the defendant replaced Southbury Food as the plaintiff's tenant under the lease.[3] In the preamble, the assignment contained several "whereas" clause provisions, the third of which provided as follows: "WHEREAS; the [current] annual base rent for the period [of] September 1, 2011, to August 31, 2012, is [$216,000 (e.g., $18,000 per month)] . . . ."[4] The assignment further provided, in paragraph 5 of the body of the document, that the plaintiff "is not in default pursuant to any [l]ease provision and [Southbury Food] is not in default of any [l]ease provision and remains current in the payment of all obligations thereunder . . . ." A copy of the lease was attached to the assignment as exhibit A.

Contemporaneously with the execution of the assignment, the plaintiff and the defendant also executed a lease amendment (amendment), which amended, in

[2] The lease provided the following example to illustrate how the fifth year cumulative rent increase would be calculated: "For example, if [the cumulative rent increase in the [CPI] was three percent (3%) for each of the [l]ease's first four years, then the base annual rent shall be . . . ($241,920) (((($216,000 x .03) x 4) + 216,000)."

[3] Southbury Food assigned all of its right, claim, title, and interest in and to the demised premises as set forth in its lease with the plaintiff.

[4] The plaintiff alleged in its complaint that "[o]n or about October 12, 2011, Tomey Realty agreed to a temporary rent concession for one year retroactive to August 1, 2011. Pursuant to the temporary concession, the base rental remained $216,000 . . . for the fifth year of the lease, and the [fifth year cumulative rent increase] was delayed until September 1, 2012. All other aspects of the lease remained in effect pursuant to the temporary concession." A copy of the alleged temporary concession letter was attached to the plaintiff's complaint as an exhibit.

part, the lease originally entered into by the plaintiff and Southbury Food. At the time the amendment was executed, nine months of the fifth year of the lease had elapsed. The amendment modified the base rent calculation commencing in the sixth year of the lease as follows: "With respect to Section 4 BASE RENTAL . . . of the [l]ease, the third paragraph therein shall be deleted and replaced with the following: 'Thereafter, the base rental for each year shall increase by 2.5% over the immediately preceding year's base rental and shall be payable in twelve equal monthly installments on the first day of each month without any prior demand, deduction or setoff whatsoever.' " Thus, the rental increases after the fifth year of the lease would no longer track the CPI. The amendment made no other changes to section 4 of the lease and specifically provided that "[e]xcept as provided hereinabove, the remaining terms and conditions of the lease shall remain unmodified and in full force and effect." The amendment did not alter the fifth year cumulative rent increase set forth in the second paragraph of section 4 of the lease. It further stated, in section 1, which deleted and replaced only the third paragraph of section 4 of the lease, that the base rent for each year would increase by 2.5 percent over the immediately preceding year's base rent. When the lease and the amendment are read together, the "immediately preceding year's base rental" refers to the base rental required to be paid in the fifth year of the lease, which includes the fifth year cumulative rent increase. A copy of the lease was attached to the amendment as exhibit A.

As of April 1, 2015, the date on which the court issued its memorandum of decision granting the defendant's motion for summary judgment and denying the plaintiff's motion for summary judgment, the defendant had not paid to the plaintiff, as base rent, any portion of the fifth year cumulative rent increase, which the plaintiff

argues became due on September 1, 2012. Instead, commencing on September 1, 2012, the beginning of the sixth year of the lease, the defendant paid an annual increase of 2.5 percent on a base rent of $216,000.

On March 20, 2013, the plaintiff commenced the present action against the defendant, alleging that the defendant had breached the lease due to its failure to pay any portion of the fifth year cumulative rent increase set forth in the second paragraph of section 4 of the lease, which it claimed became due and payable, in twelve equal monthly installments, on September 1, 2012.

On September 12, 2013, the defendant filed its answer, in which it asserted the special defenses of novation, waiver, and estoppel. The defendant also filed a counterclaim alleging that the May 14, 2012 amendment constituted a novation which modified the "rent escalation clause" to "limit increases annually to 2.5 [percent] in the event [Southbury Food] assigned its lease to the defendant."

On November 20, 2014, the defendant filed a motion for summary judgment. The plaintiff also filed a motion for summary judgment on November 24, 2014.[5] On January 7, 2015, the plaintiff filed an objection to the defendant's motion for summary judgment. The court heard oral argument from the parties on their motions for summary judgment on January 12, 2015.

As stated previously, on April 1, 2015, the court issued a memorandum of decision, wherein it granted the defendant's motion for summary judgment and denied

[5] The plaintiff attached copies of the following documents to its motion: an affidavit of Edward Tomey, the plaintiff's director; the lease; the assignment; the amendment; the affidavit of Keith Sullivan, the plaintiff's accountant; a table providing CPI data from 1913 to 2014; and a table documenting the defendant's rental payments made to the plaintiff from September, 2012, to November, 2014.

the plaintiff's motion for summary judgment.[6] In its memorandum of decision, the court stated in relevant part: "The present dispute revolves around the question of whether under the terms of the [lease, the assignment, and the amendment], [the defendant] is obligated to pay [the plaintiff the fifth year cumulative rent increase] which was provided for in [section] 4 of the [lease]. Both parties . . . moved for summary judgment claiming that they are entitled to judgment as a matter of law.

* * *

"The [fifth year cumulative rent increase] in dispute is defined in the following language in the second paragraph of [section] 4 of the [lease]: For the fifth year of the lease [beginning September 1, 2011], [t]enant agrees to pay [l]andlord . . . base rental at the annual rental amount of [$216,000], plus the cumulative increase in the Consumer Price Index [CPI] . . . over the previous four year period.

"Neither the [assignment] nor the [amendment] make specific reference to the [fifth year cumulative rent increase] despite the fact that at the time these agreements were executed in May, 2012, nine monthly payments incorporating the [fifth year cumulative rent increase] would already have become due under the terms of the [lease].[7] In addition, paragraph 5 of the [assignment] recites that [Southbury Food] is not in default of any lease provision and remains current in

[6] The plaintiff did not appeal from the court's denial of that motion.

[7] "While the plaintiff alleges and [the defendant] references the existence of a verbal understanding between [the plaintiff] and Southbury [Food] pursuant to which payment of the [fifth year cumulative rent increase] would be deferred for a year, the parol evidence rule forbids the use of extrinsic evidence outside the four corners of the contract to vary or contradict its terms. *Alstom Power, Inc.* v. *Blacke-Durr, Inc.*, 269 Conn. 599, 609, 849 A.2d 804 (2004)."

the payment of all obligations thereunder. Those obligations are identified in the preamble of the [assignment] as follows: [T]he current annual base rent for the period [of] September 1, 2011, to August 31, 2012, is [$216,000] [e.g., $18,000 per month].

"It is true that generally whereas clauses are merely explanations of the circumstances surrounding the execution of the contract and are not binding obligations unless referred to in the operative provisions of the contract. . . . *DeMorais* v. *Wisniowski*, 81 Conn. App. 595, 610, 841 A.2d 226, cert. denied, 268 Conn. 923, 848 A.2d 472 (2004). In this case, however, the body of the contract provides that [Southbury Food] was current in the very rent whose amount is specified only in the preamble, thereby rendering enforceable the amounts recited in that preamble.

* * *

"Reading together all three of the written agreements whose collective terms the parties have agreed must be interpreted in order to resolve this dispute, there is only one way to reconcile them and give them effect according to their terms. The documents must be interpreted to conclude that the [fifth year cumulative rent increase] in question was not incorporated into either the [assignment] or the [amendment], both of which were signed after the [fifth year cumulative rent increase] had become due." (Footnote in original; internal quotation marks omitted.)

On April 10, 2015, the plaintiff filed a motion to reargue, which the court denied on June 1, 2015. This appeal followed. Additional facts shall be set forth as necessary.

The plaintiff claims that the court erred in granting summary judgment in favor of the defendant because it relied upon the third "whereas" clause in the preamble

of the assignment to determine that the amount of base rent due in the fifth year of the lease remained at $216,000 per year. Specifically, the plaintiff argues that (1) the defendant took assignment of the entire lease, including the fifth year cumulative rent increase set forth in the second paragraph of section 4 of the lease, (2) the fifth year cumulative rent increase was neither modified nor eliminated by the amendment, and (3) the amount of base rent due is specified in the lease and the amendment, and the court should not have considered the language of the "whereas" clause in the preamble of the assignment. In opposition, the defendant argues that the court properly granted summary judgment in its favor because the assignment and the amendment resulted in a novation whereby the plaintiff released Southbury Food for all its responsibility under the lease, and modified the defendant's rental obligations under the lease in accordance with the assignment and the amendment.[8] We agree with the plaintiff and conclude that the fifth year cumulative rent increase was not eliminated indisputably by the language of the amendment or the assignment and that, as a result, a genuine issue of material fact exists as to whether the defendant is obligated to include in its base rental payments an additional sum representing the fifth year cumulative rent increase pursuant to the second paragraph of section 4 of the lease.

We begin our analysis by stating the appropriate standard of review. "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

[8] Furthermore, the defendant argues that if this court affirms the judgment of the trial court, the case should be remanded to that court solely for adjudication of its counterclaim, which seeks attorney's fees pursuant to the lease. Because we are reversing the judgment, we need not consider this claim.

fact and that the moving party is entitled to judgment as a matter of law. . . . 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. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . [T]he scope of our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 312–13, 77 A.3d 726 (2013). "[T]he genuine issue aspect of summary judgment procedure 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. . . . [S]ummary judgment is to be denied where there exist genuine issues of fact and inferences of mixed law and fact to be drawn from the evidence before the [c]ourt." (Internal quotation marks omitted.) *Rickel* v. *Komaromi*, 144 Conn. App. 775, 791, 73 A.3d 851 (2013).

Because the motion for summary judgment at issue in the present appeal concerns a commercial lease, we also set forth relevant contract law principles. A lease is a contract and, therefore, "it is subject to the same rules of construction as other contracts. . . . The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the

parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . . If the language of [a] contract is susceptible to more than one reasonable interpretation, [however] the contract is ambiguous. . . .

"In construing a written lease . . . three elementary principles must be [considered]: (1) The intention of the parties is controlling and must be gathered from the language of the lease in light of the circumstances surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; [and] (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible. . . . Furthermore, when the language of the [lease] is clear and unambiguous, [it] is to be given effect according to its terms. A court will not torture words to import ambiguity [when] the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [lease] must emanate from the language used in the [lease] rather than from one party's subjective perception of [its] terms." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7–8, 931 A.2d 837 (2007).

"Contract language is unambiguous when it has a definite and precise meaning about which there is no reasonable basis for a difference of opinion. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Citation omitted; internal quotation marks omitted.) *Nash* v. *Stevens*, 144 Conn. App. 1, 18, 71 A.3d 635, cert. denied, 310 Conn. 915, 76 A.3d 628 (2013).

As previously noted, in the second paragraph of section 4, titled "Base Rental," the lease provides the following: "For the fifth year of the [l]ease, [t]enant agrees to pay [l]andlord at [l]andlord's office, without any prior demand therefore, and without any deduction or setoff whatsoever, base rental at the annual rental amount of . . . ($216,000), plus the cumulative increase in the [CPI as issued by the United States Department of Labor over the previous four year period]. For example, if [the CPI] was . . . 3% for each of the [l]ease's first four years, then the base annual rent shall be . . . ($241,920) (((($216,000 x .03) x4) + 216,000). The rent shall be payable in twelve equal monthly installments on the first day of each month." Furthermore, in the third paragraph of section 4, the lease provides the following: "Thereafter, the base rental for each year shall increase by the [CPI] over the immediately preceding year's base rental and shall be payable in twelve equal monthly installments on the first day of each month without any prior demand, deduction or setoff whatsoever."

The amendment, which was executed between the plaintiff and the defendant on May 14, 2012, provides the following in relevant part: "[The plaintiff] and [the defendant] agree that the [l]ease is hereby amended and modified as follows . . . With respect to [section 4, titled 'Base Rental'] of the [l]ease, the *third* paragraph therein shall be deleted and replaced with the following: 'Thereafter, the base rental for each year shall increase by 2.5% over the immediately preceding year's base rental and shall be payable in twelve equal monthly installments on the first day of each month without any prior demand, deduction or set-off whatsoever.' " (Emphasis added.) Section 6 of the amendment provides that "[e]xcept as expressly provided hereinabove, the remaining terms and conditions of the [l]ease shall remain unmodified and in full force and effect." The

amendment was signed by the plaintiff and the defendant on May 14, 2012.

The assignment, which the plaintiff, the defendant, and Southbury Food executed on May 14, 2012, provides the following in relevant part: "WHEREAS; the [l]ease has an original term of [ten years, commencing on September 1, 2007, and ending on August 31, 2017]; and

"WHEREAS; the [current] annual base rent for the period [of September 1, 2011 to August 31, 2012, is $216,000 (e.g., $18,000 per month)]; and

"WHEREAS; [the plaintiff], [Southbury Food] and [the defendant] fully acknowledge the validity of the [l]ease . . . ."

Following these and other recital provisions, the assignment provides in relevant part: "[Southbury Food] hereby assigns to [the defendant] all of [Southbury Food's] right, claim, title and interest in and to the leased premises as set forth in the [l]ease . . .

"[The defendant] hereby accepts [Southbury Food's] assignment of all of [Southbury Food's] right, claim, title and interest in and to the leased premises as set forth in the [l]ease . . .

"[The plaintiff] hereby consents to the aforesaid assignment from [Southbury Food] to [the defendant], subject to all the terms, conditions and restrictions herein stated and subject to [the defendant's] delivery of the security deposit required under the [l]ease . . .

"[The plaintiff] is not in default pursuant to any [l]ease provision and [Southbury Food] is not in default of any [l]ease provision and remains current in the payment of all obligations thereunder . . .

"Effective upon [Southbury Food's] closing and sale to [the defendant], [the plaintiff] hereby releases [Southbury Food] of any and all liability and obligation under said [l]ease . . .

"[The defendant] acknowledges that [the plaintiff] has not made any representation to [the defendant] with respect to the leased premises . . .

"[The defendant] acknowledges that it is familiar with the leased premises and with the improvements situated thereon and it hereby accepts the same in its present condition 'as is' and that same is suitable and habitable for its purposes; and . . .

"In all other respects, the parties hereby ratify and confirm the [l]ease." The assignment was executed by the plaintiff, the defendant, and Southbury Food on May 14, 2012.

Although the operative provisions of the lease as amended do not eliminate the payment of the fifth year cumulative rent increase, one statement in the preamble of the assignment creates an inconsistency in this regard. This inconsistency stems from the third "whereas" clause in the assignment, which provides that "the [current] annual base rent for the period [of September 1, 2011, to August 31, 2012, is $216,000 (e.g., $18,000 per month)]." The second paragraph of section 4 of the lease, however, provides that in the fifth year, the one year period that commences on September 1, 2011, and that the aforementioned "whereas" clause references, the tenant is required to pay the fifth year cumulative rent increase in addition to the original base rent of $216,000. Additionally, pursuant to section 1 of the amendment, the third paragraph of section 4 of the lease required that commencing in the sixth year of the lease, which began on September 1, 2012, the base rent for each year would increase by 2.5 percent over the base rent of the immediately preceding fifth year. Pursuant to the lease, the base rent for the fifth year is increased by the fifth year cumulative rent increase. Thus, the "whereas" clause in the assignment is inconsistent with the fifth year cumulative rent increase set

forth in the lease, which is not modified in section 1 of the amendment or in any of the operative provisions of the assignment. Pursuant to the second paragraph of section 4 of the lease, in addition to the base rent of $216,000, the defendant, as the tenant under the lease, would be responsible to pay the additional fifth year cumulative rent increase for that year of the lease, thereby elevating the amount of the base rent by that amount every year thereafter, in addition to the 2.5 percent increases contemplated to begin in the sixth year of the lease by virtue of the amendment.[9]

[9] There is also a genuine issue of material fact as to the meaning and import of paragraph 5 of the assignment, an operative provision, which states that Southbury Food "is not in default of any [l]ease provision and remains current in the payment of all obligations thereunder . . . ." Because the lease was not assigned or amended until May 14, 2012, nine months into the fifth year, the plain language of the lease would dictate that Southbury Food had begun to pay a base rent that included the fifth year cumulative rent increase effective September 1, 2011. Both parties, however, allege the existence of a temporary rent concession. See footnotes 4 and 7 of this opinion. Attached to the plaintiff's complaint is a letter, addressed to Barry Tarnowicz, the president and chief executive officer of Southbury Food, dated October 12, 2011, wherein Keith Sullivan, a certified public accountant who provided services for the plaintiff, indicated that the plaintiff was willing to permit Southbury Food to pay $216,000 in base rent for an additional year, retroactive to August 1, 2011. The letter further provided that "[a]ll aspects of the current lease remain in effect." The defendant also attached this letter to its motion for summary judgment, along with a financial statement of Southbury Food that indicated the following in relevant part: "[Southbury Food] leases its premises from [the plaintiff] . . . . Rent expense was $216,000 for each of the years ended December 31, 2011 and 2010. Effective September 1, 2011, in addition to the base rent, [Southbury Food] was to also pay the cumulative increase in the [CPI] over the previous four year period. The rent would then increase annually by the increase in the CPI each year through August 31, 2017. This increase was delayed until September 1, 2012." The parties disagree as to the effect, if any, of the temporary rent concession on the terms of the lease prior to the execution of the assignment. The court disregarded the temporary rent concession, referring to it as a "verbal understanding," and concluded that it was inadmissible, under the parol evidence rule, to explain the intent of the parties. We are not convinced that evidence of the temporary rent concession should have been precluded, as it is a generally recognized principle that "[t]he parol evidence rule does not forbid the contradiction of any instrument *or portion of an instrument which purports merely to recite facts*." (Emphasis

The court erred in granting the defendant's motion for summary judgment because it improperly determined that there was no genuine issue of material fact with respect to whether the parties to the assignment intended to eliminate, from the calculation of the base rent due for the sixth year of the lease and, thereafter, the fifth year cumulative rent increase. The court, referencing two parts of the assignment, the "whereas" clause, which indicated that the current base rent was $216,000, and the provision that stated that Southbury Food was current in its obligations under the lease, concluded that because the amount of the base rent payable at the time of the execution of the assignment and amendment was specified only in the "whereas" clause, the defendant was entitled to summary judgment. The court determined that the fifth year cumulative rent increase was not incorporated into either the assignment or the amendment. This determination, however, failed to consider that neither the amendment nor the assignment expressly deleted the lease provision modifying the fifth year cumulative rent increase, and the amendment states that "the remaining terms and conditions of the [l]ease shall remain unmodified and in full force and effect." A copy of the lease, which contained the fifth year cumulative rent increase in section 4, was attached to both the assignment and the amendment.

"[I]n construing contracts, [the court must] give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision

added.) 11 S. Williston, Contracts (4th Ed. 2012) § 33.46, pp. 1222–23; see also *Hartford-Connecticut Trust Co.* v. *Devine*, 97 Conn. 193, 116 A. 239 (1922). If the factual recitations in the assignment, stating that the current annual base rent for the fifth year of the lease was $216,000 and that Southbury was not in default of any lease provision and remained current in the payment of all obligations thereunder, are merely factual, they may possibly be contradicted by evidence of the temporary rent concession.

superfluous." (Internal quotation marks omitted.) *Stratford* v. *Winterbottom*, 151 Conn. App. 60, 72, 95 A.3d 538, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014). The court disregarded this principle by failing to give effect to operative provisions of the lease and the amendment.[10]

In reviewing the operative clauses of the lease, the amendment and the assignment, there remains a genuine issue as to whether the parties intended that, commencing September 1, 2012, the sixth year of the lease, the defendant, as the new tenant, was obligated to pay, in addition to the $216,000 original annual base rent, both the fifth year cumulative rent increase contained in the original lease as well as the 2.5 percent increase set forth in section 1 of the amendment.

The operative clauses of the assignment provide the following in relevant part: that, at the time of the assignment, the defendant, as an assignee and as a tenant

[10] "As a general rule, [r]ecitals in a contract, such as 'whereas' clauses, are merely explanations of the circumstances surrounding the execution of the contract, and are not binding obligations unless referred to in the operative provisions of the contract." (Internal quotation marks omitted.) *DeMorais* v. *Wisniowski*, 81 Conn. App. 595, 610, 841 A.2d 226, cert. denied, 268 Conn. 923, 848 A.2d 472 (2004). "[I]f the recitals in a contract are clear and the operative part is ambiguous, the recitals govern the construction; however, if the recitals are ambiguous and the operative part is clear, the operative part must prevail. *If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part must control.*" (Emphasis added.) 17A Am. Jur. 2d 371, Contracts § 383 (2004). The United States Court of Appeals for the Second Circuit also has "held that [a]lthough a statement in a whereas clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document." (Internal quotation marks omitted.) *Aramony* v. *United Way of America*, 254 F.3d 403, 413 (2d Cir. 2001); accord *Abraham Zion Corp.* v. *Lebow*, 761 F.2d 93, 103 (2d Cir. 1985); *Genovese Drug Stores* v. *Connecticut Packing Co.*, 732 F.2d 286, 291 (2d Cir. 1984). Additionally, in *Weiss* v. *Smulders*, 313 Conn. 227, 251–52, 96 A.3d 1175 (2014), an appeal involving an alleged violation of the parol evidence rule, our Supreme Court also noted that the substantive provisions of a written agreement control over recital provisions, particularly where the recital provisions pertain to a collateral matter that falls outside

under the lease, accepted all right, claim, title, and interest in the leased premises that Southbury Food originally held under the lease; that neither the plaintiff nor Southbury Food was in default pursuant to the lease; that Southbury Food, up until the assignment, had remained current in the payment of all obligations under the lease;[11] that, upon the complete execution of the assignment, Southbury Food was no longer subject to any liability or obligation under the lease; and that in all other respects, the parties to the assignment ratified and confirmed the lease, a copy of which was attached to the assignment. The plaintiff may have a valid claim that the third "whereas" clause in the preamble of the assignment, inasmuch as it suggests that the annual base rent for the fifth year of the lease was $216,000, cannot, in and of itself, negate the fifth year cumulative rent increase, an obligation set forth in the lease and not modified by the operative provisions of the amendment or the assignment. Where a recital provision and an operative provision are inconsistent with each other the operative provision must control. *Weiss* v. *Smulders*, 313 Conn. 227, 252, 96 A.3d 1175 (2014); 17A Am. Jur. 2d. 371, Contracts § 383 (2004).

In accordance with this contract principle and the principle that recitals in a contract are not binding obligations unless referred to in the operative provisions of the contract; *DeMorais* v. *Wisniowski*, supra, 81 Conn. App. 610; summary judgment was improperly granted in the defendant's favor. There remains a genuine issue of material fact as to whether the parties intended to modify the amount of base rent due in the fifth and subsequent years of the lease, and the intent

the scope of the subject matter of the written agreement. See also id., 252 n.13.

[11] As previously noted in footnote 9 of this opinion, the statement that Southbury Food was current in the payment of all its obligations under the lease may be contradicted, at trial, by the temporary rent concession allegedly negotiated between the plaintiff and Southbury Food in October, 2011.

of the plaintiff and the defendant must be determined in light of the operative provisions of the three integrated documents that comprise their lease agreement.[12] Accordingly, we conclude that the court improperly granted the defendant's motion for summary judgment.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

JAG CAPITAL DRIVE, LLC *v.* ZONING COMMISSION OF THE TOWN OF EAST LYME (AC 37924)

Sheldon, Mullins and Harper, Js.

Syllabus

The plaintiff landowner appealed to the trial court from the decision of the defendant East Lyme Zoning Commission, denying the plaintiff's application for approval of a proposed affordable housing development. The plaintiff proposed construction of an affordable housing development on property located in a light industrial zone and submitted, inter alia, documentation that the commission previously had approved in that zone a convalescent home and two multifamily residential properties. The commission denied the plaintiff's application on the statutory (§ 8-30g [g] [2] [A]) ground that it was for affordable housing located

[12] We note that the defendant, in its counterclaim, alleges that the assignment and the amendment resulted in a novation whereby a new lease was formed, under which the defendant's rental obligation was modified such that the fifth year cumulative rent increase in the lease was substituted with a "fixed rental formula." "[A]n essential element of any novation is the extinguishing of the original contract by substitution of a new one." *Flagg Energy Development Corp.* v. *General Motors Corp.*, 244 Conn. 126, 145, 709 A.2d 1075 (1998), overruled in part on other grounds by *Ulbrich* v. *Groth*, 310 Conn. 375, 409, 78 A.3d 76 (2013). "A recognized test for whether a later agreement between the same parties to an earlier contract constitutes a substitute contract looks to the terms of the second contract. If it contains terms inconsistent with the former contract, so that the two cannot stand together it exhibits characteristics . . . indicating a substitute contract." (Internal quotation marks omitted.) *Alarmax Distributors, Inc.* v. *New Canaan Alarm Co.*, 141 Conn. App. 319, 331–32, 61 A.3d 1142 (2013). At this point, we decline to comment on the merits of the defendant's novation claim.

in an area zoned for industrial use that did not permit residential use. The plaintiff appealed to the trial court, which found that a convalescent home contained within the same light industrial zone housed permanent residents that lived a short distance from the plaintiff's proposed affordable housing development. The trial court concluded that § 8-30g (g) (2) (A) did not apply on the basis of that finding, and the court sustained the plaintiff's appeal and remanded the matter to the commission with direction to approve the application. The commission then appealed to this court, claiming that the trial court erred in concluding that it failed to meet its burden of proof under § 8-30g (g) (2) (A). Specifically, the commission claimed that the trial court erroneously determined that the light industrial zone permitted residential uses. *Held* that the trial court properly concluded that the commission improperly denied the plaintiff's affordable housing application without having proved that the affordable housing development would be located in an area zoned for industrial uses that did not permit residential uses: because the zoning regulations permitted convalescent homes in the light industrial zone, which involve at least some degree of residential use, the regulations could not be construed so as not to permit residential uses in that zone; moreover, the convalescent home in the light industrial zone was specifically contemplated to be and was approved for a residential use, as the zoning regulations defined a convalescent home as a facility providing for those with chronic health issues, which necessitated more than a transient use, and the commission's resolution that initially approved the convalescent home described it as a place where people would reside within the light industrial zone.

Argued May 19—officially released October 4, 2016

Procedural History

Appeal from the decision of the defendant denying the plaintiff's application for approval of an affordable housing development, brought to the Superior Court in the judicial district of New London and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the matter was tried to the court, *Cohn, J.*; judgment sustaining the appeal and remanding the matter to the defendant with direction to approve the plaintiff's application, from which the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Edward B. O'Connell, with whom, on the brief, was *Mark S. Zamarka*, for the appellant (defendant).

Timothy S. Hollister, with whom was *Andrea L. Gomes*, for the appellee (plaintiff).

Opinion

SHELDON, J. The defendant, the East Lyme Zoning Commission (commission), appeals from the judgment of the Superior Court sustaining the administrative appeal of the plaintiff, JAG Capital Drive, LLC, from the commission's denial of the plaintiff's application for approval of a proposed affordable housing development. The commission claims that the trial court erred in concluding that it failed to meet its burden of proof in denying the plaintiff's application on the ground of the industrial zone exemption—that the proposed affordable housing development would be located in an area which is zoned for industrial use and does not permit residential uses—pursuant to General Statutes § 8-30g (g) (2) (A). More specifically, the commission claims that the trial court erred in determining that the area in which the proposed affordable housing project would be located permits residential uses.[1] We disagree with the commission, and thus affirm the judgment of the trial court sustaining the plaintiff's appeal from the commission's denial of its affordable housing application.

In its December 23, 2014 memorandum of decision, sustaining the plaintiff's administrative appeal, the trial court set forth the following relevant factual and procedural history. "The plaintiff's land is located in East Lyme. It consists of 24 acres, zoned LI, Light Industrial, adjacent on the north side to a small commercial/light

[1] The commission also claims that the trial court erred in deviating from the law of the case doctrine and in basing its rejection of the industrial use exemption on a determination that the area in which the proposed development would be located permitted uses "consistent with a residential use" rather than the precise statutory language "residential use." We reject both of those claims and conclude that neither of them deserves detailed analysis.

industrial area served by a street called Capital Drive, ending in a cul-de-sac north of [the plaintiff's] 24 acres. West of the plaintiff's property are wetlands, a stream, and the East Lyme/Old Lyme border. To the east are a single-family residential neighborhood and Camp Niantic, a seasonal campground. To the south is State Route 156, which in that location is called West Main Street. The plaintiff's property has frontage on Route 156/West Main. . . .

"The plaintiff filed its initial application for site plan approval with the commission on August 7, 2012, consisting of 69 units, a proportion of which were to be affordable housing units under § 8-30g. . . . The units were to form a residential development to be known as 'Rocky Neck Village,' proposed as rental units with possible future conversion to common interest ownership. They were to be two bedroom townhome style units. . . . The town's wetlands commission had given its approval to the development in March 2011. . . .

"The commission held a public hearing on this application on February 7, 2013. The plaintiff's attorney and his designees explained the proposed site plan demonstrating that it would not cause any health or safety concerns, submitted a traffic report that had no safety concerns, entered favorable reports on stormwater and other environmental topics, and explained the inapplicability of coastal management zoning. The attorney also explained the difficulties that the plaintiff faced in marketing the property for light industrial use. . . .

"The commission staff gave a presentation and the public spoke out, some favoring and others objecting to the site plan. There was also testimony from three business owners located in the LI zone of the application. Norman Birk, president of Birk Manufacturing, informed the commission that his company uses corrosive acids, liquid stainless steel and metal finishing techniques in the manufacture of circuit boards. . . . It

has an approval from the Department of Energy and Environmental Protection to treat wastewater on site. . . . In 2011, Birk Manufacturing experienced an industrial accident when bari-chloride and muriatic acid were mixed, creating dangerous chlorine gas. Federal, state and local agencies, including a hazardous materials team were called to the scene, a large portion of the industrial park was evacuated and two Birk employees were hospitalized. . . .

"Two other company executives also spoke at the public hearing. The first was Susan Spellman, owner of Salon Associates, also located on Capital Drive. Her company receives, stores and ships chemicals used in the salon industry, including bleach, aerosols and acetones. In 2011 she was visited by an FBI agent to explain that the type of chemicals at her site might make her business a terrorist target, and to suggest means of safe storage. . . . Richard Beck, owner of Embalmer's Supply Company on Capital Drive, informed the commission that he stores embalming fluid and formaldehyde, a carcinogen on site. Evidence was taken of industrial sized truck traffic in the industrial park at all hours. . . .

"The plaintiff's attorney in reply stated to the commission that the project would be built in stages starting from Route 156. The only contact with Capital Drive would be the opening of an access road for water and other utilities. He also pointed out that the Birk Manufacturing incident had occurred inside the building, the longstanding proximity of the three businesses to the single-family residential neighborhood to the southeast, and during five to six months of each year, to Camp Niantic, a residential campground to the east and south of the plaintiff's parcel. He also noted the fact that the commission had approved the 38 Hope Street residential development in the LI zone in 2006, with an adjacent lumber yard with truck traffic and an active rail line. . . .

"On February 21, 2013, the commission met after the close of the public hearing. It concluded that the application should be denied on the ground that it was proposed in a Light Industrial District, under § 11 of its zoning regulations.[2] It was to be located in an area zoned for industrial use and in which residential uses were not permitted. The commission's resolution stated

[2] Section 11 of the East Lyme Zoning Regulations provides in relevant part:

"LI LIGHT INDUSTRIAL DISTRICTS

"GENERAL DESCRIPTION AND PURPOSE—A district suitable for heavy commercial and light manufacturing, oriented essentially to major transportation facilities. The purpose of this district is to provide areas for industrial and commercial uses in an open setting that will not have objectionable influences on adjacent residential and commercial districts.

"11.1 PERMITTED USES—The following uses of buildings and/or land and no others are permitted subject to site plan approval in accordance with Section 24.

"11.1.1 Light industrial or manufacturing uses which are not dangerous by reason of fire or explosion, nor injurious or detrimental to the neighborhood by reason of dust, odor, fumes, wastes, smoke, glare, noise, vibration or other noxious or objectionable feature as measured at the nearest property line.

"11.1.2 Trucking Terminal.

"11.1.3 Printing or publishing.

"11.1.4 Warehouse and wholesale storage; self-storage warehouses.

"11.1.5 Commercial nurseries, greenhouses and garden centers.

"11.1.6 Office complex.

"11.1.7 All related accessory uses customarily incidental to the above permitted uses . . .

"11.2 SPECIAL PERMIT USES—The following uses may be permitted when granted a Special Permit by the Zoning Commission subject to the Special Permit Requirements of Section 25.

"11.2.1 Deli, coffee shop or cafeteria.

"11.2.2 Private training facilities, trade and technical schools and facilities of higher learning.

"11.2.3 Research, design and development facilities.

"11.2.4 Health spas and gymnasiums, sports facilities and other commercial indoor recreations.

"11.2.5 Hotels.

"11.2.6 Contractor or trade services.

"11.2.7 Convalescent homes.

"11.2.8 Motor Vehicle and heavy equipment Repairers Station.

"11.2.9 Office and retail sales of industrial services . . .

"11.2.10 Adult Use Establishments . . . ."

that it acted under the provisions of the affordable housing statutes that had an exemption for an 'industrial zone.' [General Statutes] § 8-30g (g) (2) (A). . . .

"Notice of the denial of the plaintiff's application was published on March 14, 2013. . . . On March 28, 2013, the plaintiff filed a resubmission pursuant to § 8-30g (h). . . . The revised site plan (1) eliminated nine units closest to the existing uses in the LI zone as well as one building, (2) increased landscaped buffer between the industrial uses and the proposed homes to meet the East Lyme multifamily/affordable housing regulations, (3) reduced site coverage, (4) improved traffic access, (5) increased open space, and (6) decreased stormwater runoff. . . .

"At a public hearing on May 16, 2013, a professional engineer, retained by the commission, suggested minor plan revisions that were accepted by the plaintiff. . . . The plaintiff provided documentation that the LI zone allowed for types of residential uses. . . . These documents included the commission's 1990 resolution approving Bride Brook [Nursing and Rehabilitation Center (Bride Brook)] as a place where people would 'reside' within the LI zone, along with its approvals of Sea Spray [Condominiums, an affordable housing development] and 38 Hope Street as multifamily residential uses on parcels zoned LI.

"The plaintiff noted that Salon Enterprises, an operation discussed at the original public hearing, was a wholesale business, not a manufacturing facility; it conducts on-site classes for beauty parlor employees. As to Birk Manufacturing, the plaintiff showed that in the revised plan, Birk's building at its closest point is 360 feet from the corner of the nearest residential unit. The attorney for the plaintiff concluded that Birk did not expect future accidents. This was also confirmed by Mr. Birk. . . . Birk and Spellman from Salon did

express concern that the approval of the plaintiff's application could cause them to have to consider moving out of East Lyme to another location. . . .

"The commission voted at its June 6, 2013 meeting to deny the plaintiff's amended application. The commission adopted a resolution that states in part as follows: 'Whereas, for the purposes of this Resolution, the Commission will address the Amended Application in two separate parts: (1) As an affordable housing application that would locate affordable housing in an area which is zoned for industrial use . . . and (2) As an application for approval of an affordable housing development pursuant to General Statutes § 8-30g (g) (1).'

"With regard to the 'industrial use' exception, the commission found that the proposed development 'would be located entirely in an area that is presently zoned Light Industrial (LI) according to the East Lyme Zoning Map.' It further found that the LI zone provided for industrial and commercial uses and did not permit residential uses in the zone. The commission had heard testimony from business owners in the zone on the industrial uses in the area, 'including, but not limited to, manufacturing processes, heavy truck travel and chemical manufacturing, storage and transportation.'

"It was resolved that the commission denied the amended application 'to be located on Capital Drive at or near its intersection with Route 156 in East Lyme, for the reason that the development is located entirely in an area which is zoned for industrial use and which does not permit residential uses, and that the Application does not seek approval for assisted housing as defined in § 8-30g (a) of the General Statutes.' . . .

"With regard to the general approval of an affordable housing development, [the commission found that] there was both sufficient evidence and evidence of the need to protect the public health and safety to support

the commission's denial. The development was inconsistent with the town's plan of conservation and development. It was to be located in an LI zone with industrial uses, as stated above. There was an industrial accident of concern in the last year requiring evacuation of the area, drawing responses from hazardous materials teams, the Department of Energy and Environmental Protection and the federal [Environmental Protection Agency]. There was a 'quantifiable probability' of specific harm raising interests in public health and safety. 'There is a necessity to protect the public that cannot be remedied by changes to the application and the risk of such harm to the public interest outweighs the need for affordable housing.' . . .

"This appeal [from the commission's denial of the plaintiff's application] was subsequently filed. On July 15, 2014, the attorneys for the parties and the court conducted a view of the site. The group met at the cul-de-sac end of Capital Drive. Birk Manufacturing was to the left, as well as a parking lot and a small garden. Outside of Birk were two burning pots of some type. Salon Enterprises was to the right. There were a few other buildings in the cul-de-sac. There was no heavy truck traffic at the time of the viewing in midday. The court and the parties walked down a path into a wooded area. To the left along this path is Camp Niantic and to the right is an open space conservation area with the Four Mile River. The entryway to the proposed project is about 400 feet from the cul-de-sac in the midst of the woods. At this point, the plaintiff proposes to place a gate and additional plantings. The court viewed the general area where the development is to be built. There were people making use of the trail into the woods for recreational activities. This trail is to serve as an emergency entrance and exit to the development. The parties returned to the cul-de-sac and drove out of Capital Drive to Route 156. The court observed the

premises along Route 156, commercial in nature, the main entrance to the proposed development, and also [Bride Brook]. Sea Spray was also viewable nearby.

"Along with the view that the court conducted, the court ordered that the commission hold a further factual hearing on the 'day-to-day operation' of Bride Brook. This order was based on exhibit M, which dated from 1989/1990, where a Bride Brook officer indicated that the center was functioning partly as a 'rest home.' The commission conducted a further hearing on September 18, 2014, at which an affidavit of Dianne Caristo-Gaynor, the administrator of Bride Brook, was introduced.

"The affidavit, dated August 9, 2014, declared in paragraph 9 that the 'second and third floors are home to 87 Long Term Care Residents.' These residents are 'expected to live at Bride Brook for the remainder of their lives. Some have lived here more than 15 years.' In paragraph 10, the administrator stated the following indicia of the residents' residing in their 'home.' They have no other home; they are to live at Bride Brook indefinitely; they are registered to vote at Bride Brook; they receive mail at this address; they are considered in a residential community; they participate in the planning of their medical treatment; they are allowed to manage their personal financial affairs; they participate in social, religious, and community activities of choice; they have visits from family, friends and acquaintances; and they are treated with dignity and individuality, including privacy.

"During the hearing, the zoning officer obtained testimony from the administrator of Bride Brook that the residents were closely supervised by nursing staff and a doctor on call. . . . There were no kitchens in the individual units. . . . The residents may leave the premises at will, but usually leave with relatives or in

a Bride Brook van. . . . The residents must be admitted to Bride Brook on medical orders, not just on their own application." (Citations omitted; footnotes altered.)

With that as background, the court undertook a plenary review of the record to consider whether the commission had satisfied its burden under the industrial zone exception[3] pursuant to § 8-30g (g) (2) (A)—of proving that the proposed affordable housing development would be located in an area which is zoned for industrial use and does not permit residential uses.[4] The court explained: "The issue in this case is only whether the zoned area permits usages consistent with a residential use. That is why the court was particularly interested in the hearing conducted on remand concerning the Bride Brook facility. Bride Brook was approved in 1990 in the LI zone under a special permit for convalescent homes, as allowed by [§ 11.2.7 of the East Lyme Zoning Regulations]."

The court found: "Here . . . there is a factual record showing that there are 87 people who live, have individual and community activities and vote at Bride Brook.

[3] The court "assum[ed] that the commission satisfied the [threshold] 'sufficiency test' " set forth in § 8-30g (g) and conducted its own independent review as to whether the commission met its burden of proof under § 8-30g (g) (1). The plaintiff has not challenged the court's determination that the commission met the sufficiency of the evidence standard and we thus need not address it.

The court also found that the commission failed either to show that its decision was necessary to protect substantial public interest in health, safety or other matters pursuant to § 8-30g (g) (1), or that the subject of the decision from which this appeal is taken would locate affordable housing in an area zoned for industrial use and which does not permit residential use pursuant to § 8-30g (g) (2). Because the commission has not challenged the trial court's determination that it failed to meet its burden under subdivision (1), that determination stands, and, therefore, the commission may only prevail on appeal if it can show that the trial court erred in concluding that the commission failed to meet its burden under subdivision (2).

[4] It is undisputed that the proposed development was not assisted housing.

They consider it to be their legal residence. These are permanent residents in the zone in question, living a short distance from the proposed 60 unit residential development plan of the plaintiff." The court analogized the circumstances presented in this case to those in *Glastonbury Affordable Housing Development, Inc.* v. *Town Council*, Superior Court, judicial district of Hartford-New Britain, Docket No. CV 94-0543581 (September 4, 1996), in which the court directed the defendant to approve an affordable housing development where the zoning regulations permitted a "range of population-intensive uses," including "a convalescent, nursing or rest home." The court in the present case found: "This is also the situation here, based on the situation of the Bride Brook residents."

The court therefore concluded that the industrial zone exception did not apply here, and thus that the commission's denial of the affordable housing application could not be sustained on that basis. The court remanded the matter to the commission with direction to approve the plaintiff's application, subject to reasonable conditions not inconsistent with approval. The commission thereafter filed a petition for certification to appeal pursuant to General Statutes § 8-8 (o). We granted the commission's petition and this appeal followed.

The parameters of our review of an affordable housing appeal are circumscribed by § 8-30g (g), which provides: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1) (A) the decision is

necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development, or (2) (A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses; and (B) the development is not assisted housing, as defined in subsection (a) of this section. If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it.''

The standard of review embodied in § 8-30g (g) is twofold in nature. ''Under [the first sentence of § 8-30g (g)], the court must determine . . . whether the commission has shown that its decision is supported by sufficient evidence in the record. Under subparagraphs [(1) (A), (B) and (C)] of the statute, however, the court must review the commission's decision independently, based upon its own scrupulous examination of the record. Therefore, the proper scope of review regarding whether the commission has sustained its burden of proof, namely that: its decision is based upon the protection of some substantial public interest; the public interest clearly outweighs the need for affordable housing; and there are no modifications that reasonably can be made to the application that would permit the application to be granted—requires the court, not to ascertain whether the commission's decision is supported by sufficient evidence, but to conduct a plenary review of the record in order to make an independent determination on this issue.'' (Internal quotation marks omitted.) *River*

Bend Associates, Inc. v. *Zoning Commission*, 271 Conn. 1, 22, 856 A.2d 973 (2004). "[Although the] commission remains the finder of fact and any facts found are subject to the 'sufficient evidence' standard of judicial review . . . th[e] application of the legal standards set forth in § 8-30g (g) (1) (A), (B) and (C) to those facts is a mixed question of law and fact subject to plenary review." (Citation omitted.) Id., 24–25. "Because the plaintiff[s'] appeal to the trial court is based solely on the record, the scope of the trial court's review of the [commission's] decision and the scope of our review of that decision are the same." (Internal quotation marks omitted.) Id., 26–27 n.15. Because we find no principled reason for distinguishing between subdivisions (1) and (2) of § 8-30g (g) with regard to the commission's obligation; see *JPI Partners, LLC* v. *Planning & Zoning Board*, 259 Conn. 675, 691, 791 A.2d 552 (2002); the issue of whether it met its statutory burden to prove that the industrial use exemption applies presents a mixed question of law and fact over which our review is plenary.

It is undisputed that the affordable housing development for which the plaintiff sought approval in this case represents a residential use. The only issue before us is whether the proposed affordable housing development would be located in an area that is zoned for industrial use and does not permit residential uses.

Resolution of this issue requires us to review the statutory language of § 8-30g (g) and the town of East Lyme's municipal zoning regulations, the interpretation of which presents a question of law over which our review is plenary. *Alvord Investment, LLC* v. *Zoning Board of Appeals*, 282 Conn. 393, 416, 920 A.2d 1000 (2007). The following principles regarding the interplay between the affordable housing statute and municipal zoning regulations are instructive. Our Supreme Court has "outlined the differences that [it] had identified

previously between an affordable housing land use appeal brought pursuant to § 8-30g and a traditional zoning appeal. First, an appeal under § 8-30g [f] may be filed only by an applicant for an affordable housing development whose application was denied or [was] approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability of the affordable dwelling units . . . .

"Second, the scope of judicial review under § 8-30g [g] requires the town, not the applicant, to marshal the evidence supporting its decision and to persuade the court that there is sufficient evidence in the record to support the town's decision and the reasons given for that decision. By contrast, in a traditional zoning appeal, the scope of review requires the appealing aggrieved party to marshal the evidence in the record, and to establish that the decision was not reasonably supported by the record. . . .

"Third, if a town denies an affordable housing land use application, it must state its reasons on the record, and that statement must take the form of a formal, official, collective statement of reasons for its actions. . . . By contrast, in a traditional zoning appeal, if a zoning agency has failed to give such reasons, the court is obligated to search the entire record to find a basis for the [agency's] decision. . . .

"We reach this conclusion based on the text and the purpose of the statute. The text requires that the town establish that sufficient record evidence supports the decision from which such appeal is taken and the reasons cited for such decision . . . . Thus, textually the statute contemplates reasons that are cited by the town. This strongly suggests that such reasons be cited by the zoning agency at the time it took its formal vote on the application, rather than reasons that later might be

culled from the record, which would include, as in a traditional zoning appeal, the record of the entire span of hearings that preceded the vote. . . . Furthermore, the key purpose of § 8-30g is to encourage and facilitate the much needed development of affordable housing throughout the state. . . . Requiring the town to state its reasons on the record when it denies an affordable housing land use application will further that purpose because it will help guard against possibly pretextual denials of such applications. We therefore read the statute, consistent with its text and purpose, to require the town to do so." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *JPI Partners, LLC* v. *Planning & Zoning Board*, supra, 259 Conn. 688–90.

"The legislative history indicates that the legislature intended to accomplish th[e] goal [of encouraging and facilitating affordable housing throughout the state] by creating specific legislation that affects only affordable housing applications, not the overall zoning scheme. Therefore, applications that do not fit into the definition of an affordable housing application are not affected by § 8-30g. If an application does satisfy the definition of an affordable housing application, however, then the commission must satisfy the increased burden of proof in order to deny the application effectively. Under these circumstances, nonconformity of zoning is not, per se, a reason to deny the application. The legislature did not intend zoning nonconformity to block an affordable housing subdivision application. . . .

"Section 8-30g is not part of the traditional land use statutory scheme. Traditional land use policies did not solve Connecticut's affordable housing problem, and the legislature passed § 8-30g to effect a change. . . .

"Section 8-30g does not allow a commission to use its traditional zoning regulations to justify a denial of an affordable housing application, but rather forces the

commission to satisfy the statutory burden of proof. The factors that the commission considers when reviewing affordable housing subdivision applications are the same as those considered when it passes subdivision regulations. Instead of simply questioning whether the application complies with those regulations, however, under § 8-30g, the commission considers the rationale behind the regulations to determine whether the regulations are necessary to protect *substantial* public interests in health, safety or other matters. . . .

"Conformity [in decisions] is provided by § 8-30g because each decision must be justified in terms of the factors enumerated in the statute." (Emphasis in original; footnote omitted.) *Wisniowski* v. *Planning Commission*, 37 Conn. App. 303, 316–18, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995).

In sum, "zoning compliance is not mandatory prior to approval of an affordable housing subdivision application. . . . The burden of proof in § 8-30g [g] takes away some of the discretion that local commissions have under traditional land use law and allows the reviewing trial court to effect a zone change if the local commission cannot satisfy the statutory requirements for its denial of an application. Section 8-30g [g] provides that if the commission fails to satisfy its burden of proof, the trial court, 'shall wholly or partly, revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it.' " (Citation omitted; emphasis omitted.) Id., 319–20. With the foregoing principles in mind, we turn to the commission's claim on appeal.

Here, neither party disputes that the proposed development would be located in an area which is zoned for industrial use. The only issue in dispute is whether that area does not permit residential uses. The commission

claims that the trial court "drew conclusions of law unsupported by the record when it determined that Bride Brook Nursing and Rehabilitation Center is a residential use and the LI zone permits residential uses," and that the "trial court's conclusion that Bride Brook is a residential use is clearly erroneous and is contrary to the sufficient evidence in the record showing otherwise." (Internal quotation marks omitted.) The commission's arguments, however, demonstrate a misunderstanding of its burden in affordable housing appeals. As noted herein, the commission bears the burden of proving that the proposed affordable housing development would be located in an area which is zoned for industrial use and does not permit residential uses. We conclude that the commission failed to satisfy that burden.

As to the industrial use exemption, the commission declared, in response to both the plaintiff's initial application and its modified application for approval of the affordable housing development, that the area did not permit residential uses. More specifically, the commission stated, on both occasions, that "residential uses are not permitted in the LI zoning district." Those declarations, particularly in the absence of any reference to any evidence in the record, appear to be based solely upon the municipal regulatory definition of the zone in which the proposed development would be located. The commission looked no further than its own zoning regulations in determining the applicability of the industrial use exemption. As noted herein, zoning designations may not be the sole basis for the denial of an affordable housing regulation.

Although the commission did not point to any evidence in the record that the area in question did not permit residential uses, the court, in making its plenary determination as to whether the industrial exemption applies in this case, focused on the existing uses in LI zones in East Lyme, particularly the use of Bride Brook, which had been granted a special permit as a convales-

cent home in 1990. On September 18, 2014, the commission held a public hearing pursuant to the court's remand order to develop additional information concerning the day-to-day activities of Bride Brook. Following the presentation of evidence and public commenting, the public hearing was closed and the commission transitioned to a regular meeting, during which it briefly discussed the issue presented during the earlier public hearing, and then summarily concluded that "Bride Brook Nursing Home and Rehabilitation Center is not a residential use pursuant to § 8-30g (2) (A) of the General Statutes, based on evidence presented pursuant to the court's remand order dated June 26, 2014."[5] As noted herein, the court disagreed with the commission and determined that Bride Brook is a residential use and thus that the commission improperly relied upon the industrial use exemption as a basis to deny the plaintiff's application.

The East Lyme Zoning Regulations allow, by special permit, convalescent homes. Those regulations define a convalescent home as a facility that provides for those with chronic health issues,[6] which necessarily contemplates more than a transient use.[7] Indeed, as the trial

[5] Although the individual members posited various reasons for determining whether Bride Brook was a residential use, those opinions are not those of the commission and thus may not form the basis for the denial of an application. See *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 673–74, 111 A.3d 473 (2015) (individual reasons given by certain members of zoning agency do not amount to formal, collective, official statement of agency, are not available to show reasons for, or grounds of, zoning agency's decision and it is not appropriate for reviewing court to attempt to glean such formal, collective statement from minutes of discussion by members prior to zoning agency's vote).

[6] Section 1.50 of the December, 2012 revision of the East Lyme Zoning Regulations defines a convalescent home, which is interchangeable with a rest home, as: "An establishment which provides full convalescent or chronic care or both for three or more individuals who are not related by blood or marriage to the operator and who, by reason of chronic illness or infirmity, are unable to care for themselves. A hospital or sanitarium shall not be construed to be included in this definition."

[7] For example, § 1.24 of the December, 2012 revision of the East Lyme Zoning Regulations defines a hotel as providing "service for the use of transient guests."

court noted, the 1990 resolution of the commission described Bride Brook as a place where people would "reside" within the LI zone. Specifically, in a document that was submitted in connection with the application for the development of Bride Brook in 1990, as part of the "Description of Daily Activities," it was noted that: "There will be an average of 118 persons residing at Bride Brook at any one time." Thus, not only has Bride Brook functioned in fact as a residential use, as its administrator testified, that use was specifically contemplated ab initio and approved by the commission. We thus reject the commission's claims that the trial court improperly determined that Bride Brook is a residential use.

Although nonconformity with zoning designations may not, in itself, be sufficient grounds for the denial of an affordable housing application, conformity with those designations undoubtedly mandates the granting of such an application. Because the East Lyme Zoning Regulations permit convalescent homes in an LI zone, and convalescent homes, by their nature and borne out by the example of Bride Brook, potentially involve at least some degree of residential use, we conclude that the East Lyme Zoning Regulations cannot be construed "not [to] permit" residential uses in an area that has been zoned LI. We thus conclude that the trial court properly determined that the commission improperly denied the plaintiff's affordable housing application without proving that the proposed development would be located in an area that is zoned for industrial uses and does not permit residential uses.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

[8] This conclusion is further supported by the commission's previous approval of affordable housing applications in areas zoned for light industrial use.

STATE OF CONNECTICUT *v.* DURANTE BEST (AC 38311)

Lavine, Mullins and Harper, Js.

Syllabus

Convicted of several crimes that occurred after an argument with his girlfriend, E, which led to the shooting death of J and serious injuries to E and O, the defendant appealed. He claimed that he was deprived of his constitutional right to establish a defense when the trial court improperly rejected his request to instruct the jury on self-defense. The defendant and E were arguing in the bedroom of their apartment when O and J arrived at the apartment. After J knocked on the door of the apartment and no one answered, another resident in the building informed her that the defendant and E were arguing in the apartment. O and J then entered the apartment, banged on the bedroom door, and screamed and shouted orders to the defendant to open the door. When he did not comply, O and J continued to pound on the door, made threats against him, and warned him that they "had backup." The defendant opened the door, shot O and J, and then shot E as she fled the apartment. O testified at trial that the statements she and J made while pounding on the bedroom door were clearly intended for the defendant to hear. On appeal, the defendant claimed that the statements O and J made when they banged on the bedroom door provided an evidentiary basis for the jury to have reasonably concluded that he believed that O and J were about to use deadly force against him. *Held* that the trial court improperly rejected the defendant's request for a jury instruction on the defense of self-defense pertaining to his crimes against O and J: although the defendant was not entitled to such an instruction as to his crimes against E, there having been no evidence that E harmed or threatened to harm him during their argument, the evidence was sufficient to raise a question in the mind of a rational juror about whether the defendant shot O and J in self-defense, as O admitted that she and J did not have permission to enter the defendant's apartment, the defendant was faced with an unknown number of intruders who pounded on his bedroom door, screamed and shouted orders to him, made threats that O testified were clearly intended for him to hear, and warned him that they "had backup"; accordingly, because the state failed to demonstrate that the court's refusal to instruct the jury on self-defense was harmless, the judgment was reversed in part and the case was remanded for a new trial as to the crimes against O and J.

Argued April 5—officially released October 4, 2016

Procedural History

Substitute information charging the defendant with two counts each of the crimes of attempt to commit murder and assault in the first degree, and with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Rodriguez*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Reversed in part; new trial.*

Neal Cone, senior assistant public defender, with whom, on the brief, was *Lauren Weisfeld*, public defender, for the appellant (defendant).

Susann E. Gill, supervisory assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Margaret E. Kelley*, supervisory assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. On the second day of evidence in his criminal trial, the defendant, Durante Best, filed a written request for a jury instruction of self-defense.[1] The trial court denied his request. Following the trial, he was convicted of one count of murder in violation of General Statutes § 53a-54a (a), two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a). On appeal, he claims

[1] General Statutes § 53a-19 (a) provides in relevant part: "[A] person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

that the court improperly failed to instruct the jury on self-defense, and, therefore, that he was deprived of his constitutional right to establish a defense. We agree that he was entitled to an instruction of self-defense with respect to some, but not all, of the crimes of which he was convicted. Accordingly, we reverse in part and affirm in part the judgment of the trial court.[2]

"In determining whether the defendant is entitled to an instruction of self-defense . . . we must view the evidence most favorably to giving such an instruction." (Internal quotation marks omitted.) *State* v. *Terwilliger*, 294 Conn. 399, 408–409, 984 A.2d 721 (2009). Viewed in this light, the record reveals the following relevant facts, which the jury reasonably could have found. In May, 2006, the defendant was living in an apartment at 275 Jefferson Street in Bridgeport. He shared this apartment with his then girlfriend, Erika Anderson (Erika), and his stepbrother, Joseph Myers. On the afternoon of May 4, 2006, Erika had planned to attend a carnival at nearby Newfield Park with her daughter, Octavia Anderson (Octavia); Octavia's friend, Rogerlyna Jones; and Octavia's young son, Taki. Before Octavia arrived at the apartment, Erika and the defendant began to argue.

When Octavia and Jones arrived at 275 Jefferson Street, Octavia asked Jones to go to the door of the

[2] We note at the outset that "[u]nder General Statutes § 53a-19 (a) . . . a claim of self-defense may be invoked only to justify the actor's *use* of reasonable physical force. Self-defense does not apply if a defendant's use of force is not in issue." (Emphasis in original.) *State* v. *Bailey*, 209 Conn. 322, 348, 551 A.2d 1206 (1988). Because the use of force is not an issue in a prosecution for criminal possession of a firearm pursuant to § 53a-217 (a), the defendant is not entitled to an instruction of self-defense as to his conviction of criminal possession of a firearm. See id. (holding self-defense inapplicable to crime of carrying a pistol without a permit pursuant to General Statutes § 29-35). Accordingly, we affirm the judgment as to count six of the state's amended information charging the defendant with criminal possession of a firearm.

apartment to get Erika because she was preoccupied watching Taki, who was asleep. Jones knocked on the door, but nobody answered. Jones then returned to the car and informed Octavia that nobody answered, which surprised Octavia because she had spoken with Erika recently. Subsequently, Nelson Stroud, who was living in the basement area of 275 Jefferson Street at the time, informed Jones that the defendant and Erika were arguing in their apartment. Octavia asked Myers, who was sitting outside of the apartment, to watch Taki while she and Jones went to retrieve Erika. Without receiving permission from any of the occupants, Octavia and Jones entered the apartment.

Once they had entered the apartment, Octavia and Jones could hear the defendant and Erika arguing in their bedroom. Concerned for her mother, Octavia began banging on the door and "told them to open up the f-ing door." Octavia banged on the bedroom door with a large plastic wrap holder several times and screamed at the defendant to open the door, but he did not comply. Instead, the defendant instructed her to "get the f-away from my door." Octavia continued to pound on the door and warned the defendant that "if you don't open the door [I'm] going to f-you up." Jones, who was also pounding on the door, ordered the defendant to open the door and also stated that she and Octavia had backup. Octavia admitted at trial that she and Jones uttered these warnings to the defendant clearly.

Having failed to convince the defendant to open the door, Octavia turned away from the bedroom door and searched for something to hit it with. At that moment, the door was opened, and the defendant opened fire. Jones was shot first. Just after Jones was shot, Octavia felt a burning in her chest and realized that she had been shot as well. Octavia and Jones ran back to Octavia's car, and Octavia drove them to nearby Bridgeport

Hospital. Jones lost a substantial amount of blood during the car ride.

As Octavia and Jones were heading toward Octavia's car, Erika ran toward them. The defendant shot Erika, who eventually collapsed outside of the apartment. The defendant tried to take her to a hospital on his bike, but was unable to do so and fled. Emergency response personnel subsequently arrived and found Erika bleeding profusely. She was taken to Bridgeport Hospital where she was treated for several weeks. Jones died of her injuries. Erika and Octavia both survived, but sustained substantial injuries.

In an amended information dated June 6, 2007, the state charged the defendant with one count of murder as to Jones (count one); one count of attempted murder as to Erika and one count of attempted murder as to Octavia (counts two and three); one count of assault in the first degree as to Erika and one count of assault in the first degree as to Octavia (counts four and five); and criminal possession of a firearm (count six).

Evidence in the defendant's criminal trial began on September 5, 2007. On that day, the court stated on the record that it had received the state's written request to charge. The court also stated that it had granted the defendant a one day extension to submit his request. The following day, the defendant submitted his written request to charge, which contained a proposed charge of self-defense. The defendant stated that the evidentiary basis for this request was "[t]estimony from the alleged victims, [Erika and Octavia]." At the time this written request was submitted, neither Erika nor Octavia had testified. Immediately after the defendant filed his request, however, the state called Octavia and then Erika to testify.

The state also called Stroud and Tawana Myers (Tawana) to testify. Stroud was in his basement apartment at 275 Jefferson Street when he heard the defendant begin to argue with Erika. He testified that he heard Erika state that she wanted to leave, and he heard her plead with the defendant to stop hitting her. He also testified that he left his apartment on foot fifteen minutes after the argument began. As he was walking down Jefferson Street toward Central Avenue, he heard four gunshots from the apartment. Stroud turned and observed Octavia and Jones run from the house, enter their car, and drive off. He did not see Erika leave the house.

Tawana, the wife of Joseph Myers, was outside of 275 Jefferson Street on May 4, 2006. She testified that she heard the defendant and Erika arguing, and observed Octavia and Jones enter the house. She then heard argument followed by a "big boom," which she concluded was Octavia and Jones kicking in the door to the defendant's bedroom. Subsequently, she heard three or four gunshots fired in quick succession, and then observed Octavia and Jones flee from the house and drive off. Tawana observed Erika come out of the house after Octavia and Jones; she was bleeding badly from her chest and collapsed on the front porch as soon as she exited the house. After the defendant exited the house, Tawana did not hear any additional gunshots.

The state rested on September 10, 2007, and the defendant did not call any witnesses. The court then notified the parties that it would address the jury charge after the lunch recess. In addition, the court inquired whether the parties intended to file supplemental requests to charge. The state declined, and defense counsel indicated that he would review what he previously had submitted and make a decision after lunch.

That afternoon, the court held a charge conference in chambers. At the conclusion of this conference, the

court stated on the record that it had discussed "all of the issues relating to the charge" with the parties and invited the parties to comment on the record. The state acknowledged that a charge conference occurred and offered no further comment. Defense counsel likewise acknowledged that a charge conference was held in chambers, but also took exception to the court's decision not to give a self-defense charge. The court noted the exception and offered the parties an opportunity to comment further. When both parties declined, the jury returned to the courtroom for the charge. The court did not give an instruction on self-defense . Thereafter, the jury found the defendant guilty of all charges.

On appeal, the defendant claims that the court improperly failed to give the jury an instruction of self-defense. He argues that the evidence presented during the trial supported such an instruction. Specifically, he argues that Octavia's statement to the defendant that "if you don't open the door [I'm] going to f-you up," coupled with Jones' warning that the two "had backup" and the pounding on the door, provided an evidentiary basis for the jury reasonably to conclude that the defendant believed that Octavia and Jones were about to use deadly force against him.

In response, the state argues that the defendant's written request to charge was insufficient for two reasons. First, the state contends that the written request lacked an evidentiary basis to support a charge of self-defense. The state notes that the written request simply stated that the testimony of two witnesses, namely, Erika and Octavia, is the *source* of the evidence supporting the charge. In the state's view, the written request should have detailed the *specific evidence* that supported the defendant's proposed jury instruction rather than simply identifying the source of the evidence. Second, the state argues that the written request contained an incomplete and inaccurate statement of self-defense

principles.[3] Specifically, the state claims that because the defendant used deadly physical force against the victims, the proposed jury instruction necessarily must have contained, but did not contain, a discussion of the use and limits of deadly physical force in defense of

[3] The legal principles set forth in the defendant's written request to charge were as follows: "The defendant claims that his use of force was justified as self-defense. This requires that I state to you the applicable rules of law on the use of force in self-defense. Self-defense is a legal defense to the use of force which would otherwise be criminal. This does not mean, however, that the defendant must prove the defense of self-defense. The burden to prove guilt beyond a reasonable doubt remains on the state, which means that the state must disprove the defense beyond a reasonable doubt.

"A person is justified in using reasonable physical force upon another person to defend himself from what he reasonably believes to be the imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for that purpose. However, a person is not justified in using physical force self-defense when, with intent to cause physical injury to another person, he provokes the use of physical force by that other person; nor is a person justified in using physical force in self-defense when he is the initial aggressor.

"First of all, the defendant must actually believe that he is faced with the imminent use of physical force upon him. He must in fact have such a belief.

"Second, that belief must be reasonable. A reasonable belief is one that a reasonably prudent person, viewing the situation from the defendant's perspective, and in the same circumstances as the defendant was in, would have. It is not an irrational belief, nor is it a belief that is not justified by all the circumstances existing then and there. Nor is it necessarily the belief that the defendant in fact had; it is a belief that was reasonable, from the perspective of a reasonable person in the defendant's circumstances.

"Third, acting with that reasonable belief, the amount and degree of force that he uses must be reasonable. It must be that degree of force that a reasonable person, in the same circumstances, viewed from the perspective of the defendant, would use, and no more. If the degree of force used is excessive or unreasonable in view of all the circumstances, the defendant is not entitled to the defense of self-defense.

"Finally, a person is not justified in using physical force if, intending to cause physical injury to the other person, he provokes the use of physical force by that other person he is the initial aggressor. The initial aggressor may not necessarily be the person who first used physical force. The initial aggressor may be the first person who threatened to use physical force.

"Whether the defendant had the requisite belief, whether the defendant's belief was reasonable, whether the degree of force he used was reasonable, and whether he provoked the use of physical force, are questions of fact for you to determine from the evidence."

self. Alternatively, the state claims that, even if the defendant was entitled to an instruction of self-defense as to Octavia and Jones, he was not entitled to such a charge with respect to his conviction of attempted murder and assault for his conduct against Erika. The state relies on Erika's testimony that after Octavia and Jones were shot, she ran toward them and was shot by the defendant near a tree in the yard. On the basis of this testimony, the state claims that Erika was shot when she was fleeing from the defendant and, therefore, that there is no evidentiary basis to support a charge of self-defense as to her.

Before we begin our analysis, we note that the state's primary position—that the defendant's written request to charge is insufficient—implicates the reviewability of the defendant's claim. The state acknowledges that the failure to set forth a detailed factual basis for a proposed charge is treated by the courts as a failure to preserve that claim, but also argues that this failure "should disentitle a defendant to the charge." Although we find no support for the state's latter proposition, we will consider the issue of reviewability. As stated previously, the defendant's written request to charge identifies "[t]estimony from the alleged victims, [Erika and Octavia]," as the basis for the proposed instruction.

Our rules of practice set forth the steps necessary to preserve a claim that a trial court improperly failed to give a jury instruction. Practice Book § 42-16 provides in relevant part: "An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of

exception. The exception shall be taken out of the hearing of the jury." See also *Lin* v. *National Railroad Passenger Corp.*, 277 Conn. 1, 13, 889 A.2d 798 (2006).

Practice Book § 42-18 governs the form and content of such requests. Practice Book § 42-18 provides that written requests shall contain "a single proposition of law clearly and concisely stated with the citation of authority upon which it is based, *and the evidence to which the proposition would apply*. . . ." (Emphasis added.) This court previously has held that the requirements of Practice Book § 42-18 are satisfied "only if the proposed request contains such a complete statement of the essential facts as would have justified the court in charging in the form requested." (Internal quotation marks omitted.) *State* v. *Arreaga*, 75 Conn. App. 521, 525, 816 A.2d 679 (2003).

In the present case, the defendant's written request does not state any essential facts or evidence, but instead merely identifies two witnesses, Erika and Octavia, whom the defendant claims would produce that evidence via testimony. Although the court required the parties to submit their proposed charges before all of the evidence had been presented, it clearly gave counsel the opportunity to supplement their proposed charges after the evidence was submitted. The defendant failed to take advantage of this opportunity. Because the defendant's request fails to set forth a complete statement of essential facts justifying the proposed charge, we agree with the state that it did not comply with Practice Book § 42-18.[4] Consequently, we

[4] The state also contends that the defendant's written request to charge is inadequate because it fails to set forth a complete and accurate statement of the legal principles of self-defense. Because we conclude that the defendant's written request is inadequate for its failure to state a proper evidentiary basis, we need not address this additional contention. Accordingly, we offer no opinion concerning whether the defendant should have differentiated deadly force because it is irrelevant to our analysis.

conclude that the defendant has failed to preserve his claim for review.[5]

Nevertheless, the defendant argues that his claim is reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third condition of *Golding*). We agree. In his main brief, the defendant has requested review of an unpreserved claim pursuant to *Golding*, presented a record that is adequate for our review, and has alleged a violation of a fundamental constitutional right, namely, the right to proper jury instructions on the elements of self-defense. See *State* v. *Elson*, 311 Conn. 726, 755–56, 91 A.3d 862 (2014). Therefore, we will review the defendant's unpreserved constitutional claim.

Turning to the merits of the defendant's claim, under the remaining two prongs of *Golding*, the defendant must show that the alleged constitutional violation exists and deprived him of a fair trial, and that the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. See

[5] Although the defendant failed to submit an adequate written request, we note that he did take exception to the court's refusal to charge the jury on self-defense. The defendant's exception, like his written request to charge, did not conform to our rules of practice. Practice Book § 42-16 provides in relevant part that "[c]ounsel taking the exception shall state *distinctly* the matter objected to and the ground of exception. . . ." (Emphasis added.) "The requirement that the claim made by the exception be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked." (Internal quotation marks omitted.) *State* v. *Wright*, 62 Conn. App. 743, 755, 774 A.2d 1015, cert. denied, 256 Conn. 919, 774 A.2d 142 (2001).

In the present case, defense counsel failed to state the ground of his exception on the record, but merely stated that he took exception to the court's failure to give an instruction on self-defense. Our rules of practice require defendants to state distinctly both the matter objected to and the ground of such an exception. Although the defendant stated distinctly that he was objecting to the failure to give a self-defense instruction, he did not set forth any grounds supporting this exception.

In re Yasiel R., supra, 317 Conn. 781. For the reasons we now discuss, we conclude that both of these prongs have been satisfied and, therefore, that the defendant was entitled to an instruction on the elements of self-defense as to his conduct toward Octavia and Jones, but not as to his conduct toward Erika.

The following legal principles are relevant to our analysis of the third prong of *Golding*. "[T]he fair opportunity to establish a defense is a fundamental element of due process of law . . . . This fundamental constitutional right includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified. . . . Thus, [i]f the defendant asserts [self-defense] and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to [an] . . . instruction [on self-defense]. . . . Before an instruction is warranted, however, [a] defendant bears the initial burden of producing sufficient evidence to inject self-defense into the case. . . . To meet that burden, the evidence adduced at trial, whether by the state or the defense, must be sufficient [if credited by the jury] to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. . . . This burden is slight, however, and may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Edwards*, 234 Conn. 381, 388, 661 A.2d 1037 (1995).

Adopting the version of Erika and Octavia's testimony most favorable to the defendant, we conclude that the evidence presented to the jury was sufficient to raise the question of whether the defendant acted in self-defense. To begin with, Octavia admitted that neither

she nor Jones had received permission from any occupant to enter the defendant's apartment. Once inside, Octavia began pounding on the door to the defendant's bedroom with an object and shouting orders to him, such as "open up the f-ing door." When the defendant did not comply, Octavia and Jones threatened the defendant, stating that if he did not open the door, they would "f-you up." Thus, the defendant was faced with intruders in his home who were pounding on his door and leveling threats, which Octavia admitted were leveled clearly for the defendant to hear. Additionally, the defendant was faced with an unknown number of intruders, as Jones warned the defendant, while pounding on his bedroom door, that she and Octavia "had backup." At oral argument before this court, the state conceded that the statements made by Octavia and/or Jones could have been construed as threats. Because this evidence, if believed, may have been sufficient to have raised a question in the mind of a rational juror as to whether the defendant had shot Octavia and Jones in self-defense, he was entitled to a jury determination of his claim. The trial court, therefore, improperly rejected the defendant's request for an instruction on self-defense as to his crimes toward Octavia and Jones.

With regard to the fourth prong of *Golding*, we note simply that the state has not argued that the court's failure to provide an instruction was harmless beyond a reasonable doubt. Thus, the state has failed to meet its burden to demonstrate that such an error was harmless.

Having concluded that the defendant was entitled to an instruction as to Octavia and Jones, we turn to the state's contention that he was not entitled to an instruction as to counts two and four of the information, charging the defendant with attempted murder and assault in the first degree, respectively, for his conduct toward Erika. We agree with the state.

The following additional facts are relevant to this issue. Erika testified during trial. On direct examination, she testified that after Octavia and Jones were shot, she went toward them and was shot by the defendant near a tree in the yard. On cross-examination, defense counsel asked Erika a series of questions about what occurred in the bedroom. For example, defense counsel asked Erika if she went for a gun when the two were arguing. She answered no. Defense counsel then asked Erika if she wrestled with the defendant over the gun, and if the gun went off accidentally as they were fighting to control it. She answered no to both questions. She also denied even reaching for the gun. Defense counsel also asked Erika if she had a box cutter on her keychain, which she admitted. When defense counsel asked if she went after the defendant with the box cutter, she denied it.

The state relies on Erika's prior testimony that she was shot outside and contends that she was fleeing when the defendant assaulted her. The defendant points out that Tawana's testimony that all gunshots were fired in the house in quick succession contradicts Erika's account. Regardless of where Erika was shot, we conclude that there is no evidence in the record to justify a self-defense charge as to her. None of the evidence adduced at trial indicates that Erika posed a threat to the defendant. Erika denied each question posed which might have suggested that she exhibited threatening behavior, such as whether she threatened the defendant with a box cutter or tussled with the defendant for the gun. Although there is no dispute that the defendant and Erika were arguing, there is no evidence that Erika harmed or threatened to harm the defendant during the course of this argument. In the absence of any such evidence, we conclude that, on remand, the defendant is not entitled to a jury instruction of self-defense for his conduct toward Erika.

The judgment is reversed only as to counts one, three, and five of the amended information and the case is remanded for a new trial on those counts; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

SUE NADEL *v.* STEVEN LUTTINGER
(AC 37763)

Beach, Sheldon and Mullins, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting in part the plaintiff's motion for contempt. The defendant claimed that the trial court improperly categorized a cash performance award that he received as an asset to be distributed as property pursuant to paragraph 5B of the parties' separation agreement, rather than as earned income to be distributed as alimony pursuant to paragraph 2 of that agreement. Pursuant to paragraph 5B of the agreement, if and when a nonvested award of any kind became vested, the plaintiff was entitled to her share thereof, net of all applicable taxes. Because the agreement did not clearly provide for the equal division of property assets, although the parties testified as such, the court did not find the defendant in contempt. The court did, however, conclude that the plaintiff was entitled to 50 percent of the cash award, and the court granted the plaintiff's motion for contempt to the extent that the motion sought an order directing the defendant to pay the difference between 50 percent of the cash performance award, net of applicable taxes, and the amount he had already paid to the plaintiff. *Held*:

1. The trial court's finding that the cash performance award was an asset subject to distribution as property under paragraph 5 of the agreement was not clearly erroneous: although the defendant claimed that the cash award was a form of earned income under the agreement, which included wages and bonuses, it was clear from the language of the agreement that paragraph 5B was not limited to restricted stock options only, but rather applied to nonvested awards of any kind, which could include a cash award; furthermore, the language of the performance award itself supported the conclusion that it was properly deemed to be something other than ordinary salary or a bonus, the evidence presented showed that the cash award was granted during the marriage and vested after its dissolution, and paragraph 5B of the agreement pertained to assets that were granted during the marriage and vested thereafter, and made

clear that when a nonvested award of any kind became vested, the plaintiff was entitled to her share net of all applicable taxes; moreover, although the separation agreement was properly determined to be clear and unambiguous, the trial court did not violate the rules of contract interpretation by examining extrinsic sources, as it was incumbent on the court to determine the nature of the performance award in issue, and nothing prevented the court from considering evidence that tended to explain into what category the payment belonged.

2. The trial court's determination that the defendant owed $55,728.75 to the plaintiff was clearly erroneous: the only evidence supporting the court's finding was the plaintiff's own conclusion that the defendant owed her that amount, there was no evidence of the amount of the performance award that the defendant already had paid to the plaintiff as alimony, and the amount the court awarded was based on the gross amount of the cash award, which conflicted with the separation agreement providing that the plaintiff was entitled to her share net of any applicable taxes; accordingly, the plaintiff was entitled to one half of the net amount of the cash performance award, less the amount already paid to her by the defendant.

Argued April 11—officially released October 4, 2016

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Heller, J.*, granted in part the plaintiff's motion for contempt, and the defendant appealed to this court; subsequently, the court, *Heller, J.*, issued an articulation of its decision. *Reversed in part; further proceedings.*

Samuel V. Schoonmaker IV, with whom, on the brief, was *Wendy Dunne DiChristina*, for the appellant (defendant).

Steven R. Dembo, with whom were *Caitlin E. Kozloski* and, on the brief, *P. Jo Anne Burgh*, for the appellee (plaintiff).

BEACH, J. In this postdissolution action, the defendant, Steven Luttinger, appeals from the judgment of the trial court granting in part the motion for contempt filed by the plaintiff, Sue Nadel. He claims that the court erred in (1) categorizing a cash performance award received by the defendant as an asset to be distributed as property pursuant to the separation agreement, rather than as earned income to be distributed pursuant to provisions regarding alimony, and (2) finding the amount owed to the plaintiff. We disagree with the defendant's first claim, but agree with the second.

The following facts and procedural history are relevant. The parties were married in November, 1991. The plaintiff filed for dissolution and, on December 17, 2013, a hearing was held. At that time, the parties presented a separation agreement to the court, *Hon. Stanley Novack*, judge trial referee. The dissolution judgment, which was rendered on January 8, 2014, incorporated by reference the parties' December, 2013 separation agreement.

The agreement provided for alimony and for the division of property. Alimony was addressed in paragraph 2 of the agreement. Paragraph 2B provided that alimony was to be calculated with reference to the defendant's "earned income." The amount of the obligation was determined by a sliding scale: "(1) On the first $250,000 of [the defendant's] earned income, both cash and non-cash, [the plaintiff] will receive 25%; (2) On $250,001 to $500,000 of [the defendant's] earned income, both cash and non-cash, [the plaintiff] will receive 20%; (3) On $500,001 to $750,000 of [the defendant's] earned income, both cash and non-cash, [the plaintiff] will receive 15%; (4) On $750,001 to $1,000,000 of [the defendant's] earned income, both cash and non-cash, [the plaintiff] will receive 10%; (5) Over $1,000,000, [the

plaintiff] will not share. (6) Connecticut General Statutes § [46b-86 (b)] shall apply." Paragraph 2C defined the defendant's "earned income" as "all amounts paid to him for his personal services, including: wages, commissions, bonuses, consulting fees, finder's fees, or any other type of compensation both cash and non-cash he has the right to receive for his personal services."

Paragraph 2D provided that the defendant's "earned income will include both cash and non-cash compensation; provided, however, that [the plaintiff's] entitlement to a percentage of [the defendant's] earned income will be satisfied first out of all cash paid to [the defendant] during a calendar year . . . . If [the defendant] should voluntarily defer any cash compensation, or shall voluntarily elect non-cash compensation in lieu of cash, then in that event, he shall be deemed to have received the voluntary deferral in cash."

The agreement contained other provisions regarding alimony that are not directly relevant here. It is clear from the agreement, then, that the plaintiff was entitled to a decreasing percentage share of the defendant's earned income as the amount of his income rose, and the agreement contemplated that both cash and non-cash remuneration would be subject to alimony.

Obligations as to property division were addressed in paragraph 5. Paragraph 5A provided that ten specifically listed financial assets, not including the award in issue in this case, were to be divided equally at the time of dissolution.

Paragraph 5B is critical to the analysis of this case. The heading of the paragraph is "AMC[1] Restricted Stock Awards and Units (husband)." The paragraph provides: "The division of assets as equitable distribution shall

[1] The defendant was employed by American Movie Classics, LLC, which hereinafter is referred to as AMC.

include all restricted stock units and options that have been awarded to [the defendant] through the date of the dissolution of the marriage, including non-vested RSU's[2] and options. If and when non-vested awards of any kind become vested, then the [plaintiff] shall forthwith be entitled to her share thereof net of all applicable taxes based on the tax rate from the year in which the applicable taxes are imposed. Within 7 days after RSU's vest, the [plaintiff] shall receive her share, taking into account any appreciation or depreciation of said shares. Within 30 days after the filing of the [defendant's] tax return in which the receipt of the restricted stock units are reflected, the parties shall 'true-up' in order to share equitably the tax burden on the vesting of the RSU's." Although paragraph 5B does not expressly state how the parties were to divide the net proceeds of assets subject to the paragraph, the parties agreed that such assets were to be divided evenly between them.

During the relevant times, the defendant was employed by AMC. He participated in two incentive programs. One, the "AMC Networks Restricted Share Awards," though not directly in issue in this appeal, has been referred to by the parties, and facts concerning the program appear in the record. Pursuant to that program, the defendant received in 2011 a total of 4250 shares of restricted AMC stock, which did not vest until March, 2014. The defendant considered this stock award to be property pursuant to paragraph 5B and paid the plaintiff accordingly. There is no dispute regarding this transaction.

The second incentive program forms the context of the present appeal. In March, 2011, AMC notified the defendant that he had been selected to receive a contingent cash award.[3] The fundamental term of the

[2] The references in the agreement to RSU's are to restricted stock units.

[3] The defendant received similar performance awards in 2012 and 2013. This appeal specifically concerns only the 2011 award.

agreement was stated in paragraph one of the "Performance Award Agreement." The "target" amount of the award was $165,000; the exact amount was to be determined by the company after it determined the extent to which certain performance objectives were attained in the 2013 calendar year.

The defendant received the cash proceeds of the award in March, 2014. The gross amount of the award was $222,915. After taxes were deducted, the net amount received by the defendant was $140,503.33. Although there are some misleading characterizations on several brokerage statements, it was agreed that the "Restricted Share Awards," referred to previously, were transactions in shares of company stock, while the "Performance Awards," the subject of this appeal, were entirely cash transactions. The defendant treated the AMC cash performance award as earned income and, accordingly, paid the plaintiff a percentage of that award pursuant to paragraph 2B of the separation agreement, which concerns alimony.[4]

In April, 2014, the plaintiff filed a postjudgment motion for contempt. The plaintiff sought to have the defendant held in contempt for treating the cash performance award as earned income and paying her a percentage of the award as alimony pursuant to paragraph 2B of the separation agreement. She argued at the contempt hearing that the cash award was an asset granted to the defendant prior to the entry of the judgment of dissolution and, thus, that the defendant should have paid her 50 percent of the cash performance award according to paragraph 5 of the separation agreement.

Following a hearing on the plaintiff's motion for contempt, the court, *Heller*, *J.*, determined that the cash performance awards had been granted to the defendant during the marriage, were "non-vested awards" within

[4] It is not entirely clear from the record precisely what amount was paid.

the meaning of paragraph 5B and, upon vesting, the defendant was obligated to pay the plaintiff her share. The court noted that, according to the testimony of the parties, they had agreed to divide property assets within paragraph 5 equally, although paragraph 5 did not expressly so state. The court found that the separation agreement did not clearly provide for the equal division of such assets; thus, the court did not find the defendant in contempt. The court concluded that the plaintiff was entitled to 50 percent of the cash award and granted the plaintiff's motion for contempt to the extent that it sought an order directing the defendant to pay the difference between 50 percent of the cash performance award, net of applicable taxes, and the amount that he already had paid to her. The court ordered the defendant to pay the plaintiff $55,728.75 and did not find the defendant in contempt.

Pursuant to a June, 2015 order by this court, the trial court issued an articulation. The court clarified its finding that the cash performance award was not an award of a restricted stock unit, but rather was a nonvested award pursuant to paragraph 5B of the separation agreement. It further stated that the amount of its award of $55,728.75, made after finding that the plaintiff was entitled to one half of the net cash performance award, was reached because the court credited the plaintiff's conclusion in her testimony that that's what she was owed.

I

The defendant's principal claim is that the court erred in categorizing his postjudgment performance cash award as property to be distributed according to the provisions of paragraph 5B of the separation agreement, rather than as earned income subject to paragraph 2C. The defendant argues that the plain and unambiguous

language of the separation agreement compels the conclusion that the cash award was a form of income under paragraph 2C, which expressly included "bonuses" within its definition of earned income. Earned income, of course, was subject to distribution as alimony rather than as property. We disagree, and hold that, although the language of the separation agreement is clear and unambiguous, it compels the conclusion that the cash performance award was properly considered to be an asset subject to distribution pursuant to paragraph 5.

Both parties argue that paragraphs 2C and 5B are clear and unambiguous. The court agreed, and so do we. "Our interpretation of a separation agreement that is incorporated into a dissolution decree is guided by the general principles governing the construction of contracts. . . . A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . If the language of a contract is clear and unambiguous, the intent of the parties is a question

of law, subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008).

As stated previously, paragraph 2C defined the defendant's "earned income" as "all amounts paid to him for his personal services, including: wages, commissions, bonuses, consulting fees, finder's fees, or any other type of compensation both cash and non-cash he has the right to receive for his personal services." The defendant argues that the payment in issue was clearly a "cash bonus," because it was a payment in cash, rather than shares of stock, the money was actually paid after the date of dissolution, and the cash performance award was not clearly within the definitions of property assets as provided in paragraph 5. The defendant also alludes to the description of the award as it appears in various financial statements.[5]

Paragraph 5B, which concerns property division, provides that "[t]he division of assets as equitable distribution shall include all restricted stock units and options that have been awarded to the [defendant] through the date of the dissolution of the marriage, including non-vested RSU's and options. If and when non-vested awards of any kind become vested, then the [plaintiff] shall forthwith be entitled to her share thereof net of all applicable taxes based on the tax rate from the year in which the applicable taxes are imposed. Within 7 days after RSU's vest, the [plaintiff] shall receive her

[5] We note that documents other than the separation agreement are not properly to be referenced, for the purpose of construing the words of the agreement, unless the agreement is ambiguous. See *Isham* v. *Isham*, 292 Conn. 170, 180, 972 A.2d 228 (2009) ("[w]hen only one interpretation of a contract is possible, the court need not look outside the four corners of the contract" [internal quotation marks omitted]). The court of course properly may rely on extrinsic evidence to determine the factual characteristics of the actual payment, so that it can determine how and whether the distribution of the payment is regulated by the agreement.

share, taking into account any appreciation or depreciation of said shares."

The defendant argues that paragraph 5B applies only to distributions of stock, such as restricted stock options. He contends that the phrase "non-vested awards of any kind," in the context of paragraph 5B, refers to and applies only to those assets particularly described in the first sentence of the paragraph, which specifically mentions only nonvested restricted stock units and nonvested options.[6] He further argues that the heading of paragraph 5B, "AMC Restricted Stock Awards and Units," has some significance, despite the boilerplate language of paragraph 23.[7] The plaintiff contends that the language of paragraph 5B does not necessarily exclude nonstock transactions from the category of financial assets subject to distribution according to paragraph 5, because the phrase "non-vested awards of any kind," contemplates a broader scope. We agree with the plaintiff.

The first sentence of paragraph 5B states that the category of assets subject to division "shall include" certain restricted stock units. "[T]he word 'include' may be considered a word of limitation as well as a word of enlargement. . . . In *Hartford Electric Light Co*. v. *Sullivan*, [161 Conn. 145, 150, 285 A.2d 352 (1971)], we recognized that the most likely common use of the term 'shall include' is one of limitation. . . . In that case, however, we could not conclude with certainty that it was so employed." (Citations omitted.) *State* v. *White*, 204 Conn. 410, 422–23, 528 A.2d 811 (1987). In the present case, the context of the term "shall include" compels the conclusion that the term is not one of limitation.

[6] The court's finding that the cash performance award was not a stock transaction is not contested.

[7] Paragraph 23 of the settlement agreement provides: "HEADINGS The paragraph headings herein are for convenience only and shall not be construed to limit or in any way affect any provisions of this Agreement."

The first sentence mentions restricted stock units, but the term "non-vested awards of any kind," which appears in the next sentence, is very broadly phrased. The use of the enlarging phrase indicates that the term "shall include" does not limit the applicability of paragraph 5B to only restricted stock units, but rather it apples to "non-vested awards of any kind," which were awarded, but not paid, during the marriage. A construction limiting the application of paragraph 5B to restricted stock units and options would render the words "of any kind" superfluous. *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 546, 893 A.2d 389 (2006) ("the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous" [internal quotation marks omitted]). If the plaintiff was entitled under the agreement to the appropriate share of "non-vested awards of any kind," and if the cash performance award was a non-vested award, then the cash performance award was subject to distribution under paragraph 5.

The second sentence also indicated that the plaintiff "shall forthwith" be entitled to her share of the "non-vested awards of any kind" upon the vesting of such awards. This provision sets forth a timetable different from that applicable to restricted stock units. According to the third sentence, the plaintiff shall receive her share within seven days of vesting, and, according to the fourth sentence, the parties were subject to a "true-up" provision. The parties, represented by counsel, easily could have specifically stated, for example, that paragraph 5 applied only to stock transactions, but they did not.

The performance award agreement, dated March 29, 2011, authoritatively explained the award and was introduced by the defendant at the contempt hearing. The agreement referred to the transaction as an "[a]ward" rather than a bonus. Paragraph 21 of the agreement

stated that the award "shall be considered special incentive compensation and will be exempt from inclusion as 'wages' or 'salary' in pension, retirement, life insurance and other employee benefits arrangements of the Company and its Affiliates, except as determined otherwise by the Company." The language of the award itself supports the conclusion that the award is properly deemed to be something other than ordinary salary or a bonus.

The critical distinction, on a reading of the agreement as a whole, is not between cash and stock or between performance cash awards and restricted stock units. Rather, it is clear that nonvested awards made prior to dissolution, presumably recognizing service during the course of the marriage, were considered to be property, to be distributed accordingly. When the award vested, the net proceeds were, then, to be distributed equally between the parties. On the basis of the evidence presented at the contempt hearing, we do not conclude that the court's finding that the cash award was a "nonvested asset of any kind" under paragraph 5B was clearly erroneous.[8] The evidence presented at trial

[8] The defendant also argues that an examination of the agreement as a whole, and in particular paragraphs 2D and 2E, supports his interpretation of the separation agreement. He notes that paragraph 2D indicates that voluntarily deferred cash compensation is part of the alimony calculation. He argues that involuntary cash bonus deferrals were not addressed in paragraph 2D because they were addressed in paragraph 2C. He notes that paragraph 2E, which provided that deferred noncash compensation granted within the alimony term was to be paid to the plaintiff according to the portion owed to her upon the defendant receiving the deferred payments, and includes noncash compensation granted in one year but paid in later years, as alimony not property. These provisions discuss cash and noncash compensation and how they fit into the alimony calculations. Significantly, the first sentence of paragraph 2E indicates that it refers to "non-cash compensation received by [the defendant] *going forward from the date of the decree* . . . ." (Emphasis added.) Both paragraphs 2D and 2E refer to events in the future. The court's findings, which were supported by evidence, that the cash award was a "non-vested [award] of any kind" under paragraph 5B and that the award was made prior to the dissolution, were not inconsistent with these provisions.

makes clear that the cash award was granted during the marriage and vested after dissolution. Paragraph 5B pertains to assets that were granted during the marriage and vested after, and makes clear that when "non-vested awards of any kind" become vested, the plaintiff shall be entitled to her share net of all applicable taxes.

We recognize, finally, the defendant's argument that the court violated the rules of contract interpretation by examining extrinsic sources, such as footnotes on financial affidavits and a Fidelity report, to support its interpretation without first finding the separation agreement to be ambiguous. The court did reference such sources, but nothing prevents a court from considering evidence that tends to explain into what category a payment belongs. Although the agreement itself was properly determined to be clear and unambiguous, it was nonetheless incumbent on the court to determine the nature of the award in issue.

II

The defendant next claims that even if this court affirms the trial court as to the first issue, the court's determination that the defendant owed $55,728.75 was clearly erroneous. He argues that the court erred in crediting the plaintiff's conclusory testimony that the amount due to her was $55,728.75, when that amount was 25 percent of the *total* bonus of $222,915 and did not account for taxes as required under paragraph 5B.[9] We agree.

[9] The defendant also argues that the amount awarded is incorrect because the court failed to follow the "true-up" procedure in paragraph 5B. This argument assumes that paragraph 5B pertained only to restricted stock units and that the cash award was subject to the "true-up" provision. As stated in part I of this opinion, paragraph 5B did not pertain only to restricted stock units, but rather, pertained to restricted stock units and "non-vested awards of any kind." The final sentence of paragraph 5B required the parties to "true-up": "Within 30 days after the filing of the [defendant's] tax return in which the receipt of the restricted stock units are reflected, the parties shall 'true-up' in order to share equitably the tax burden on the vesting of the RSUs." This sentence concerns restricted stock units. The court properly

"A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 858, 905 A.2d 70 (2006).

In its articulation, the court explained the method used for calculating the money owed as follows: "Having found that the [plaintiff] was entitled to half of the cash performance award payment that the [defendant] received on March 13, 2014, net of applicable taxes, the court credited the [plaintiff's] testimony that the balance due her was $55,728.75, and it ordered the [defendant] to pay that amount to the [plaintiff]."

The only evidence supporting the court's finding was the plaintiff's own conclusion, admitted into evidence without objection, that the defendant owed her $55,728.75. We have been directed to no evidence as to the amount of the award that the defendant paid to the plaintiff as alimony. The sparse evidence before the court in this regard did show, however, that the gross amount of the cash award was $222,915, and the net amount was $140,503. Under paragraph 2B, the amount of the defendant's obligation to pay alimony was variable, depending on overall income.[10] The amount awarded, $55,728.75, is clearly 25 percent of $222,915, which was the *gross* amount of the cash award. Under paragraph 5B the plaintiff was entitled to her share of a nonvested award of any kind "*net of all applicable*

found that the performance cash award was not a restricted stock unit; thus, the sentence regarding truing up does not apply.

[10] Paragraph 2B also provides that if the defendant's earned income is over $1 million, the plaintiff's share of that as alimony is zero percent. Both parties testified at the contempt hearing that a certain percentage of the cash award was paid to the plaintiff as alimony; that specific amount, however, was not in evidence.

taxes based on the tax rate from the year in which the applicable taxes are imposed." (Emphasis added.) We are left with a firm conviction that a mistake has been committed. The record shows that the net amount of the cash performance award was $140,503.33. The plaintiff, then, was entitled to one half of that amount, $70,251.67, less whatever the defendant previously paid as alimony.

The judgment is reversed only as to the amount of the award owed to the plaintiff and the case is remanded for further proceedings in accordance with this opinion. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

FREDERICK CORNELIUS *v.* LINDA ARNOLD, TAX ASSESSOR, TOWN OF FARMINGTON (AC 38011)

Keller, Mullins and Norcott, Js.

Syllabus

The plaintiff property owner appealed to the trial court from the decision of the defendant tax assessor, claiming that the assessment of certain of his real property was improper and manifestly excessive. The defendant had assessed the plaintiff's property on October 1, 2011, and, following periodic informal efforts to have the assessment reduced, the plaintiff commenced the present action on January 29, 2013. The defendant moved for summary judgment on the ground that the action was untimely pursuant to the statute (§ 12-119) providing that a property owner may appeal the decision of a tax assessor to the Superior Court within one year from the date as of which the property was last evaluated for purposes of taxation. The trial court granted the defendant's motion for summary judgment, concluding that the plaintiff had not commenced the present action within one year of the assessment, and that he had not raised a genuine issue of fact as to whether the defendant had engaged in an illegal course of conduct that would have tolled the limitations period. On appeal, the plaintiff claimed that the trial court improperly rendered summary judgment, as he had timely commenced this action because the date of the assessment was not the date as of which the property was last evaluated for purposes of taxation, and there was a genuine issue of material fact as to whether the defendant's continuing course of conduct tolled the limitations period. *Held*:

1. The trial court properly concluded that the plaintiff's challenge to the assessment was untimely because it fell outside of the one year limitation period for bringing an action pursuant to § 12-119: the plaintiff was required to commence the present action within one year of October 1, 2011, as our appellate courts have held uniformly that, under the plain language of § 12-119, the assessment date is the date as of which the property was last evaluated for purposes of taxation; moreover, there was no merit to the plaintiff's claim that § 12-119 was ambiguous, as his alternative interpretations were either factually inapplicable or legally incorrect; furthermore, the plaintiff could not prevail on his claim that the one year limitation period in § 12-119 was subject to a balancing of equities that must be resolved in his favor, as it was not the trial court's role to balance the equities to determine whether to apply the statute of limitations in this case, and § 12-119 was clearly intended to take the place of the remedy in equity based on an overvaluation of property.
2. The evidence presented to the trial court by the plaintiff in opposition to the defendant's motion for summary judgment failed to establish a genuine issue of material fact as to the applicability of the continuing course of conduct doctrine; the evidence indicated that the plaintiff was aware of and disagreed with the assessment when he initiated an informal effort to have it reduced in 2011, but then he waited more than one year before attempting again to challenge the assessment, and the defendant was under no duty to engage in negotiations because of the plaintiff's informal efforts to reduce the assessment.

Argued February 11—officially released October 4, 2016

Procedural History

Appeal from the decision by the defendant as to the tax assessment on certain of the plaintiff's real property, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of New Britain, where the court, *Hon. Arnold W. Aronson*, judge trial referee, granted the defendant's motion for summary judgment as to the first count of the amended complaint and rendered judgment thereon, from which the plaintiff appealed to this court; thereafter, this court granted the defendant's motion to dismiss the appeal; subsequently, the plaintiff withdrew the second count of the amended complaint, and the plaintiff appealed to this court. *Affirmed.*

Frederick Cornelius, self-represented, the appellant (plaintiff).

Duncan J. Forsyth, with whom were *Kelly C. McKeon* and, on the brief, *Michael C. Collins*, for the appellee (defendant).

Opinion

MULLINS, J. The self-represented plaintiff, Frederick Cornelius, appeals from the summary judgment rendered in favor of the defendant, Linda Arnold, the tax assessor of the town of Farmington. On appeal, the plaintiff claims that the trial court improperly concluded that (1) his action for relief from wrongful assessment was untimely because he commenced the action beyond the one year time limitation set forth in General Statutes § 12-119,[1] and (2) he failed to establish a genuine issue of material fact as to whether a continuing course of conduct tolled that time limitation. We

[1] General Statutes § 12-119 provides in relevant part: "When it is claimed . . . that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof . . . prior to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the [S]uperior [C]ourt for the judicial district in which such town or city is situated. Such application may be made within one year from the date as of which the property was last evaluated for purposes of taxation and shall be served and returned in the same manner as is required in the case of a summons in a civil action, and the pendency of such application shall not suspend action upon the tax against the applicant. In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court. If such assessment is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes in accordance with the judgment of said court."

Thus, "[i]n a tax appeal taken pursuant to § 12-119, the plaintiff must prove that the assessment was (a) manifestly excessive *and* (b) . . . could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of the property. . . . [The plaintiff] must [set forth] allegations beyond the mere claim that the assessor overvalued the property. . . . The focus of § 12-119 is whether the assessment is illegal." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 105, 61 A.3d 461 (2013).

disagree with both claims and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history inform our review. On January 29, 2013, the plaintiff commenced this action by service of a summons and two count complaint on the defendant. In count one of the amended complaint, the plaintiff alleged the following. On October 1, 2011, he was the owner of a parcel of real property located at 1509 Farmington Avenue in Farmington (property).[2] On that date, the defendant valued the property at $238,714 and assessed the property at a value of $167,100. The assessment, on which the tax laid on the property was computed, "was manifestly excessive and could not have been arrived at except by disregarding duties of the assessor established under . . . General Statutes §§ 12-62 and/or 12-55."[3]

[2] In count two, the plaintiff appealed, pursuant to General Statutes § 12-117a, from the action of the Farmington Board of Assessment Appeals reducing the October 1, 2012 assessment of the property to $70,630. Because count two remained pending in the trial court, the plaintiff's initial appeal to this court was dismissed for lack of a final judgment. Before filing the present appeal, the plaintiff withdrew count two, rendering the trial court's judgment final. See *Annecharico* v. *Patterson*, 38 Conn. App. 338, 339–40, 660 A.2d 880 (1995). Accordingly, only count one is at issue in the present appeal.

[3] General Statutes § 12-62 (b) provides in relevant part: "(1) Commencing October 1, 2006, each town shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town's previous revaluation became effective . . . . The town shall use assessments derived from each such revaluation for the purpose of levying property taxes for the assessment year in which such revaluation is effective and for each assessment year that follows until the ensuing revaluation becomes effective.

"(2) When conducting a revaluation, an assessor shall use generally accepted mass appraisal methods . . . . Prior to the completion of each revaluation, the assessor shall conduct a field review. Except in a town that has a single assessor, the members of the board of assessors shall approve, by majority vote, all valuations established for a revaluation. . . ."

General Statutes § 12-55 provides in relevant part: "(a) On or before the thirty-first day of January of each year, except as otherwise specifically provided by law, the assessors or board of assessors shall publish the grand list for their respective towns. Each such grand list shall contain the assessed

The defendant pleaded the time limitation set forth in § 12-119 as a special defense, alleging that the plaintiff had not commenced the action within one year of the October 1, 2011 assessment he challenged. The defendant thereafter moved for summary judgment on the basis of the special defense. The plaintiff objected, arguing that his action was timely pursuant to § 12-119 as properly read or, in the alternative, that a continuing course of conduct had tolled the limitations period.[4]

By memorandum of decision, the trial court rendered summary judgment as to count one. See footnote 2 of this opinion. The court concluded that "[t]he plaintiff's failure to bring the appeal, as alleged in count one, within the one year period starting with October 1, 2011, supports the defendant's motion for summary judgment."[5] The court further concluded that the plaintiff

values of all property in the town . . . for the assessment year commencing on the October first immediately preceding. The assessor or board of assessors shall lodge the grand list for public inspection, in the office of the assessor on or before said thirty-first day of January, or on or before the day otherwise specifically provided by law for the completion of such grand list. . . .

"(b) . . . The assessor or board of assessors may increase or decrease the valuation of any property as reflected in the last-preceding grand list, or the valuation as stated in any personal property declaration or report received pursuant to this chapter. . . ."

[4] The plaintiff appended three exhibits to his objection: (1) a residential property card for the property bearing a handwritten note that "10/26/11 owner came in [and] said house was torn down a few months ago. No permits were taken out as of 1/31/12. Building Dept. will not write a letter"; (2) a December 5, 2012 letter from the plaintiff to the defendant requesting "all information regarding the 2007 property revaluation"; and (3) a January 16, 2013 letter from the plaintiff to the defendant purporting to memorialize a January 10, 2013 meeting between the parties.

[5] The court incorrectly identified February 4, 2013, the date on which the plaintiff filed the complaint in the Superior Court, as the date of the action's commencement. An application for relief from wrongful assessment is not commenced until it is "served and returned in the same manner as is required in the case of a summons in a civil action . . . ." General Statutes § 12-119; see General Statutes § 52-45a (civil action commenced by legal process); cf. *Chestnut Point Realty, LLC* v. *East Windsor*, 158 Conn. App. 565, 573–74, 119 A.3d 1229 (construing identical language in General Statutes § 12-117a,

failed to raise a genuine issue of fact as to whether the defendant had engaged in an illegal course of conduct that would have tolled the limitations period in § 12-119. This appeal followed. Additional facts will follow as necessary.

On appeal, the plaintiff claims that the court improperly rendered summary judgment for two principal reasons. First, he claims that his commencement of the action on January 29, 2013, was timely because the October 1, 2011 date of the allegedly illegal assessment of the property was not the "date as of which the property was last evaluated for purposes of taxation," on which the one year limitations period in § 12-119 begins. Second, he claims that whether a continuing course of conduct tolled the limitations period was a genuine issue of material fact that precluded summary judgment.

"Summary judgment may be granted where the [claim] [is] barred by the statute of limitations." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014). "The question of whether a claim is barred by the statute of limitations is a question of law over which we exercise plenary review." (Internal quotation marks omitted.) *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 661, 127 A.3d 257 (2015).

"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

which provides that tax appeal "shall be . . . served and returned in the same manner as is required in case of a summons in a civil action," to require service of process for commencement of tax appeal), cert. granted on other grounds, 319 Conn. 928, 125 A.3d 203 (2015). Because we conclude that the limitations period in § 12-119 expired before January 29, 2013, the date on which process was served, any error was not material to the court's determination that the plaintiff's action was untimely.

moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he scope of our review of the trial court's decision to grant the [defendant's] motion for summary judgment is plenary. . . .

"[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Citation omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 309–10.

I

The plaintiff first claims that summary judgment was improper because he commenced his action within the one year limitation period in § 12-119, as that statute properly is read. He argues that the "date as of which the property is last evaluated for purposes of taxation" within the meaning of § 12-119 is the date on which the assessment is "finalized" because "the evaluation process is ongoing." Because the date of finalization will vary according to the circumstances of a given case, he argues, the statute is ambiguous and must be read in his favor. He also contends that the limitations period is directory rather than mandatory or subject to a balancing of the equities, and that an action pursuant to § 12-119 does not exclude the pursuit of other equitable remedies not subject to the time limitation. We are not persuaded.

"The legislature, in creating the municipal taxation scheme, placed precise statutes of limitations over most substantive taxpayer claims." *National CSS, Inc.* v. *Stamford*, 195 Conn. 587, 594, 489 A.2d 1034 (1985) (citing, among other statutes, § 12-119). "It is well settled that, if the owner of the [property] at the [time] of the [assessment] in question . . . want[s] to challenge the [assessment], [he is] required to follow the appropriate statutory procedures, either by (1) timely appealing from the [assessment] to the city's board of assessment appeals pursuant to General Statutes §§ 12-111 and 12-112, and from there by timely appealing to the trial court pursuant to General Statutes § 12-117a, or (2) timely bringing a direct action pursuant to . . . § 12-119. [A] taxpayer who has failed to utilize the available statutory remedies [may not] assert . . . that the tax has not been properly assessed. . . . The rationale for this rule is the need on the part of the government for fiscal certainty. A municipality, like any governmental entity, needs to know with reasonable certainty what its tax base is for each fiscal year, so that it responsibly can prepare a budget for that year. . . . Public policy requires, therefore, that taxes that have not been challenged timely cannot be the subject of perpetual litigation, at any time, to suit the convenience of the taxpayer. . . . A taxpayer who has not sought redress in an appropriate manner is foreclosed from continuing litigation outside [those] statutes." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Danbury* v. *Dana Investment Corp.*, 249 Conn. 1, 12–15, 730 A.2d 1128 (1999).

A

The plaintiff first argues that the reference in § 12-119 to the "date as of which the property was last evaluated for purposes of taxation" is ambiguous because, under the circumstances of a given case, that date may be either (1) January 31 following the October

1 assessment date, in the event that the assessor conducts an interim assessment of the property; see General Statutes § 12-55 (b); (2) May 1 following the assessment date, in the event that the assessment is appealed to the board of assessment appeals; see General Statutes § 12-111; or (3) August 1 following the assessment date, the date on which taxes become due, because "[p]ayment finalizes the [assessment] process . . . ." He argues that we must resolve this ambiguity in his favor and conclude that he timely commenced the present action. We disagree.

"[I]f there is no ambiguity in the language of [a] statute, it does not become ambiguous merely because the parties contend for different meanings." (Internal quotation marks omitted.) *Hardt* v. *Watertown*, 95 Conn. App. 52, 57, 895 A.2d 846 (2006), aff'd, 281 Conn. 600, 917 A.2d 26 (2007). "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." (Internal quotation marks omitted.) *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013).

Section 12-119 provides in relevant part: "When it is claimed that . . . a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the

statutes for determining the valuation of such property, the owner thereof . . . may . . . make application for relief to the [S]uperior [C]ourt for the judicial district in which such town or city is situated. Such application may be made within one year from the date as of which the property was last evaluated for purposes of taxation . . . .''

In seeking to determine the meaning of the phrase ''the date as of which the property was last evaluated for purposes of taxation''; General Statutes § 12-119; as applied to the facts of this case, ''we do not write on a clean slate, but are bound by our previous judicial interpretations of the language and the purpose of the statute.'' (Internal quotation marks omitted.) *Stratford* v. *Jacobelli*, 317 Conn. 863, 871, 120 A.3d 500 (2015). Our appellate courts uniformly have held that ''the date as of which the property was last evaluated for purposes of taxation'' refers to the assessment date.[6] As our Supreme Court has stated, ''property [is] assessed for purposes of taxation on October 1 of each year. The claim that . . . property ha[s] been wrongfully or excessively assessed [may be] appealed . . . by direct action to the court within one year from the date when the property was last evaluated for purposes of taxation pursuant to § 12-119.'' (Footnote omitted.) *Norwich* v. *Lebanon*, 193 Conn. 342, 346–48, 477 A.2d 115 (1984); see also *Wilson* v. *Kelley*, 224 Conn. 110, 122 n.10, 617 A.2d 433 (1992) (''[o]ur decision today . . . requires that a declaratory judgment action that is predicated on the substantive rights of § 12-119 be brought within one year of the date of assessment'').

Likewise, in *Grace N' Vessels of Christ Ministries, Inc.* v. *Danbury*, 53 Conn. App. 866, 870, 733 A.2d 283

[6] General Statutes § 12-62a provides in relevant part: ''(a) Each municipality . . . shall establish a uniform assessment date of October first.

''(b) Each such municipality shall assess all property for purposes of the local property tax at a uniform rate of seventy per cent of present true and actual value, as determined under section 12-63. . . .''

(1999), this court stated that "[the plaintiff's] application to the trial court challenged, inter alia, the October 1, 1992, and October 1, 1993 assessments [of the property]. Because [the plaintiff] filed the application[7] on August 3, 1995, more than one year from either of those dates and, therefore, beyond the time limitation permitted in § 12-119, the trial court correctly determined that its claims . . . are time barred." (Footnote added.)

Accordingly, under the foregoing authorities, the plaintiff had one year from the assessment date of October 1, 2011, to commence his action. He failed to do so. Thus, the trial court properly concluded that the plaintiff's challenge to the 2011 assessment of his property, which he commenced on January 29, 2013, fell outside the one year limitation on bringing an action pursuant to § 12-119.

The plaintiff relies on the cases of *Interlude, Inc.* v. *Skurat*, 253 Conn. 531, 754 A.2d 153 (2000), and *Wiele* v. *Board of Assessment Appeals*, 119 Conn. App. 544, 988 A.2d 889 (2010), for the proposition that the application of a one year time limit to a claim of an illegal assessment is improper. These cases, however, are factually distinguishable from the present case.

In *Interlude, Inc.*, the court concluded that § 12-119 was entirely inapplicable to the plaintiff's claim of an illegal assessment because the plaintiff did not own the subject property on the date of assessment. *Interlude, Inc.* v. *Skurat*, supra, 253 Conn. 539. Because § 12-119 did not apply, the court left for another day the question of what statute of limitations would apply *under those circumstances*. Id., 540 n.12. Here, by contrast, there is no dispute as to the plaintiff's ownership of the property on October 1, 2011, the date of the challenged assessment. In *Interlude, Inc.*, the court's conclusion

[7] See footnote 5 of this opinion.

that § 12-119 was entirely inapplicable defeats the plaintiff's reliance on that case to argue that our Supreme Court "has . . . expressed significant reservations regarding the proper application of any statute of limitations when a claim for an illegal assessment *is brought under § 12-119*." (Emphasis altered.) Indeed, the court in *Interlude, Inc.*, noted that "the entire range of municipal taxing statutes . . . make[s] clear that the assessment date is the foundation of municipal taxing power. Thus, it is necessary to consider the date of assessment as the appropriate date . . . *for purposes of valuation of taxable property* . . . . General Statutes § 12-119." (Citation omitted; emphasis added; internal quotation marks omitted.) *Interlude, Inc.*, v. *Skurat*, supra, 538–39.

In *Wiele*, this court declined to apply the limitations period in § 12-119 to bar a claim of an illegal assessment because the plaintiff in that case, who had moved out of state, lacked notice of the assessment until many years after the assessment had been conducted. *Wiele* v. *Board of Assessment Appeals*, supra, 119 Conn. App. 547, 554–55. Under such circumstances, this court remanded the case to the trial court with direction to determine whether the lack of notice would support an argument that the limitations period should be equitably tolled. Id., 555. Here, there is no claim that the plaintiff lacked notice of the 2011 assessment he now challenges. Notwithstanding the plaintiff's attempt to argue that the limitations period should be tolled in this case; see part II of this opinion; there was no reason here, as there was in *Wiele*, for the court to decline to apply the limitations period.

Pursuant to our appellate courts' uniform understanding of "the date as of which the property was last evaluated" to refer to the assessment date, the time limitation set forth in § 12-119, as applied to the facts of the present case, required the plaintiff to commence

the present action within one year of the October 1, 2011 assessment that he alleged was illegal. This he did not do.

The plaintiff nevertheless argues that the legislature's choice of this broadly worded phrase requires us to conclude that it intended to provide a more temporally expansive understanding of the evaluation process that may encompass January 31, May 1, or August 1 as the date of evaluation. We disagree. As to the first of these proposed dates, we acknowledge that § 12-55, which mandates the publication of the taxable grand list on or before January 31, allows the assessor to "increase or decrease the valuation of any property" prior to taking the required oath upon the grand list; General Statutes § 12-55 (b); and, as a result, "an assessor has the authority under § 12-55 to conduct an interim assessment of property . . . ." *Kasica* v. *Columbia*, supra, 309 Conn. 97. Nevertheless, we interpret the relevant statutory language as applied to the facts of the present case; id., 93 ("we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case" [internal quotation marks omitted]); and, here, there was absolutely no evidence before the trial court that any such interim assessment occurred. Indeed, the plaintiff expressly alleges in the application for relief that it was the October 1, 2011 assessment that was illegal.

As to the latter two dates, neither reasonably can be interpreted as constituting the "date as of which the property was last evaluated for purposes of taxation . . . ." General Statutes § 12-119. The plaintiff argues that "[i]f the valuation of a property can be changed under § 12-111 until May 1 of the following year due to a decision of the board of assessment appeals, then clearly, the [property] is still being 'evaluated' in April." We cannot reasonably interpret the statutory scheme, however, to contemplate that the evaluation process is

still ongoing after an appeal has been taken to the board of assessment appeals pursuant to § 12-111.[8]

The plaintiff also argues that payment of taxes by the due date of August 1 "finalizes the process" of evaluation. In support of this argument, he relies on a Supreme Court case discussing a prior version of § 12-119, which could be "invoked up to the expiration of one year, not from the making of the assessment but from the time when the tax became due . . . ." *Cohn* v. *Hartford*, 130 Conn. 699, 702–703, 37 A.2d 237 (1944). As we have noted, however, the numerous appellate decisions to have considered the present version of the statute uniformly have interpreted its time limitation to commence on the date of assessment. See *Wilson* v. *Kelley*, supra, 224 Conn. 122 n.10; *Norwich* v. *Lebanon*, supra, 193 Conn. 346–48; *Grace N' Vessels of Christ Ministries, Inc.* v. *Danbury*, supra, 53 Conn. App. 870; see also *Crystal Lake Clean Water Preservation Assn.* v. *Ellington*, 53 Conn. App. 142, 151, 728 A.2d 1145, cert. denied, 250 Conn. 920, 738 A.2d 654 (1999); *Farmington* v. *Dowling*, 26 Conn. App. 545, 552, 602 A.2d 1047 (1992), appeal dismissed, 224 Conn. 592, 619 A.2d 852 (1993) (certification improvidently granted). For the foregoing reasons, the plaintiff's alternative interpretations of the relevant language are either factually inapplicable or legally incorrect.

Because the plain meaning of "the date as of which the property was last evaluated for purposes of taxation" provided the plaintiff with one year from the October 1, 2011 assessment in which to commence the

[8] Indeed, to appeal to the board of assessment appeals pursuant to § 12-111, a person already must be aggrieved by an act of the assessor, including, for example, the valuation of his property for taxation purposes. Section 12-111 (a) provides in relevant part: "Any person . . . claiming to be aggrieved by the doings of the assessors of such town may appeal therefrom to the board of assessment appeals. . . . Such board may equalize and adjust the grand list of such town and may increase or decrease the assessment of any taxable property or interest therein . . . ."

present action pursuant to § 12-119, there is no ambiguity to resolve in the plaintiff's favor. "Where the language of the statute is unambiguous, we are confined to the intention expressed in the actual words used and we will not search out any further intention of the legislature not expressed in the statute. . . . In the absence of ambiguity it is unnecessary to resort to principles of statutory construction such as the resolution of ambiguity in favor of the taxpayer." (Citation omitted.) *Harris Data Communications, Inc.* v. *Heffernan*, 183 Conn. 194, 198, 438 A.2d 1178 (1981); see *Stratford* v. *Jacobelli*, supra, 317 Conn. 874–75 (declining to apply canon of statutory construction resolving ambiguity in favor of taxpayer where taxpayer failed to advance other reasonable interpretation of statute in question).

B

In the alternative, the plaintiff contends that the one year limitation on bringing an action pursuant to § 12-119 is "clearly directory," subject to a balancing of the equities that must be resolved in his favor, or that the relief provided by § 12-119 is "cumulative and not exclusive of equitable remedies" not subject to the statute's one year time limitation. We are not persuaded.

First, the plaintiff argues that the time limitation in § 12-119 is directory, not mandatory, because it provides that an application for relief "may" be brought within a year of the date as of which the property was last evaluated for taxation purposes. We decline to consider this argument because it is inadequately briefed. The plaintiff notes that the statute employs the word may, which " 'ordinarily does not connote a command,' " as our Supreme Court noted in *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 20, 848 A.2d 418 (2004); nevertheless, he fails to examine the context in which the word may is employed, proceeding instead to a conclusory assertion

that § 12-119 must, therefore, be permissive. "Although we are solicitous of the rights of self-represented litigants . . . this court is not required to review claims that are inadequately briefed." (Citation omitted; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 649 n.1, 137 A.3d 1 (2016). In any event, we note that the commencement of an application for relief from an illegal assessment beyond the one year limitations period in § 12-119, as long as it is specially pleaded, as the defendant has done here, provides a basis for a court to deny the relief provided for in the statute. See *L. G. DeFelice & Son, Inc.* v. *Wethersfield*, 167 Conn. 509, 510–11, 513, 356 A.2d 144 (1975).

Second, the plaintiff argues that the one year limitation is subject to a balancing of equities that tips in his favor. We disagree. It is not a court's role to balance the equities to determine whether to apply a statute of limitations in a given case, for, in determining whether to impose a time limitation on a particular type of action, our legislature *already* has balanced the relevant equities and determined the point in time at which they weigh in favor of finality. "The purposes of statutes of limitation[s] include finality, repose and avoidance of stale claims and stale evidence. . . . These statutes represent a legislative judgment about the balance of equities in a situation involving a tardy assertion of otherwise valid rights: [t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 806–807, 99 A.3d 1145 (2014); see also *Danbury* v. *Dana Investment Corp.*, supra, 249 Conn. 15 (time limitations on taxpayer challenges recognize municipal interest in fiscal certainty).

Third, the plaintiff argues that the remedy provided by § 12-119 is "cumulative and not exclusive of equitable remedies, and a party may elect to proceed under either or both." On the contrary, "as [§ 12-119] was clearly intended to take the place of the remedy in equity based on an overvaluation of the property and as all the relief can be obtained under it which could be afforded by equity, it precludes a resort to equity generally in such a case as the one before us." (Internal quotation marks omitted.) *Norwich* v. *Lebanon*, 200 Conn. 697, 706, 513 A.2d 77 (1986); see also *Crystal Lake Clean Water Preservation Assn.* v. *Ellington*, supra, 53 Conn. App. 150 ("a taxpayer may not [additionally seek a common law remedy] in an attempt to circumvent the time restraints of § 12-119 if it would undermine the purpose of the statute").

II

The plaintiff also claims that the court improperly concluded that he failed to raise a genuine issue of fact as to whether the defendant's continuing course of conduct tolled the one year limitations period in § 12-119. He argues that he created a genuine issue of material fact by submitting evidence that, although the parties "engaged in a continuing course of conduct to establish a proper valuation for the property," the defendant did not provide a response to his request to revise the 2011 assessment that "at any time may have remedied the conflict and removed the need for a lawsuit . . . ." We disagree.

As previously noted, a plaintiff may avoid summary judgment on statute of limitations grounds by creating an issue of fact as to whether an equitable exception to the statute applies. *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 310 ("burden normally shifts to the plaintiff to establish a disputed issue of material

fact" regarding equitable exception to statute of limitations); *Wiele* v. *Board of Assessment Appeals*, supra, 119 Conn. App. 551 ("the limitation in § 12-119 is procedural and personal rather than jurisdictional and, therefore, susceptible to equitable doctrines"). "In certain circumstances . . . we have recognized the applicability of the continuing course of conduct doctrine to toll a statute of limitations. . . . [W]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed."[9] (Citation omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 311.

"[I]n order [t]o support a finding of a continuing course of conduct that may toll the statute of limitations there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such a wrong." (Internal quotation marks omitted.) *Brusby* v. *Metropolitan District*, supra, 160 Conn. App. 662. "The continuing course of conduct doctrine has no application after the plaintiff has discovered the harm . . . ." Id.

In the present case, the plaintiff did not and, indeed, could not establish a genuine issue of material fact as to the applicability of this doctrine because the very

[9] Our appellate courts previously have not considered whether the continuing course of conduct doctrine may toll the limitations period in § 12-119. The plaintiff relies on *Wiele* to argue that the doctrine may provide an exception to the limitations period in § 12-119. In *Wiele*, this court suggested, but did not decide, that the doctrine of equitable tolling applies to toll the limitations period in § 12-119 where the property owner did not have notice of the challenged assessment. See *Wiele* v. *Board of Assessment Appeals*, supra, 119 Conn. App. 553, 555. In the present case, because we conclude that the plaintiff failed to raise a genuine issue of material fact, we need not address the continuing course of conduct doctrine's applicability to the limitations period in § 12-119.

course of conduct on which he sought to rely demonstrates that he already had discovered the harm upon which he sued—namely, the allegedly illegal 2011 assessment of the property. Before the trial court, the plaintiff argued that "[o]n October 26, 2011, [he] initiated an informal effort to have the assessment reduced," which "continued periodically [until] December 5, 2012 . . . when the effort became more formalized. The plaintiff's request to revise the assessment to reflect the nonexistence of the structure created a duty on the part of the defendant to . . . at least respond to the plaintiff's legitimate concern. The defendant never responded to the plaintiff's request." (Emphasis omitted.) Consequently, he argued, "[t]he equitable doctrine of continuing course of conduct tolled the inception of any applicable statute of limitations until at least January 13, 2013 . . . which was the last occurring conduct outside of this action." The evidence by which the plaintiff attempted to demonstrate a continuing course of conduct indicated that in October, 2011, he had sought to reduce the assessment by notifying the defendant of the removal of a house from the property several months prior, and that the parties had met on January 10, 2013, to discuss the assessment of the property.[10]

[10] The January 16, 2013 letter from the plaintiff to the defendant purporting to memorialize the meeting reads in relevant part that "the following are the salient points as I understood them:

"1. Although you profess a personal willingness to address the issues of the assessment for this property, you indicated that you are unable to address them because no relief is available because the issues are not a result of any 'mistake' but rather are the result of 'judgment.' . . .

"4. You indicated that the information you provided to me in your e-mail on December 6, 2012, in response to my request for information of December 5, 2012, contains all the information and correspondence available and 'there is nothing else than what has already been provided.'

"If this is not an accurate representation of our conversation, or if there is any relevant information that I have not included, please advise any necessary corrections or additions at your earliest opportunity.

"Sincerely,

"[The plaintiff]."

The evidence presented to the trial court in opposition to the defendant's motion for summary judgment demonstrates, in sum, that after initially challenging the 2011 assessment on October 26 of that year, the plaintiff waited more than one year before attempting again to challenge the assessment, in December, 2012. See footnote 10 of this opinion. This evidence, which unequivocally indicates the plaintiff's awareness of and disagreement with the 2011 assessment, utterly fails to implicate the continuing course of conduct doctrine.

Here, the plaintiff clearly had discovered the harm upon which he sued; he simply waited too long to do so. As we previously have noted in this opinion, there were two avenues by which the plaintiff could have challenged the validity of the 2011 assessment of the property: he could have filed a timely appeal to the board of assessment appeals, and, from there, a timely appeal to the Superior Court; see General Statutes §§ 12-111 and 12-117a; or he could have filed a timely appeal pursuant to § 12-119 directly to the Superior Court. See *Danbury* v. *Dana Investment Corp.*, supra, 249 Conn. 12–15. He elected to engage in periodic "informal" efforts to have the assessment reduced instead of commencing the present action under § 12-119. He offers no authority for the assertion that these efforts created a duty on the part of the defendant to engage in negotiations regarding the assessment, and, indeed, the defendant was under no such duty. The plaintiff's attempts to negotiate a lower assessment were not a substitute for timely resorting to the existing procedure for challenging the assessment's legality. "[A] taxpayer who has failed to utilize the available statutory remedies [may not] assert . . . that the tax has not been properly assessed." (Internal quotation marks omitted.) *Danbury* v. *Dana Investment Corp.*, supra, 14–15.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTINE L. FERRARO *v.* DAVID FERRARO, JR. (AC 38082)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain financial orders. *Held* that the trial court abused its discretion in fashioning its financial orders, that court having improperly made certain factual findings with respect to the defendant's net income without evidentiary support, and therefore, the case was remanded for a new hearing on all financial issues: although the court relied on a child support guidelines worksheet that was prepared by family services, the figures in the worksheet did not match the figures provided by the parties at trial and they were not supported by the evidence, the federal and state tax deduction figures used by the court to determine net income did not come from the parties' testimony at trial, the exhibits submitted or the parties' financial affidavits, and the court did not provide any explanation as to how it had arrived at its figures or the basis for its failure to use the figures provided, which thereby denied the defendant the opportunity to challenge or rebut the court's assumptions regarding standard and itemized tax deductions, medical expenses and child credits, and its calculations of net income; furthermore, if the trial court took judicial notice of certain supplemental information, it provided no notice to the parties that it was doing so, and it did not provide them with an opportunity to challenge or rebut that information; moreover, the trial court improperly entered an order regarding extracurricular activity expenses for the minor children when neither party had requested such an order, and there was no evidence supporting the need for an order that allocated the expenses of extracurricular activities between the parties.

Argued May 23—officially released October 4, 2016

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Shah*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court denied the defendant's motion for reconsideration and to reargue, and the defendant appealed to this court; subsequently, the court granted the defendant's motion for articulation

and issued an articulation of its decision. *Reversed in part; further proceedings.*

John F. Morris, for the appellant (defendant).

Michael D. Day, for the appellee (plaintiff).

Opinion

KELLER, J. In this marital dissolution action, the defendant, David Ferraro, Jr., appeals from the judgment of the trial court with respect to the court's financial orders. The defendant claims that the court improperly (1) made factual findings with respect to his net income without evidentiary support, and (2) entered an order regarding expenses for the minor children's extracurricular activities when neither he nor the plaintiff, Christine L. Ferraro, had requested such an order. We agree with the defendant and, accordingly, reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's appeal. The court dissolved the parties' twenty-one year marriage on May 6, 2015. At the time of the dissolution, the parties had two minor children, ages fifteen and thirteen. In its memorandum of decision, the court found that the marriage had broken down irretrievably and attributed "greater responsibility to the plaintiff" for "the collapse of their marital union . . . ."[1] The parties' custody and parenting agreement was approved by the court, *Morgan, J.*, prior to the beginning of the two day trial, and was incorporated by reference into the judgment of dissolution by

[1] The court made the following finding in its memorandum of decision: "The breakdown of the marriage is due to several reasons, including, among other causes, the plaintiff's jealousy and financial mismanagement and the defendant's anger, and both parties bear responsibility for the collapse of their marital union, although the court attributes greater responsibility to the plaintiff for the numerous yet unsubstantiated allegations of infidelity and abuse and the stress that caused the relationship between not only the parties but between the children and the defendant . . . ."

the court, *Shah*, *J*. With respect to the remaining issues, the court entered financial orders for child support, alimony, and the division of property. The plaintiff was awarded periodic alimony for a period of twelve years. The defendant was ordered to pay $500 per week for the first two years and $450 per week for the remaining ten years. The defendant was ordered to pay child support in the amount of $310 per week in accordance with the child support guidelines worksheet dated April 28, 2015, which had been prepared by or at the direction of the court. The alimony and child support orders were based on the court's factual findings that the defendant's weekly net income was $1408, and the plaintiff's imputed weekly net income was $428.[2] In addition to other orders relating to, inter alia, health insurance, unreimbursed medical and dental expenses, and the division of the defendant's pension benefits, the court entered an order for the sharing of expenses for the children's extracurricular activities.

The defendant filed a motion for reconsideration and reargument on May 18, 2015, claiming that the court's orders were "inconsistent with the evidence" and failed to leave the defendant with sufficient income for his living expenses. The defendant additionally claimed that the order for extracurricular activity expenses was

[2] The plaintiff had worked from the beginning of the parties' marriage until 2011. She was unemployed when she commenced the present action on May 8, 2014. On August 21, 2014, the court, *Alander*, *J.*, ordered the plaintiff to seek employment, to document her efforts, and to report back to the court on September 18, 2014. She then worked for a period of two weeks in 2014, but was terminated from her employment for excessive absenteeism.

In its memorandum of decision, the court made the following finding: "Despite being under court order, the plaintiff has failed to maintain employment and has not provided any credible evidence of reasonable efforts to obtain employment." Accordingly, "[b]ased upon the plaintiff's work history and her recent employment, the plaintiff has the ability to work full-time at a rate of $11.50 hourly . . . and [the court] imputes such earning capacity to the plaintiff."

improper because neither party had requested such an order. The court denied the defendant's motion without explanation. This appeal followed.

The defendant filed his appeal on June 25, 2015. On July 29, 2015, the defendant filed a motion for articulation, requesting, inter alia, that the trial court articulate (1) the reason for using a child support guidelines worksheet prepared by a family services supervisor to determine net income rather than the evidence submitted by the parties at trial, (2) the evidential sources for the court's "figures used for taxes and deductions," and (3) the reason the court failed to include its alimony award as an income source for the plaintiff when it calculated how the uninsured health care costs for the minor children were to be divided between the parties.

On September 4, 2015, the court granted the defendant's motion and provided the following articulation of its orders: (1) "the court had the appropriate child support guidelines worksheet . . . prepared based on evidence and testimony provided at trial"; (2) "the court based all of its findings on evidence and testimony provided at trial, including the financial affidavits provided by the parties . . . and used family law software provided by the Judicial Branch" as sources for the figures on the worksheet for taxes and deductions; and (3) upon further review of the court's worksheet, the court "modifie[d]" its orders with respect to the allocation of unreimbursed medical expenses. Attached to the court's September 4, 2015 order was a child support guidelines worksheet dated September 4, 2015, which included assumptions regarding the number of personal and dependent exemptions for each party, itemized deductions, refundable credits and tax deductions. The defendant did not file a motion for review of the trial court's articulation with this court, nor did he amend his appeal to include an issue relative to the court's

modification of the original judgment of dissolution in the September 4, 2015 articulation.[3]

"The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court' findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Citation omitted; internal quotation marks omitted.) *Mensah* v. *Mensah*, 145 Conn. App. 644, 651–52, 75 A.3d 92 (2013).

[3] For this reason, we do not consider one of the defendant's claims raised in this appeal. The defendant argues that the court improperly modified the judgment in its September 4, 2015 articulation. Citing *Koper* v. *Koper*, 17 Conn. App. 480, 484, 553 A.2d 1162 (1989), for the principle that "[a]n articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision," the defendant claims that the court's sua sponte modification of the order in the judgment with respect to the allocation of unreimbursed medical expenses for the minor children was improper. Aside from the fact that the sua sponte modification actually benefited the defendant by reducing his share of the costs, the defendant failed to preserve the issue for this appeal, and we decline to review it. See *Webster Trust* v. *Mardie Lane Homes, LLC*, 93 Conn. App. 401, 402 n.3, 891 A.2d 5 (2006).

"We next note that our review of financial orders entered by a trial court in a dissolution matter is governed by the mosaic doctrine. Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Valentine* v. *Valentine*, 149 Conn. App. 799, 803, 90 A.3d 300 (2014).

I

The defendant's first claim is that the court improperly made factual findings with respect to his net income without evidentiary support. Specifically, the defendant argues that the court based its factual finding of his weekly net income "on a child support guidelines worksheet created after the close of evidence, using information not found in the evidence." The court's May 6, 2015 memorandum of decision refers to the April 28, 2015 worksheet, although it does not identify the author of the worksheet. The worksheet itself, which was not appended to the decision, indicates that it was "prepared by Connecticut Judicial Service Center." The defendant maintains that the court relied on calculations generated by a software program posttrial, and not on the evidence submitted in the parties' financial affidavits or evidence presented at trial, so that he had no opportunity to present evidence to challenge or rebut the court's calculations.[4]

[4] One of the defendant's claims is that the trial court delegated the creation of the April 28, 2015 worksheet to a third party, thereby resulting in "an improper delegation of a fundamental judicial function." We are not persuaded.

"It is well settled authority that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function.

It is undisputed that the court relied on the April 28, 2015 worksheet in determining the weekly net incomes of the parties. It also is evident, from a careful review of the parties' testimony, financial affidavits and the exhibits submitted at trial, that the figures in the worksheet do not match the figures provided by the parties at trial. The defendant's April 14, 2015 financial affidavit showed a net weekly income of $1077.10 after his mandatory deductions. The court, using different figures for the defendant's federal and state income tax deductions, found that the defendant's net weekly income was $1408. There is no explanation, in the court's May 6, 2015 memorandum of decision or the court's September 4, 2015 articulation, as to how the court arrived at its figures or the basis for the court's failure to use the figures submitted at trial. The court's figures are not identified as to origin or explained as to content. In scrutinizing the attachments to the court's articulation, which were provided months after the judgment of dissolution was rendered, it appears that the court sua sponte made various assumptions regarding standard and itemized deductions, medical expenses and child credits. From the record, it is clear that the defendant had no opportunity to challenge or rebut the court's assumptions and calculations.

The alimony and child support orders entered by the court were based on its factual findings as to the weekly

The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to enter any order or judgment so advised or recommended." (Internal quotation marks omitted.) *Nashid* v. *Andrawis*, 83 Conn. App. 115, 120, 847 A.2d 1098, cert. denied, 270 Conn. 912, 853 A.2d 528 (2004).

In the court's September 4, 2015 articulation, it stated that it "had the . . . worksheet . . . prepared" using the evidence and testimony presented at trial. Further, the court stated that it based its findings on the evidence and testimony presented at trial, including the parties' financial affidavits, and that it "used family law software provided by the Judicial Branch . . . ." There is nothing in the record that indicates that the court did not select the figures inputted into the computer program for the calculations on the worksheet.

net income of the parties. "It is well settled that a court must base child support and alimony orders on the available net income of the parties, not gross income." (Internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 209, 61 A.3d 449 (2013). "[W]hile our decisional law in this regard consistently affirms the basic tenet that support and alimony orders must be based on net income, the proper application of this principle is context specific." *Hughes* v. *Hughes*, 95 Conn. App. 200, 204, 895 A.2d 274, cert. denied, 280 Conn. 902, 907 A.2d 90 (2006). Although the child support guidelines "create a legal presumption as to the amount of child support payments . . . the figures going into that calculation on the worksheet must be based on some underlying evidence." (Citation omitted.) *Aley* v. *Aley*, 101 Conn. App. 220, 228–29, 922 A.2d 184 (2007). "A court may not rely on a worksheet unless it is based on some underlying evidence." (Internal quotation marks omitted.) *Barbour* v. *Barbour*, 156 Conn. App. 383, 391, 113 A.3d 77 (2015). In the present case, the court's figures do not match the figures on the parties' financial affidavits. Moreover, there was no testimony or other evidence presented at trial with respect to alternate federal and state tax calculations, exemptions, deductions or credits. Simply put, there is nothing in the underlying evidence to support the court's figures in the worksheet.[5]

[5] The plaintiff argues that the court was not obligated to accept the defendant's representations on his April 14, 2015 financial affidavit as to his federal and state tax deductions, and that the court could have concluded, from the defendant's testimony at trial with respect to tax refunds, that he was overwithholding. This argument is not persuasive because the court, which did not explain the figures used in its calculations, did not even mention tax refunds in its memorandum of decision.

The defendant testified that he and the plaintiff received a $10,000 refund in 2013 for the tax year 2012, when the parties were an intact family and filed jointly. He testified that they used the money to pay household expenses. The defendant also testified that he was entitled to a tax refund in 2014, but that the money went directly to the state to satisfy a lien filed against him by the state to reimburse monetary assistance paid to the plaintiff. The evidence at trial revealed that the plaintiff had applied for and received

In the court's articulation, it states that it relied on the "evidence and testimony provided at trial, including the [parties'] financial affidavits" in calculating the amount of the defendant's weekly net income. This statement is not supported, however, by the figures provided in those affidavits when compared with the court's April 28, 2015 worksheet, and by a review of the testimony at trial and the exhibits submitted to the court. The figures do not match and, although the court is free to credit or discredit some or all of a witness' evidence; *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 878, 784 A.2d 905, cert. denied, 258 Conn. 946, 947, 788 A.2d 95, 96, 97 (2001); the court still must provide a basis for the determinations that it makes as supported by the underlying evidence.

It is possible that the court, in selecting the figures used for the calculation of net income, took judicial notice of the Internal Revenue Code, the tax tables or some other relevant depository of information. The court did not indicate, however, either in its memorandum of decision or in its articulation, that it had taken judicial notice of any supplemental information in reaching its determinations. If the court did take judicial notice of certain facts, it should have notified the parties that it intended to do so and provided them with the opportunity to be heard.[6]

more than $11,000 of state assistance during the term of the marriage on the basis of her claim that the defendant was not supporting her and the children. At trial, the defendant submitted bank statements that he countered proved that he regularly had been providing for his family's support. In any event, the amount of the 2014 refund never was disclosed, nor was there any testimony about the amounts of tax refunds, if any, received in prior years.

[6] Section 2.2 (b) of the Connecticut Code of Evidence provides: "The court may take judicial notice without a request of a party to do so. Parties are entitled to receive notice and have an opportunity to be heard for matters susceptible of explanation or contradiction, but not for matters of established fact, the accuracy of which cannot be questioned."

In this case, the figures used by the court plainly contradicted the figures in the financial affidavits submitted at the time of trial.

"Notice to the parties is not always required when a court takes judicial notice. Our own cases have attempted to draw a line between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard . . . and matters of established fact, the accuracy of which cannot be questioned, such as court files, which may be judicially noticed without affording a hearing." (Citations omitted.) *Moore* v. *Moore*, 173 Conn. 120, 121–22, 376 A.2d 1085 (1977). "There are two types of facts considered suitable for the taking of judicial notice: those which are 'common knowledge' and those which are 'capable of accurate and ready demonstration.' McCormick, Evidence (2d Ed.) § 330, p. 763. Courts must have some discretion in determining what facts fit into these categories. It may be appropriate to save time by judicially noticing borderline facts, so long as the parties are given an opportunity to be heard." Id., 123 n.1. There also is a distinction between "legislative facts," those which help determine the content of law and policy, and "adjudicative facts," those concerning the parties and events of a particular case. The former may be judicially noticed without affording the parties an opportunity to be heard, but the latter may not, at least if they are central to the case. See *Izard* v. *Izard*, 88 Conn. App. 506, 509–10, 869 A.2d 1278 (2005).

In the present case, the court did not state whether it had taken judicial notice of certain facts to make its determination with respect to the defendant's weekly net income. If it did, it is not possible to determine, without speculation, the facts that were judicially noticed and how the court's calculations incorporated that information. What is known is that the court prepared its own child support guidelines worksheet, but did not attach that worksheet to its May 6, 2015 memorandum of decision. The defendant filed a motion for

reconsideration and reargument, but the court denied that motion without explanation. The court did attach the worksheet to its September 4, 2015 articulation, but the parties were never notified of the judicially noticed facts upon which the court relied nor were they provided with an opportunity to challenge or rebut the court's calculations.

In summary, the court's finding as to the defendant's weekly net income is without evidentiary support. The federal and state tax deduction figures used by the court to determine net income, as reflected in its April 28, 2015 child support guidelines worksheet, did not come from the parties' testimony at trial, the exhibits submitted, or the parties' financial affidavits. There is no evidentiary basis for the court's determination. If the court took judicial notice of supplemental information, it provided no notice to the parties that it was doing so, nor did it provide them with an opportunity to challenge or rebut that information. Accordingly, the court abused its discretion, and we must remand the matter for a new hearing.

II

The defendant's next claim is that the court improperly entered an order regarding extracurricular activity expenses for the minor children when neither party had requested such an order.[7] Specifically, the defendant argues that the court, in its order,[8] did not set any limit

[7] Although our disposition of the defendant's first claim disposes of this appeal, we will address his second claim because it is likely to arise on remand.

[8] The court entered the following order: "The parties shall discuss, in advance, any extracurricular activity, enrichment program and/or summer camp activities for the benefit of the minor children. Only such activities as may be agreed upon by the parties shall be considered an approved activity for enforcement of these orders, but neither party may unreasonably withhold his or her approval. The cost of all approved activities will be shared equally by the parties. Any activity not approved by both parties may still be engaged in by the child, on the following two conditions: (1) the cost is covered entirely by the party approving the activity; and (2) the activity does not interfere with the parenting access time of the other parent."

on the cost of the activities, "thereby creating an open ended obligation." He claims the order was entered without any basis because no party requested it and there was no evidentiary support for it. We agree.

As previously noted, the parties stipulated to terms in a custody and parenting agreement that was approved by the court and incorporated by reference into the judgment of dissolution.[9] There is no provision in that agreement that addresses the extracurricular activities of the minor children. Further, in the financial affidavits submitted by the plaintiff and the defendant, no expenses are listed for extracurricular activities. Each party submitted proposed orders to the court, and neither party requested an order with respect to extracurricular activity expenses. A review of the transcript of the two day trial reveals that no testimony was presented as to the extracurricular activities undertaken by the children, let alone what the expenses of such activities would be. Simply put, there is no evidence supporting the need for an order that allocates the expenses of extracurricular activities between the parties.

We conclude, therefore, that the court abused its discretion in fashioning its financial orders. Accordingly, we remand the case for a new hearing on all financial issues.

The judgment is reversed only with respect to the financial orders and the case is remanded for a new

[9] We note that the custody and parenting agreement expressly provides that it constitutes "a final resolution of [the parties'] parenting issues." Moreover, the agreement contains a paragraph regarding participation in family therapy and provides that the parties are to share the costs of such therapy in accordance with the child support guidelines. If the parties wanted the court to enter an order with respect to the allocation of expenses for extracurricular activities, this agreement would have provided the logical procedural vehicle for such a request.

hearing on all financial issues; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STEVEN SEWELL *v.* COMMISSIONER OF CORRECTION
(AC 37738)

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

Syllabus

The petitioner, who had been convicted of assault in the first degree and other crimes arising out of the shooting of the victim, sought a writ of habeas corpus claiming that his trial counsel had rendered ineffective assistance by failing to conduct an adequate investigation into the state's witnesses prior to trial. Prior to trial, defense counsel was aware that the state would call a witness who was known only by a nickname, but counsel was not aware of the real identity of the witness, O, until her name was disclosed during jury selection. Trial counsel twice moved for a mistrial due to the state's late disclosure of witnesses, including O. The trial court denied both motions, but allowed trial counsel additional time to prepare his cross-examination of O. The habeas court found that trial counsel's cross-examination of O effectively addressed any bias, interest in the outcome of the trial, motive to fabricate, and her ability to observe and recollect. The habeas court further found that trial counsel had investigated all reasonable leads and talked with all witnesses whom he knew about, or through due diligence, reasonably could have known about. The habeas court concluded that there was neither deficient performance nor any prejudice to the petitioner due to trial counsel's allegedly deficient performance, and that court denied his petition for a writ of habeas corpus. On the granting of certification to appeal to this court, *held* that the habeas court properly concluded that the petitioner did not establish that he was prejudiced by the alleged ineffective assistance of his trial counsel; the petitioner did not present any direct evidence that further investigation would have yielded new evidence that would have affected the outcome of his trial, but rather provided only mere speculation that additional investigation would have undermined O's testimony, which was insufficient in light of the fact that her testimony identifying the petitioner as the shooter was corroborated by other witnesses at trial, including the victim.

Argued May 25—officially released October 4, 2016

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, *Nazzaro*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court, which dismissed the appeal; subsequently, the court, *Oliver*, *J.*, granted the parties' motion for a stipulated judgment to restore the petitioner's appellate rights; thereafter, the court, *Oliver*, *J.*, granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Michael J. Culkin, assigned counsel, for the appellant (petitioner).

Jonathan M. Sousa, special deputy assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Robert O'Brien*, former supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Steven Sewell, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court erred by concluding that his trial counsel did not render ineffective assistance. The petitioner claims that his trial counsel failed to adequately investigate the state's witnesses and prepare for trial, and as a result, he was prejudiced.[2]

[1] The habeas court granted his petition for certification to appeal. See footnote 4 of this opinion.

[2] On appeal, the petitioner also claims that his trial counsel provided ineffective assistance "by not making a motion for mistrial or otherwise objecting to the testimony of a witness, who was not fully disclosed until jury selection, until after that witness had already testified." This claim was not raised before the habeas court and we decline to review it. "Having not raised [an] issue before the habeas court, [a] petitioner is barred from raising it on appeal. This court is not bound to consider claimed errors unless it appears on the record that the question was distinctly raised . . . and was

We disagree with the petitioner and, accordingly, affirm the judgment of the habeas court.

In deciding the petitioner's direct appeal of his conviction, this court summarized the facts that the jury reasonably could have found as follows: "On December 23, 2001, the victim, Timothy Sweat, was in the apartment he shared with his mother and brother in New Haven. The victim sold beer, cigarettes, soda and chips from his apartment to patrons he knew. At approximately 6:30 p.m. that day, Sweat responded to a knock at his door by looking through the peephole. When he recognized Judale Wynkoop, who is also known as Dell, to whom he had sold beer previously, Sweat opened the door. As the two men stood in the doorway speaking, the [petitioner] emerged from a hallway outside the apartment, holding a black pistol. As the [petitioner] approached, Wynkoop stepped away, Sweat raised his hands and the [petitioner] shot him through the thumb and into his chest at close range. Sweat tried, without success, to grab the [petitioner's] face and throat and then backed into his apartment. The [petitioner] ran down the street.

"Prior to trial, the [petitioner] filed a written request for disclosure under Practice Book §§ 40-11, 40-12 and 40-13. In its response to that request, the state did not list either Angel Ogman or Darryl Wilson as witnesses or turn over to the [petitioner] any statements attributed to these individuals.

"At trial, the state called a number of witnesses, including Sweat, Ogman, who is also known as Yummy,

ruled upon and decided by the court adversely to the [petitioner's] claim. . . . This court is not compelled to consider issues neither alleged in the habeas petition nor considered at the habeas proceeding . . . ." (Internal quotation marks omitted.) *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 367, 90 A.3d 368, cert. denied, 314 Conn. 919, 100 A.3d 852 (2014).

[certain police officers] . . . and Wilson, who is also known as D-Woo.

"During the first day of evidence, the [petitioner] moved for a mistrial because of the state's late disclosure of Wilson as a witness. That motion was denied. After Ogman testified later on that same day, the [petitioner] moved for a mistrial on the basis of her testimony. That motion also was denied. At the close of trial, the jury found the [petitioner] guilty of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (5), and criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c. Immediately after the jury returned its verdict, the [petitioner] stipulated to having committed a class A, B or C felony with a firearm in violation of General Statutes § 53-202k. The court imposed a total effective sentence of twenty-five years imprisonment." (Footnote omitted.) *State* v. *Sewell*, 95 Conn. App. 815, 817–18, 898 A.2d 828, cert. denied, 280 Conn. 904, 907 A.2d 94 (2006).

The petitioner filed a writ of habeas corpus in 2006 and amended it in 2008. The petitioner argued before the habeas court that his trial counsel had been ineffective because he failed to: adequately advise the petitioner of potential defenses, conduct an investigation of the facts and witnesses that the state planned to present, obtain witness statements, present witnesses to support the defense strategy, and appropriately prepare for trial.

The petitioner's petition for a writ of habeas corpus was centered on trial counsel's handling of the Ogman testimony. As early as May 6, 2002, the petitioner's trial counsel was aware that the state intended to call a witness who was identified only as Yummy. The petitioner's trial counsel was unable to determine that Ogman was the witness known as Yummy until the

state revealed her legal name on the first day of jury selection on February 14, 2003.[3] During the trial, Ogman testified that she saw the petitioner in the vicinity of the victim's apartment just prior to the shooting and that the petitioner later confessed to her that he had in fact shot the victim. Following Ogman's testimony, trial counsel moved for a mistrial on the basis of undue surprise, but the motion was denied. However, the trial court granted the petitioner's trial counsel additional time to prepare for his cross-examination of Ogman.

The habeas court concluded that the petitioner's trial counsel had performed adequately. "There was extensive cross-examination of Ms. Ogman and Mr. Wilson and Mr. Wynkoop, all on any interest the witnesses had in the outcome of the trial, bias, motive to fabricate, ability to observe and recollect. This was no three question cross by the defense attorney. Although surprised by the revelations of Ogman, [also known as] Yummy, and Wilson, [also known as] D-Woo, the attorney was afforded opportunity to prepare his cross-examinations, the length and quality of which is reflected in the transcript. Put another way, this court cannot infer any deficiency in the cross-examination of the witnesses. . . . [T]here is no evidence before this court to conclude that any additional investigation would have revealed any evidence that could affect differently the outcome in this matter."

The habeas court found that the petitioner's trial counsel personally visited the apartment complex

[3] On direct appeal before this court, the petitioner claimed that the state's failure to properly disclose Ogman as a witness deprived him of his constitutional right to a fair trial. *State* v. *Sewell*, supra, 95 Conn. App. 815. This court affirmed the judgment of the trial court, concluding that the petitioner's rights were not violated because there was no prejudice or a denial of due process rights as a result of the late witness disclosure. Id., 823. Before the trial court, the state claimed that the late disclosure was due to the fact that the state knew the witness as "Yummy" and did not know her real name or whereabouts.

where the crime occurred and spoke to several individuals in order to gather evidence and locate unidentified witnesses. The habeas court concluded the claim of inadequate preparation "to be unproven, again, notwithstanding the protestations and the argument in support of the motions for mistrial, the lawyer claiming surprise and the like. It is apparent that the trial court gave counsel opportunity to review the impact of both Ogman and Wilson and recessed the proceedings in order to prepare, and there was no testimony before this court today that the lawyer was not prepared."

The petitioner also claimed that his trial counsel failed to communicate with him. According to the petitioner, the state offered a reduced sentence of fifteen years of incarceration in exchange for a guilty plea, but the petitioner rejected the offer. The petitioner argued that if his trial counsel had properly investigated Ogman and had provided better communication with him about witnesses, he may have pursued an alternative defense other than actual innocence. The habeas court refuted this claim: "[T]his court concludes that [the petitioner's trial counsel] was vigorous in his representation of [the petitioner] and understood that this particular case was not a plea case. There were no pleas offered, other than some time into the case, into the state's case, there was no plea bargaining so-called, the state's attorney didn't offer a particular plea. And the court finds that the attorney appreciated as much, given his client's position that, 'I am innocent. I didn't do it.' . . . There is no indication to lead this court to conclude that both lawyer and client did not have an open avenue of communication. This court tacitly finds that [the petitioner's trial counsel] investigated all reasonable leads and talked with all witnesses whom he knew about, or through due diligence, could reasonably know about."

The habeas court concluded that there was neither deficient performance by the petitioner's trial counsel

nor was there any prejudice due to his performance. The habeas court denied the petitioner's writ of habeas corpus. This appeal followed.[4]

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 61–62, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance." (Internal quotation marks omitted.) *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 100–101, 111 A.3d 829 (2015).

[4] On September 16, 2009, the habeas court, *Nazzaro, J.*, denied the petitioner's petition for certification to appeal. The petitioner appealed the denial of certification to this court, but that appeal was dismissed when the petitioner failed to comply with an order for supplemental briefing. On February 17, 2015, the habeas court, *Oliver, J.*, granted a motion for stipulated judgment filed by the petitioner and the respondent, the Commissioner of Correction, which restored the petitioner's appellate rights to the denial of his habeas petition. Thereafter, the habeas court, *Oliver, J.*, granted his petition for certification to appeal.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish both prongs of the *Strickland* test. *Hamlin* v. *Commissioner of Correction*, 113 Conn. App. 586, 595, 967 A.2d 525, cert. denied, 291 Conn. 917, 970 A.2d 728 (2009). "[A] habeas court may dismiss the petitioner's claim if he fails to satisfy either prong. . . . Accordingly, a court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim." (Citation omitted; internal quotation marks omitted.) Id.

The petitioner claims that the habeas court erred by concluding that he failed to prove his claim of ineffective assistance of trial counsel. Specifically, the petitioner argues that the habeas court erred by finding that there had not been deficient performance by trial counsel in regards to his investigation of Ogman and preparation for her cross-examination. The petitioner also claims that the habeas court's conclusion that there was no prejudice was erroneous. We disagree. Because the petitioner must establish both prongs of the *Strickland* test in order to prevail, we address only his claims regarding the habeas court's judgment as to prejudice.

On the basis of our review of the evidence presented at the habeas trial, the petitioner has failed to demonstrate how he was prejudiced by the performance of his trial counsel. The petitioner argues that if his trial counsel had more thoroughly investigated Ogman, he would have been able to "poke holes in [her] version of the story."[5] The petitioner has not challenged the

[5] On appeal, the petitioner also claims that the habeas court erred by not concluding that he was prejudiced by his trial counsel's performance because had he known the content of Ogman's testimony he would have directed his trial counsel to engage in pretrial negotiations. The petitioner did not raise this claim before the habeas court, and we decline to review it. See *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 367, 90 A.3d 368, cert. denied, 314 Conn. 919, 100 A.3d 852 (2014).

habeas court's findings that trial counsel conducted a "vigorous cross-examination trying to impeach or discredit the state's witnesses on the one hand on all aspects, ability to observe, recall, whether there was any ax to grind because of past relationships." The petitioner has not presented any direct evidence that further investigation would have yielded new evidence that would have affected the outcome of his trial. Instead, he has provided only mere speculation. See *Holley* v. *Commissioner of Correction*, 62 Conn. App. 170, 175, 774 A.2d 148 (2001) ("[t]he burden to demonstrate what benefit additional investigation would have revealed is on the petitioner"). Additional investigation also would not have changed the fact that the testimony of two other witnesses corroborated Ogman's version of events, including the testimony of the victim, who identified the petitioner as the shooter. The habeas court properly concluded that the petitioner could not establish that he was prejudiced by the alleged ineffective assistance of counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TIMOTHY J. QUAIL, SR. (AC 38308)

Beach, Keller and Bishop, Js.

Syllabus

Convicted of murder and larceny in the fifth degree, the defendant appealed, claiming that the trial court improperly denied his motion to suppress certain physical evidence that the police seized during a warrantless search of his sister's residence as well as the results of forensic testing thereon. The defendant, who had been living with the victim, his girlfriend, beat her with a baseball bat, stabbed her multiple times, and left her body in her apartment. Thereafter, he sold some of the victim's possessions at a pawn shop, gave away her jacket, and abandoned her truck and other possessions at a highway rest stop. In

the days following the crime, the defendant spent time in the homes of various relatives and friends, made contradictory statements as to the victim's whereabouts, and made statements indicating that he might be on the news, that he might have hit the victim with a baseball bat, and that the victim was dead. On the third night after the victim's death, the defendant slept in his sister's unoccupied bedroom and, the following day, family members found him unresponsive and took him to a hospital. That same day, the victim's father discovered her body. That night, after talking to the defendant's sister, police seized the defendant's clothing and personal effects from his sister's bedroom and, thereafter, performed forensic testing on those items, which revealed the presence of the victim's blood. At trial, the defendant filed a motion to suppress those items and the results of the forensic testing on them. He argued that he was an overnight guest in the bedroom and had a reasonable expectation of privacy, that the seizure occurred when he was not present, and that he did not consent to the seizure. The trial court denied the motion to suppress, reasoning that the state had proven by a preponderance of the evidence that the defendant's sister had consented to the search of her bedroom, and that, therefore, the result of the forensic testing on the seized items also was admissible. On appeal, the defendant challenged the warrantless seizure of his clothing and personal effects from the bedroom as violating his rights under the fourth amendment to the United States constitution. The state argued that the seizure was proper and, alternatively, that any error in the denial of the defendant's motion to suppress and subsequent admission of the evidence at issue was harmless. *Held* that because the state presented ample and compelling circumstantial evidence demonstrating the defendant's guilt, and because the state further demonstrated that even if the trial court improperly denied the motion to suppress, any such error was harmless beyond a reasonable doubt, this court declined to decide fourth amendment issues attendant to the legality of the seizure of the physical evidence: the result of the forensic testing performed on the defendant's clothing that was seized from his sister's bedroom could not reasonably be viewed as having impacted the result of the trial because there was other evidence before the jury that tied the defendant to the crime scene, including forensic evidence that suggested he had used the baseball bat, as well as ample evidence of his false statements concerning the victim's whereabouts, his motive to kill the victim, his conduct with respect to items that he took from the victim's residence following her death, his contradictory and false statements concerning his activities following her death, and his admissions that he had hit the victim with a baseball bat and that she was dead.

Argued March 10—officially released October 4, 2016

Procedural History

Information charging the defendant with the crimes of murder and larceny in the fifth degree, brought to

the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the jury before *Swords*, *J.*; thereafter, the court denied the defendant's motion to suppress certain evidence; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Daniel J. Foster, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Patricia M. Froehlich*, state's attorney, and *Matthew A. Crockett*, senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Timothy J. Quail, Sr., appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a, and larceny in the fifth degree in violation of General Statutes § 53a-125a. The defendant claims that the court improperly denied his motion to suppress physical evidence, including the results of forensic testing performed on such physical evidence, that the police seized during a warrantless search of his sister's residence. We affirm the judgment of conviction.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In December, 2009, the defendant was in a romantic relationship with the victim, Robin Cloutier. At or near that time, the defendant, who was unemployed, was not a licensed driver, and did not own an automobile, began residing with the victim at her apartment in Pomfret. Prior to the events underlying this appeal, the defendant expressed his desire to sell the victim's possessions without her permission. In a phone call to his son, which occurred while the victim was alive, the

defendant conveyed that he had "things to sell," and wanted to meet with him on December 14, 2009.

In the evening hours of December 13, 2009, the defendant and the victim drove together in the victim's truck to the apartment of the defendant's sister, Theresa Quail, in Plainfield. The defendant and the victim spent a portion of the evening at Theresa Quail's apartment, where they socialized and consumed alcohol with Theresa Quail and her boyfriend. Theresa Quail's son, Jesse Cousineau, and his girlfriend also were present. Later that evening, the victim and the defendant, who had displayed anger toward the victim that evening, abruptly left in the victim's truck; they subsequently returned to the victim's apartment.

At some point after the defendant and the victim left Theresa Quail's apartment on December 13, 2009, but prior to the evening of December 14, 2009, the defendant struck the victim multiple times, both on her head and on other parts of her body, with a baseball bat. Using a knife, the defendant also stabbed the victim multiple times in her neck and torso. The physical assault occurred in the victim's bedroom, and the victim died as a result of the physical injuries inflicted by the defendant.[1]

At or about the time that the defendant caused the victim's death, he took possession of numerous items that belonged to the victim by removing them from her residence and putting them inside of her truck. These items included a leather jacket, a desktop computer, a television, several cable television receivers, a collection of foreign currency, a new video game console in its original packaging, and loose change. At some point on December 14, 2009, the defendant left the victim's

[1] There was evidence that, following the violent incident that led to the victim's death, a shirt had been placed on the victim's bed and that a cigarette had been smoked in the victim's bedroom.

residence in her truck. At this point, the victim's cell phone had been turned off, the telephone at her apartment had been disconnected, her bedroom door was locked, the blinds in her apartment had been closed, and the doors to the apartment were locked. The defendant walked the victim's dog.[2] At or around noon on December 14, 2009, the defendant, driving the victim's truck alone, traveled to the residence of his mother, Gertrude Quail.

During the course of conversation, the defendant's mother inquired about the victim's whereabouts. Although the victim was unemployed at that time, and was collecting unemployment compensation benefits, the defendant replied that the victim was "working." The victim's mother expressed her belief that the victim had been laid off, but the defendant disagreed. The defendant also stated that he had to pick the victim up from work later that afternoon, at 5 p.m.

Later, on December 14, 2009, the defendant traveled in the victim's truck to a pawn shop in East Windsor. There, he sold the video game console, the desktop computer, and some of the foreign currency for $225. The owner of the pawn shop asked the defendant why he was selling a new, unopened video game console during the holiday season at the pawn shop. The defendant replied that he was separating from the person to whom he had intended to give it as a gift.

On that same day, the defendant drove alone to a gentleman's club in East Windsor. The defendant spent time at the bar inside of the club, and in front of a stage where a female dancer, whom he tipped well that day, was performing. A short time thereafter, the defendant spoke with the dancer outside of the club, and he used

[2] One of the victim's neighbors, Corri Degray, last saw the victim on either December 12 or 13, 2009, and observed the defendant walking the victim's dog on the morning of December 14, 2009.

her cell phone. When the dancer was leaving the club for the day, the defendant removed the victim's leather jacket from the victim's truck and gave it to her.

The defendant contacted his son in an attempt to sell some of the other items that had belonged to the victim, telling his son that he was moving and that he needed money. Later, the defendant drove the victim's truck to Springfield, Massachusetts, where he abandoned it in a parking lot with empty tractor trailer trucks. The defendant abandoned the victim's television and cable television receivers in one of the empty trailers. The police did not retrieve the truck until December 23, 2009.

In the early morning hours of December 15, 2009, the defendant arrived at a Sunoco gas station in Springfield. The store manager at the gas station spoke with the defendant, who appeared to be intoxicated and edgy; the defendant told him that his truck had been towed and that he needed to make a telephone call. After he used a telephone at the store, the defendant instructed the store manager to tell anyone who might call back that he would be at a nearby Mobil gas station. The defendant walked to the Mobil station and approached Michael Proulx, who was fueling his vehicle. The defendant asked Proulx if he could drive him to Enfield, and Proulx agreed. The defendant told Proulx that he had traveled to a liquor store in Massachusetts with his brother and his girlfriend, the police had towed his truck away while he was at the store, and his brother had been arrested. The defendant, who was carrying a backpack and appeared to be under the influence of drugs, told Proulx that his belongings were in the truck that had been towed away. Later that morning, Proulx left the defendant in Enfield, near the residence of the defendant's brother, Joel Quail. For several hours following his arrival at his brother's residence, the defendant hid inside a boat that was located in his brother's yard.

At approximately 11 a.m. on December 15, 2009, the defendant knocked on the door to his brother's residence, and was greeted by his brother. He told Joel Quail that he had been walking all night because the Springfield police had confiscated his truck after finding a large knife in it. Later that day, Joel Quail drove the defendant to Theresa Quail's apartment in Plainfield. They were met there by their older sister, Linda Quail, who also was residing at the apartment. The defendant, Linda Quail, and Joel Quail spent several hours together. Eventually, they were joined by Theresa Quail, Theresa Quail's boyfriend, Cousineau, Cousineau's girlfriend, and other acquaintances of Theresa Quail.

During a conversation between the defendant, Cousineau, and Linda Quail, the defendant stated that "he was going to be on the news and [despite] whatever they saw not to think differently of him." The defendant then hugged Cousineau. Cousineau asked the defendant about his relationship with the victim, but the defendant gestured that he did not want to talk about it. Shortly thereafter, Cousineau attempted to reach the victim by telephone, but he reached her voicemail.

Later during the evening of December 15, 2009, the defendant became involved in an argument with Theresa Quail and her boyfriend, and he was asked to leave Theresa Quail's residence. Before he left, Theresa Quail asked the defendant about the victim's whereabouts. The defendant replied that she was at work. After he left Theresa Quail's residence, the defendant went to the residence of one of Theresa Quail's neighbors, Todd Houston, who was also a friend of his. Houston was socializing with his girlfriend and another friend when the defendant arrived at his apartment. The defendant was in possession of several bottles of beer and a bottle of the prescription medicine Xanax that bore the victim's name. During the course of conversation, Houston inquired about the victim. In reply, the defendant stated

to Houston that the victim "[was] not doing too good," he and the victim had been in an argument, he "may or may not have hit her with a baseball bat," and the victim was dead. The defendant calmly yet tearfully related that he was with the victim, at her residence, when they observed a neighbor's dog outside. He stated that he and the victim brought the dog some type of straw bedding. Later, the neighbor who owned the dog arrived at the victim's apartment, armed with a gun. The defendant stated that he tried to calm the neighbor, but the defendant ultimately crawled to the bedroom, escaped from the apartment by means of a bedroom window, and crawled to the front of the apartment complex. He then stated "[s]omething to the effect that there was an argument and he may or may not have hit [the victim] with a baseball bat." Additionally, the defendant "said something to the effect that he was going to be on the news." Houston, believing that the defendant was joking about harming the victim, reacted to the defendant's statements by expressing his disbelief. Houston asked the defendant how he had arrived at his apartment, to which the defendant replied that he had hitchhiked, and that the victim's truck was "gone." Some of this conversation was overheard by Houston's girlfriend, Paula Peloquin, who overheard the defendant state his belief that he had struck the victim with a baseball bat. The defendant left Houston's apartment after approximately forty-five minutes.

After departing Houston's residence either in the late evening hours of December 15, 2009, or the early morning hours of December 16, 2009, the defendant ultimately returned to Theresa Quail's apartment. He fell asleep in Linda Quail's bedroom, which was unoccupied. In the early afternoon of December 16, 2009, Cousineau and several others entered the bedroom. They found the defendant, lying on the floor and clad in boxer shorts. He was wrapped in blankets and a towel,

unresponsive, and struggling to breathe. Cousineau called 911. Emergency medical personnel arrived at the apartment and transported the defendant to a nearby hospital.

On December 16, 2009, the victim's father, Thomas Audrain, who believed that the victim feared the defendant, went to the victim's apartment twice, once in the morning and once in the late afternoon, after he learned from the victim's children that she had failed to pick them up from her former husband's home. Audrain observed that the victim's truck was not parked outside, and he did not observe any signs of forced entry into to the residence. He observed the victim's purse, wallet, and driver's license on the kitchen table therein. During his second visit to the residence in search of the victim, he used tools to forcibly open the victim's locked bedroom door.[3] He discovered the victim's lifeless body lying in a pool of blood on the bedroom floor. Audrain noticed evidence of a violent struggle in the bedroom, a broken television was on the floor, and a bloody baseball bat[4] was on the victim's bed. Audrain sought help from a neighbor of the victim, who called 911, after he realized that the telephones in the victim's residence had been disconnected. On the basis of the evidence at the crime scene, the police determined that the victim's murder occurred in her bedroom.

[3] The state presented evidence with respect to a shirt with blood like stains that was found in the victim's living room. Nicholas Yang, a forensic examiner, testified that the blood like stains on the shirt revealed the presence of the victim's DNA and that the defendant was a contributor to DNA samples collected from the inside neck and shoulder seams of the shirt.

[4] The results of DNA tests performed on the bat, which were presented at trial, reflected that the defendant's DNA could not be eliminated as a contributor in a test of the bat's grip. One of the victim's neighbors, Ellen Silva, testified that she occasionally saw the victim and the defendant sitting outside of the victim's apartment and that, on at least one occasion, she observed the defendant using a baseball bat to hit a ball for the victim's dog to fetch. Also, Silva testified that, on December 14 and 15, 2009, she heard the victim's dog whining in the victim's apartment.

On April 11, 2012, the state charged the defendant with committing murder and larceny in the fifth degree. Following a seven day trial, a jury found the defendant guilty of both charges. The court imposed a total effective sentence of sixty years of incarceration. This appeal followed.

With respect to the ruling at issue in this appeal, the following additional facts are relevant. At trial, the state offered in evidence the defendant's clothing and wallet that the police seized from Linda Quail's bedroom[5] in Theresa Quail's residence during a warrantless search on December 16, 2009, as well as the results of forensic tests that had been performed on these seized items. On April 18, 2012, which was the fourth day of the defendant's trial, the defendant moved to suppress all of these items. In the memorandum of law in support of the motion, the defendant argued, inter alia, that the seized items should have been suppressed because they were seized without a warrant, without probable cause, and outside of any exception to the warrant requirement. Furthermore, the defendant argued in his memorandum of law in support of the motion that the results of the subsequent search of the seized items should have been suppressed because the evidence yielded by such subsequent searches were fruits of the poisonous tree. The defendant argued that the police had seized items of personal property from an area in which he, as an overnight guest in the bedroom, had a reasonable expectation of privacy, and that the seizure occurred at a time when he was not present and, in fact, was unresponsive and incapable of consenting to the seizure. He argued in relevant part that no third party had

[5] As set forth in our earlier recitation of the facts, during the late evening hours of December 15, 2009, or the early morning hours of December 16, 2009, the defendant returned to Theresa Quail's residence and slept in the bedroom, which was unoccupied at the time. Cousineau and others found the defendant in the bedroom in the early afternoon of December 16, 2009.

consented to the seizure of the items, and that "[t]here was nothing about the seized items of personal property that indicated [that] they were associated with any crime against the alleged victim; nor did such indicator of criminality associated with the defendant's clothes appear in plain view. Even if the police were standing in a permissible area [of the residence searched], the mere sight of the items did not provide them probable cause to believe that these were the same clothes worn at the time of the killing of the alleged victim. The police acted not from probable cause or even reasonable suspicion, but rank speculation in seizing the defendant's property." On April 19, 2012, the court held a hearing on the motion to suppress.

At the suppression hearing, state police Sergeant John Turner testified in relevant part as follows. He was the supervisor of the crime scene investigation at the victim's apartment on the night when her body was discovered, December 16, 2009. When he and other state police officers arrived at the victim's apartment on that night, they interviewed Audrain, who identified himself as the victim's father. After interviewing Audrain, the state police learned that the victim had a boyfriend, whom they later identified as the defendant, and that he had a sister, Theresa Quail, who lived in Plainfield. The state police contacted Plainfield police and asked them if they knew of anyone with the defendant's last name, to which the police responded that they were aware that a person with that last name, the defendant, had just been transported to Backus Hospital from Theresa Quail's apartment in the afternoon on December 16, 2009, and that he had been in an unconscious state. Turner then dispatched state police detectives Priscilla Vining and Daniel Cargill to Theresa Quail's apartment in order to interview any witnesses, to determine the circumstances surrounding the defendant's transport

to the hospital, the nature of the defendant's relationship to the victim, and the whereabouts of the defendant in relation to the victim's death. Furthermore, Turner testified that Vining and Cargill returned to the victim's apartment shortly after midnight on December 17, 2009, and obtained statements from Linda and Theresa Quail, and collected evidence—the defendant's clothing and wallet—from Linda Quail's bedroom in Theresa Quail's apartment. Turner testified that when Vining and Cargill returned to the victim's apartment, he instructed them to turn over the defendant's clothing to the evidence officer "for use . . . in the investigation should it become necessary," which they ultimately did. Turner testified: "At this point in time there was . . . no real connection . . . with [the defendant] and the murder, but I certainly believe that if he did become a suspect later on that that clothing could be evidence in the future. Based on knowing what the [crime] scene looked like and how bloody it was, one . . . could certainly believe that there'd be blood on that clothing, whether visible or not."

Vining also testified in relevant part as follows at the April 19, 2012 suppression hearing. When she went to the victim's apartment on the night of December 16, 2009, she and other state police officers learned that the victim never arrived at her former husband's home to pick up her two children on that day, which was her scheduled day of the week to have custody of them. Furthermore, Vining testified that when she arrived at the victim's apartment, she learned that, several hours earlier, the defendant, with whom the victim had been living, had been transported, in an unconscious state, from Theresa Quail's Plainfield apartment to a hospital. State police then searched a database for the defendant and determined that he was a registered sex offender and that he had been arrested multiple times in the past for violent and drug-related crimes. Vining testified that,

pursuant to Turner's orders, she and Cargill went to Theresa Quail's apartment at approximately 10 p.m. that night. Theresa Quail invited them inside the apartment when they arrived, and she and Cargill interviewed Linda Quail and Theresa Quail. Vining testified that Linda Quail, who had been living in Theresa Quail's apartment, then led her and Cargill up to her bedroom after the interview.[6] Linda Quail's bedroom was cluttered with clothing and household items. There was no indication that the defendant lived in that room but Linda Quail told her and Cargill that some clothing on the bedroom floor belonged to the defendant, specifically a denim jacket, a pair of blue jeans, a pair of socks, and a pair of sneakers.[7] Vining testified that blood was not visible on the clothing, but based upon her training and experience, the perpetrator of a crime such as the crime against the victim probably would have had blood on their clothing, so she seized it.

[6] At this point in Vining's testimony at the suppression hearing, defense counsel objected to any testimony with respect to Linda or Theresa Quail's consent to the police searching Linda Quail's bedroom. Defense counsel also asked the court to extend the reasoning of *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2008), and *Davis* v. *Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), to the admissibility of consent. Specifically, defense counsel argued: "Since this is a threshold hearing, which is more than likely going to be dispositive of the whole case, we think those elements which have been addressed in *Crawford* certainly should extend to a suppression hearing with such dramatic results, depending on how the court rules. For those reasons, the official objection is to any testimonial hearsay regarding the issue of consent that came out of the mouth of anyone who's not here to testify."

In response, the state argued, in relevant part: "Anything that Detective Vining testifies to as to what the occupants of the house told her is offered not for the truth of the matter, but for the effect on the [hearer] and what the officer did as it relates to the subject of what it is that the defendant wants to suppress. This is not—what she's testifying to is not testimonial and *Crawford* [does not] apply." The court overruled defense counsel's objection.

[7] There were also items in the pockets of the clothing, including a wallet, a nail clipper, and a toothbrush. At the suppression hearing, defense counsel indicated that they were not seeking to suppress the sneakers and the socks collected from Linda Quail's bedroom, but that they were only seeking to suppress the pants, the shirt, and the wallet.

On April 20, 2012, the court issued an oral decision from the bench denying the defendant's motion to suppress. It stated: "Having heard the evidence that was adduced yesterday . . . the court finds that the collective knowledge of the state police at the time that . . . Vining and . . . Cargill arrived at [Theresa Quail's apartment], which was sometime around [10 p.m.] that night, indicates that there was no evidence of forced entry to [the victim's] apartment . . . that it was an extremely bloody scene so that there was likely transfer of blood to any perpetrator's clothing; the state police found a baseball bat which was probably at least one of the instruments used in committing the crime and that type of instrument would, of course, cause blood spattering. And it was very obvious from the photographs and from anybody that looked at the bat that it had blood like stains contained on it.

"The evidence also shows that the defendant had been living with [the victim], but was not present at the apartment at the time that her body was discovered. The state police also knew that the defendant was a registered sex offender and had numerous arrests for violent crimes in the past. The state police, learning from . . . Audrain that the defendant was [the victim's] boyfriend, called the Plainfield police, who indicated to them that the defendant had been taken by ambulance to Backus Hospital approximately [three] hours earlier because of either an extreme intoxication and/or a drug overdose.

"Although all civilian witnesses that have testified in this case indicate that the last time that [the victim] was seen alive on, I believe, Sunday, December [13, 2009] this information was not known to the state police at the time that they went to [Theresa Quail's apartment], therefore they could have reasonably assumed that [the victim] was killed on December [16, 2009] when the body was discovered.

"The testimony at the hearing further shows that Detectives Vining and Cargill went to [Theresa Quail's apartment] in Plainfield; that they knocked on the door; that they identified themselves to the person who answered the door and explained why they were there; that they asked who the name of the person who had answered the door and that woman indicated she was . . . Theresa Quail; that the detectives explained to Theresa Quail and also Linda Quail why they were there and after further discussions . . . Cargill with Linda Quail and . . . Vining with [Theresa] Quail . . . Vining and Cargill and Linda Quail went up to Linda Quail's bedroom which was on the second floor at the top of the stairs.

"The testimony indicated that Linda Quail led the state police up there. Entering the room . . . Vining observed the room to have on the floor certain items including a mattress, a lot of clothing—female clothing primarily—as well as household items. Linda Quail also indicated that certain clothing on the floor belonged to the defendant.

"Based upon the fact that the crime scene was very bloody and that a baseball bat at a minimum was involved . . . Vining knew from her training and experience that any perpetrator would likely have blood spatter and/or transfers on his clothing; therefore . . . Vining seized that clothing as potential evidence.

"The court finds that the state police were lawfully in Linda Quail's bedroom based on Linda Quail's consent to allow them into her room. The testimony indicates that while downstairs the state police explained to Linda Quail why they were at [Theresa Quail's apartment] and that Linda Quail voluntarily thereafter led them upstairs.

"At the hearing, there was not a scintilla of evidence adduced indicating that Linda Quail was forced, threatened, or coerced into bringing the state police upstairs

to her bedroom. The state need only prove the lawfulness of a search and seizure by a preponderance of the evidence. Although in this case the evidence of consent is not overwhelming, there is no evidence which demonstrates that Linda Quail did not really consent.

"Accordingly, on this record, the court finds that Linda Quail did consent to a search of her bedroom. Once in the bedroom, Linda Quail pointed out clothing that belonged to the defendant. The court finds that that testimony was not hearsay, in that it was introduced to show the effect on the hearer and to explain why . . . Vining would seize the clothing that she did.

"The clothing that was seized was seized in plain view on the floor of the room and upon seeing it, it was immediately apparent to . . . Vining, based on her training and experience and in light of the bloody crime scene that she had observed, that this clothing was potentially incriminatory.

"Moreover, this evidence—in other words, the clothing—is of a type that, if not seized at that time because of its location and mobility, it could have been lost, stolen, destroyed or in some way tampered with.

"Therefore, for all of the foregoing reasons, the court finds that the state police lawfully seized the defendant's clothing from the bedroom of Linda Quail on December 16 and 17, 2009; therefore, the court denies the defendant's motion to suppress."[8]

On April 24, 2012, which was the next day on which trial proceedings took place, the court once again took up the matter of the defendant's motion to suppress, at which point it stated the following: "Okay. So let me put the following additional [statements] on the record.

[8] Pursuant to Practice Book § 64-1, the court subsequently signed a transcript of its oral decision and filed it with the clerk of the trial court.

And it amplifies, I guess, the decision that I rendered last Friday on the motion to suppress. The defense did raise a *Crawford* v. *Washington* [supra, 541 U.S. 36] issue with respect to the motion to suppress and rightly indicated that there is—[that is] a case of first impression here in Connecticut. In this court's opinion, there is no *Crawford* v. *Washington* issue, so I [do not] need to rule on that with respect to this particular case.

"Number one, the state did not offer any statements of Linda Quail to prove consent to search or seize. And, secondly, the sole statement of Linda Quail offered by the state was her statement—[Linda Quail's] statement that certain clothing in the room belonged to the defendant. And as [I have] already indicated previously, that was not hearsay because it was offered to show the effect on the hearer. In other words, why . . . Vining seized the clothing that she did.

"All right. With respect to that clothing, the court has previously determined that the clothing was immediately apparent to . . . Vining, as likely containing evidence of the crime of murder. The court has also previously found that the—at [10 p.m.] on December 16, 2009, the state police reasonably believed that the murder had occurred on December 16, 2009, the day that the body was found. Stated differently, they had no reason to believe that the murder did not occur on . . . December 16, 2009.

"The court failed to state [in its earlier decision on the motion to suppress] that because the state police were only called to the crime scene on December 16, it was reasonable for them to conclude that the murder took place on December 16, and thus also it was reasonable for them to conclude that the defendant had been wearing the clothing found in Linda Quail's bedroom at the time of the murder, or on December 16, 2009.

"And the final loose end with respect to the suppression hearing, is that in the motion to suppress, in addition to moving that the defendant's clothing be suppressed, the defendant has also moved that the results of any testing of the clothing be suppressed. The state counters [that] the testing was conducted after the state police obtained a [warrant pursuant to *State* v. *Joyce*, 229 Conn. 10, 639 A.2d 1007 (1994) (*Joyce* warrant)]. The defense does not contest the validity of the *Joyce* warrant, but rather argues that the results of any testing should be suppressed as the fruit of the initial poisonous warrantless [seizure] of the clothing.

"As an aside, the court does take judicial notice that a *Joyce* warrant was issued for the blue jeans, sneakers, socks, and shirt on June 14, 2011. That warrant authorized the forensic science lab[oratory] to test the defendant's clothing for the presence of evidence of the crime of murder. The court's understanding from argument here is that the test results [that] the state intends to introduce were obtained by the lab[oratory] after June 14, 2011; thus, the tests were conducted in accordance and under the authority of the [*Joyce*] warrant.

"The court has previously found that the warrantless seizure of the defendant's clothing was not unlawful; therefore, the court now extends that reasoning to find that the test results obtained were not the result of the fruit of any poisonous tree or any illegal warrantless seizure of the clothing. Accordingly, the court also denies the defendant's motion to suppress the test results."

After the court issued its decision denying the defendant's motion to suppress, the state presented, inter alia, the following evidence: the defendant's clothing and wallet that were seized from Linda Quail's bedroom; the results of DNA and forensic tests performed on

those items pursuant to the *Joyce* warrant, which testing revealed that the defendant's shirt and blue jeans contained blood like stains that tested positive for the victim's DNA; and Vining's testimony about her and Cargill's visit to Theresa Quail's apartment on the night of December 16, 2009.

Before this court, the defendant does not contest that Theresa Quail, as a co-occupant of the bedroom, validly consented to the police *search* of the bedroom in which he had been an overnight guest prior to the time at which he was transported to the hospital on December 16, 2009. Relying on arguments that he advanced before the trial court, the defendant challenges the court's denial of his motion to suppress on the ground that the warrantless *seizure* of his clothing and personal effects from the bedroom at Theresa Quail's residence violated his rights under the fourth amendment to the United States constitution.[9] The defendant argues that Linda Quail did not consent to the seizure of his clothing and personal effects and that even if she had done so, such consent was invalid because she did not have the authority to so consent.[10] The state argues, in essence, that the seizure of the defendant's items by the police, which occurred after the defendant had been transported to the hospital in an unconscious state, was lawful because it occurred "pursuant to valid consent" by Theresa Quail, and any subsequent testing of the items occurred pursuant to a *Joyce* warrant. Alternatively, relying on the other evidence presented at trial, the state argues that any error in the denial of the

[9] In his brief, the defendant also cites to article first, § 7, of the Connecticut constitution, but has not adequately analyzed a claim thereunder.

[10] In support of his claim, the defendant relies, inter alia, on *Arizona* v. *Hicks*, 480 U.S. 321, 327, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), *United States* v. *Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), and *State* v. *Edwards*, 214 Conn. 57, 75, 570 A.2d 193 (1990).

defendant's motion to suppress and subsequent admission of the evidence at issue was harmless beyond a reasonable doubt.

"It is well settled that constitutional search and seizure violations are not structural improprieties requiring reversal, but rather, are subject to harmless error analysis. . . . Accordingly, we often have declined to decide fourth amendment issues attendant to the legality of a search or seizure when it is clear that any erroneous admission into evidence of the fruits of the search was harmless beyond a reasonable doubt. . . . The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely, to convict the guilty and acquit the innocent. . . . Therefore, whether an error is harmful depends on its impact on the trier of fact and the result of the case. . . . This court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt . . . [but] the state bears the burden of proving that the error was harmless . . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . .

"Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the

[evidence] in the prosecution's case, whether the [evidence] was cumulative, the presence or absence of evidence corroborating or contradicting the [evidence] . . . and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . The state bears the burden of proving that the error is harmless beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Smith*, 156 Conn. App. 537, 560–62, 113 A.3d 103, cert. denied, 317 Conn. 910, 115 A.3d 1106 (2015). To the extent that we may dispose of the appeal on the ground of harmless error, without having to resolve the fourth amendment claim raised by the parties, it is consistent with our jurisprudence that we do so. See *Moore* v. *McNamara*, 201 Conn. 16, 20, 513 A.2d 660 (1986) ("[t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case").

We carefully have discussed the facts that the jury reasonably could have found on the basis of the evidence presented at trial. In the present case, there was ample and compelling circumstantial evidence that demonstrated the defendant's guilt. We have repeatedly acknowledged that "it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Davis*, 283 Conn. 280, 330, 929 A.2d 278 (2007).

The state presented evidence that the defendant, who was living at the victim's residence and who accompanied the victim home on the night of her murder, had ample opportunity to murder the victim. The evidence concerning the crime scene and the steps taken by the

assailant to conceal the victim's death, such as disconnecting the victim's phone and locking doors in her residence, suggested that the victim was murdered by someone, like the defendant, who had access to her residence and was known by the victim. There was evidence that, like the defendant, the victim's assailant was a smoker and that the assailant had smoked in the victim's bedroom.

The state presented evidence that the defendant had a motive to kill the victim. In the days prior to her death, the defendant, who was unemployed, expressed his interest in selling the victim's belongings without her knowledge. On the night of the victim's murder, the defendant quarreled with the victim. There was evidence that immediately following the victim's murder, the defendant took possession of the victim's truck and other items belonging to the victim, and that he sold many of these items. There was evidence that the defendant either discarded or gave away other items belonging to the victim, behavior that strongly suggested that he knew that the victim no longer would have a need for these possessions.

The state presented evidence that the defendant was conscious of his guilt and had attempted to avoid detection for his involvement in the victim's death. There was compelling evidence that the defendant made several false statements concerning the victim's whereabouts following her murder. Among these statements, he stated to his mother that he had to pick the victim up from a job that she did not have. The defendant also made false and conflicting statements to others with respect to the victim's truck and his activities in Springfield. Additionally, it sheds light on the defendant's state of mind that, after a tire on the victim's truck deflated, he simply abandoned the truck in Springfield. He neither called the victim to tell her what had occurred nor sought her assistance in returning to Connecticut. In

addition to this conduct, the evidence demonstrated that, upon arriving at his brother's residence in Enfield on the morning of December 15, 2009, the defendant hid for several hours in a boat that was stored on his brother's property, an unusual act that undoubtedly shed light on his continued effort to conceal himself and his whereabouts.

Most compelling, however, was the evidence that, prior to the time at which the victim was discovered dead in her residence, the defendant essentially confessed to the victim's murder. "[C]onfessions have a particularly profound impact on the jury, so much so that we may justifiably doubt [the jury's] ability to put them out of mind even if told to do so." (Internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 581, 46 A.3d 126 (2012). Houston unambiguously testified that the defendant told him the tale about a visit from the victim's angry neighbor and, subsequently, that he himself had struck the victim with a baseball bat (one of the murder weapons in the present case), and that he believed her to be dead. Houston's girlfriend, Peloquin, testified that she recalled Houston asking the defendant about the victim. Peloquin stated that the defendant replied: "I think I hit her with a bat." Peloquin testified that the defendant told a story about an angry neighbor who owned a dog and his having crawled out of the house through a window. Peloquin added that, later that evening, the defendant started crying.

It adds to their probative value that these highly incriminatory statements were made by the defendant, while he was emotional, to a friend. Prior to telling this chilling version of events, and prior to the discovery of the victim's body, the defendant made statements to Cousineau and his sister, Linda Quail, which conveyed that the defendant would be "on the news," and that they should not think any differently of him. Plainly, these statements reflected the defendant's awareness

that he soon would be the subject of media attention for something that would tend to make his family members think poorly of him. These statements, viewed in conjunction with the other evidence presented in this case, was independent and overwhelming evidence of the defendant's guilt.[11]

Additionally, the DNA evidence from the clothing discovered during the police search of the bedroom was not the only evidence of a forensic nature that linked the defendant to the victim's murder. The state presented evidence that the defendant could not be eliminated as a contributor to the DNA collected from the grip of the bloody baseball bat found at the crime scene. The state presented evidence that the defendant was a contributor to DNA collected from the inside neck and shoulder area of a shirt that was found at the crime scene and the blood like stains on the shirt contained the DNA of the victim.

We recognize, as the defendant argues, that in particular criminal convictions, DNA evidence may be the most compelling evidence of an accused's guilt. See, e.g., *State* v. *Smith*, 280 Conn. 285, 309, 907 A.2d 73 (2006). In the present case, however, the result of the forensic

[11] In addition to presenting evidence of these statements made by the defendant prior to the time that the victim's body was discovered, the state presented evidence that, on May 15, 2010, while he was incarcerated, he spoke on the telephone with his son. The defendant asked if there was any news about the investigation of the victim's murder. His son replied that there was a story in the news in which the defendant was reported to have told one of Theresa Quail's neighbors, on the night before the defendant was transported to the hospital, that he had killed the victim with a baseball bat. Rather than stating that he did not kill the victim, the defendant essentially replied that this conversation had occurred, but that the events described therein were untrue.

Furthermore, the state presented evidence that, in a telephone conversation that took place on March 13, 2010, while the defendant was incarcerated but prior to the forensic testing of the clothing seized from his bedroom at Linda Quail's residence, the defendant stated to his brother that there was no blood on his clothing or the victim's truck.

testing performed on the clothing that was discovered by the police in the defendant's bedroom was, by far, not the most compelling evidence of his guilt. There was other forensic evidence that tied the defendant to the crime scene, where he resided with the victim, including forensic evidence that suggested that the defendant had used the murder weapon. Apart from forensic evidence, however, was the ample evidence of the defendant's admissions of involvement in the victim's death, the defendant's false statements concerning the victim's whereabouts following the murder, his motive to kill the victim, his conduct with respect to items that he took from the victim's residence following her death, his hiding in a boat following her death, and his contradictory and false statements concerning his activities following her death.

Against this evidentiary backdrop, we conclude that the state has succeeded in demonstrating that it presented overwhelming evidence of guilt independent of the evidence at issue in the present claim.[12] Additionally, the state has demonstrated that, in light of the strength of the state's case, the evidence at issue in the present claim cannot reasonably be viewed as having impacted the result of the trial. Thus, even if the court improperly denied the motion to suppress, we conclude that such denial was harmless error in the present case.

The judgment is affirmed.

In this opinion the other judges concurred.

[12] Consistent with our analysis of the evidence presented by the state, we observe that the evidence related to the clothing seized from Theresa Quail's residence was not a prominent feature of the prosecutor's closing argument to the jury. During the state's initial closing argument, the prosecutor once referred, in general, to the "forensic science evidence" in this case. During the state's rebuttal closing argument, the prosecutor discussed the ample circumstantial evidence that supported a finding of guilt and, only at the end of her argument, referred to the evidence that the victim's blood had been found on the clothing seized by the police as "one last piece of the puzzle" that demonstrated the defendant's guilt.

ANTHONY MARIANO ET AL. *v.* THE HARTLAND BUILDING AND RESTORATION COMPANY ET AL.
(AC 37710)

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

Syllabus

The plaintiff employee commenced an action against the defendant subcontractors to recover damages for personal injuries he sustained after a bridge he had been working on collapsed. The defendants were hired by the general contractor, B, the plaintiff's employer, who had entered into a prime contract with the state to demolish the bridge. B was granted permission to intervene as a plaintiff in the personal injury action, seeking reimbursement from the defendants for the workers' compensation benefit payments that B made to the plaintiff. One of the defendants filed an apportionment complaint against, inter alia, an engineering company, C, that had entered into a consulting agreement with the state to review B's demolition plans. The plaintiff then brought a direct claim for negligence against C, and C filed a counterclaim against B for indemnification. B claimed that C's counterclaim was barred by the exclusivity provision of the Workers' Compensation Act (§ 31-275 et seq.), which provides that workers' compensation payments are the exclusive source of remedy against an injured employee's employer. B moved for summary judgment on the counterclaim, claiming that it failed as a matter of law because no legal duty existed between C and B. In support of its motion for summary judgment, B submitted an affidavit from its vice president that stated that B and C never entered into a written agreement concerning the bridge demolition. C then filed an amended counterclaim alleging that the state standard specifications had been incorporated by reference into both the consulting agreement and B's prime contract with the state, which overcame the exclusivity provision because the contracts established that B had a duty to indemnify C as an agent of the state. C subsequently filed an objection to the motion for summary judgment, claiming that B had failed to establish that there were no genuine issues of material fact regarding C's allegations that it was a third-party beneficiary of the prime contract by virtue of its agency relationship with the state. The trial court, noting that C had not submitted a copy of the consulting agreement, concluded that C had not presented evidence that B owed it an independent legal duty and rendered summary judgment in favor of B. On appeal, C claimed that the trial court erred in concluding that B had carried its initial burden of proving the nonexistence of any genuine issue of material fact with respect to C's allegations that it was an agent of the state and, thus, a third-party beneficiary of the prime contract. *Held* that the trial

court erred in concluding that B was entitled to summary judgment on the counterclaim as a matter of law, B having failed to meet its burden of establishing the absence of a genuine issue of material fact regarding C's allegation that it was an agent of the state and a third-party beneficiary of the prime contract; because B submitted no evidence that addressed that factual allegation, a genuine issue of fact remained that could not be determined on summary judgment, and C was under no obligation as the nonmoving party to submit documents establishing the existence of that issue.

Argued April 13—officially released October 11, 2016

Procedural History

Action to recover damages for the defendants' alleged negligence, brought to the Superior Court in the judicial district of Waterbury, where the court, *Trombley*, *J.*, granted the motion to intervene as a party plaintiff filed by Brunalli Construction Company; thereafter, the named defendant filed an apportionment complaint against Close, Jensen and Miller, P.C., et al.; subsequently, the plaintiffs filed a cross complaint against the apportionment defendants; thereafter, the apportionment defendant Close, Jensen and Miller, P.C., filed a counterclaim as to the intervening plaintiff; subsequently, the apportionment defendant Close, Jensen and Miller, P.C., filed an amended counterclaim; thereafter, the court, *Shapiro*, *J.*, granted the motion for summary judgment filed by the intervening plaintiff as to the amended counterclaim, from which the apportionment defendant Close, Jensen and Miller, P.C., appealed to this court. *Reversed; further proceedings.*

Christopher A. Klepps, with whom was *Donald W. Doeg*, for the appellant (apportionment defendant Close, Jensen and Miller, P.C.).

James E. Coyne, for the appellee (intervening plaintiff).

Opinion

DiPENTIMA, C. J. The apportionment defendant Close, Jensen and Miller, P.C. (Close), appeals from the

summary judgment rendered in favor of the intervening plaintiff, Brunalli Construction Company (Brunalli), on Close's counterclaim.[1] On appeal, Close claims that the trial court erred in (1) concluding that Brunalli carried its initial burden of proving the nonexistence of any genuine issue of material fact and (2) determining that the affidavit submitted by Close in support of its opposition to Brunalli's motion for summary judgment failed to demonstrate the existence of an issue of material fact. We agree with the first claim of Close and therefore reverse the judgment of the trial court.[2]

The record before the court, viewed in the light most favorable to Close as the nonmoving party, reveals the following facts and procedural history. The underlying action arose from the June 15, 2010 collapse of the Salem Bridge in Naugatuck, which occurred as work was underway to demolish the bridge. At the time of the incident, Anthony Mariano (Anthony) was employed by Brunalli, which had entered into a contract with the state to serve as the general contractor on the project to demolish the Salem Bridge (prime contract). Nearly a year after the collapse, in July, 2011, the plaintiffs, Anthony and Shirley Mariano (Marianos), initiated an action against the defendants The Hartland Building & Restoration Company (Hartland) and Witch Enterprises, Inc., both of which were Brunalli's subcontractors, alleging that Anthony had sustained personal injuries as a result of the collapse. Shortly after commencing this action, Brunalli filed an intervening complaint, pursuant to General Statutes § 31-293, seeking reimbursement for the workers' compensation benefit payments it paid to Anthony as a result of his injuries. In late 2011, Hartland filed an apportionment complaint

[1] Close and Brunalli are the only parties to Close's counterclaim. As a result, the remaining plaintiffs and defendants are not parties to this appeal.

[2] Because our resolution of Close's first claim is dispositive of the appeal, we do not reach the second claim.

against Close[3] and Martin J. Page (Martin), engineers associated with the Salem Bridge project.[4] The Marianos, then, brought a direct claim against Close and Martin.

On May 10, 2012, Close filed a counterclaim against Brunalli. Relevant to this appeal, Close alleged that, pursuant to "its agreement" with the state, it reviewed the demolition plan and a temporary support plan that Brunalli submitted to the state. According to Close, Brunalli and/or its subcontractors negligently performed their work in connection with the demolition of the Salem Bridge. Close also alleged that Brunalli, by "failing to adhere to the . . . demolition plan and/or the . . . temporary support plan and/or failing to ensure that its subcontractors adhered to the . . . demolition plan and/or the . . . temporary support plan was the active and primary cause of the damages, if any, suffered by [the Marianos] and superseded any passive negligence on the part of [Close], if any." Thus, because of Brunalli's various purported failures, Close alleged that Brunalli had a common-law duty to indemnify and hold harmless Close to the extent that the Marianos prevailed on their claims against Close.

On August 30, 2012, Brunalli filed its answer and special defense to Close's counterclaim. Pertinent to this appeal, Brunalli denied any negligence and claimed that Close's counterclaim was barred by General Stat-

[3] According to Close, it served as the state's consulting liaison engineer for the Salem Bridge project.

[4] According to Martin, he was a registered professional engineer in Connecticut. In his capacity as a consulting engineer, Martin was engaged by Hartland to assist in the Salem Bridge project. Specifically, "[t]he scope of [his] engagement . . . was limited to engineering, preparation and wet-stamping (with a [r]egistered [p]rofessional [e]ngineering seal) design documents in accordance with contract documents and project specifications . . . ." We note that Martin is not a party to this appeal.

utes § 31-284 (a),[5] the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq.

On May 24, 2013, Brunalli filed a motion for summary judgment on Close's counterclaim for indemnification. It argued that Close's counterclaim failed, as a matter of law, because no independent legal duty existed between Brunalli and Close. In support of the motion for summary judgment, Brunalli attached an affidavit from James Needham, vice president for Brunalli. Needham averred that Brunalli and Close "never entered into a written agreement" concerning the Salem Bridge project. Thus, in its memorandum of law in support of its motion for summary judgment, Brunalli argued that Close's allegations in its counterclaim had "fail[ed] to establish the independent legal duty necessary to overcome the exclusivity provision of the [act]."

Approximately six weeks later, on July 8, 2013, pursuant to Practice Book § 10-60,[6] Close filed a request for leave to amend its counterclaim with the amended

[5] General Statutes § 31-284 (a) provides in relevant part: "An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment . . . . All rights and claims between an employer who complies with the requirements of subsection (b) of this section and employees . . . arising out of personal injury . . . sustained in the course of employment are abolished other than rights and claims given by this chapter, provided nothing in this section shall prohibit any employee from securing, by agreement with his employer, additional compensation from his employer for the injury or from enforcing any agreement for additional compensation."

[6] Practice Book § 10-60 (a) provides in relevant part: "[A] party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner . . . (3) By filing a request for leave to file such amendment, with the amendment appended, after service upon each party . . . and with proof of service endorsed thereon. If no objection thereto has been filed by any party within fifteen days from the date of the filing of said request, the amendment shall be deemed to have been filed by consent of the adverse party. . . ."

counterclaim appended (amended counterclaim). Close alleged that under the terms of Brunalli's prime contract with the state, Brunalli was obligated to perform its work with due care. Moreover, Close alleged in the amended counterclaim that on or about April, 2008, Close and the state had entered into a consulting agreement "whereby [Close] agreed to act as the state's consulting liaison engineer with regard to state and local bridge programs," including the Salem Bridge project. According to Close, both the consulting agreement, which was between the state and Close, and the prime contract, which was between Brunalli and the state, "incorporate[d] by reference the state . . . Department of Transportation standard for roads, bridges and incidental construction [standard specifications]." Thus, Close alleged that the standard specifications established that Brunalli had a duty to "indemnify and save harmless, the [s]tate, the Department [of Transportation] and all of its officers, employees, and *agents* from all suits, actions or claims of any character, name or description brought for or on account of any injury or damage caused to any person or property as a result of, in connection with, or pursuant to the performance of the [prime] contract." (Emphasis added; internal quotation marks omitted.) Close reasoned that the consulting agreement created an agency relationship between the state and itself. Therefore, Brunalli, pursuant to the standard specifications, was obligated to indemnify Close as an agent of the state, because Close was a third party beneficiary of the prime contract. The remainder of the amended counterclaim largely repeated the allegations from the original counterclaim. Brunalli did not oppose the request for leave to amend the counterclaim; hence, the amended counterclaim became the operative pleading during the pendency of the motion for summary judgment. See *Darling* v. *Waterford*, 7 Conn. App. 485, 487, 508 A.2d 839 (1986)

(if opponent fails to object to proposed amendment within fifteen days, amendment is automatically allowed, and "[t]he trial court ha[s] no discretion, at that time, to deny the request, absent extraordinary circumstances").

On July 10, 2013, Close filed its objection to Brunalli's motion for summary judgment, claiming that Brunalli had failed to establish that there were no genuine issues of material fact as to whether Close's amended counterclaim was barred by the exclusivity provision of the act. It argued that "Brunalli's motion for summary judgment ignore[d] the parties' contractual relationships, which create[d], at least, a question of fact as to whether an independent legal duty existed between [Close] and Brunalli." Specifically, Close directed the court's attention to the amended counterclaim, in which Close alleged that "it [was] the third party beneficiary of the prime contract's indemnification provision by virtue of an agency relationship created by the consulting agreement." According to Close, because the term "agent" in the subject indemnity provision was undefined, and Close and the state "understood" that Close was an agent of the state, "whether [Close was] a third party beneficiary of the prime contract by virtue of an agency relationship with the state [was], at least, a question of material fact that a jury must determine."

In support of its objection to Brunalli's motion for summary judgment, Close appended an affidavit from Thomas M. Ryan, its director of engineering. Ryan averred that he not only had personal knowledge of the consulting agreement between Close and the state, but also that he had personal knowledge of the work Close performed, pursuant to the consulting agreement, in connection with the Salem Bridge project. He also averred that "[d]uring the course of [the] contractual relationship with the [s]tate, [Close] was understood by both the [s]tate and [Close] to be the [s]tate's agent."

Close did not provide any other affidavits and did not submit certified copies of the consulting agreement referred to in Ryan's affidavit or the prime contract.[7]

The court heard oral argument on November 6, 2014, on Brunalli's motion for summary judgment. On January 2, 2015, the court issued its memorandum of decision in which it granted Brunalli's motion. The court noted that the only exhibit Close submitted was Ryan's affidavit, and the court highlighted the fact that Close did not submit a copy of the consulting agreement referenced in Ryan's affidavit. The court determined that Ryan's statement that "[d]uring the course of the contractual relationship with the [s]tate, [Close] was understood by both the [s]tate and [Close] to be the [s]tate's agent," was "only a conclusion, without an evidentiary basis." Therefore, the court found that Close "ha[d] not presented evidence that Brunalli had an independent legal duty to [Close]," and that "Brunalli ha[d] presented evidence that there was no contractual relationship creating an independent legal duty to [Close], which [Close] ha[d] not disputed . . . ." This appeal followed.

The dispositive issue in this appeal is whether Brunalli's motion for summary judgment adequately demonstrated that there were no genuine issues of material fact, specifically as to Close's allegation in its amended counterclaim that it was an agent of the state and, thus, a third party beneficiary of the prime contract's indemnification provision. Close argues that Brunalli, as the moving party, failed to meet its threshold burden because Needham's affidavit averring that Close and

[7] Brunalli's motion for summary judgment was directed at the counterclaim dated May 10, 2012, and was not amended to address the amended counterclaim. Nonetheless, the court could determine whether Brunalli was entitled to summary judgment as it pertained to Close's amended counterclaim. See Practice Book § 10-61 ("[i]f the adverse party fails to plead further, pleadings already filed by the adverse party shall be regarded as applicable so far as possible to the amended pleading").

Brunalli have never entered into a contractual relationship was "not dispositive as to whether Brunalli owed [Close] an independent legal duty to indemnify." Close does not dispute Needham's assertion. Rather, Close contends that the court improperly granted Brunalli's motion for summary judgment because Brunalli failed to submit any evidence countering Close's allegations that (1) it was an agent of the state, (2) pursuant to the prime contract, Brunalli was duty bound to perform its work with due care, and (3) Close was a third-party beneficiary of the prime contract.

Brunalli counters that "even as framed in [Close's] amended counterclaim," its motion for summary judgment "made the required showing that there [was] no genuine issue of material fact that it did not have an independent legal duty to indemnify [Close]; therefore, [Close's] claims were barred by the exclusivity provision of the [act] . . . ." Furthermore, Brunalli argues that the lack of an independent legal duty negated Close's allegation that Brunalli "had an obligation to indemnify [Close] based upon a duty to perform its work with due care." After reviewing the record, we conclude that Brunalli failed to demonstrate that there was no genuine issue of material fact because it submitted no evidence addressing Close's allegation in its amended counterclaim that it was an agent of the state and, therefore, it was a third-party beneficiary of the prime contract's indemnification provision.

We set forth our well established standard of review on appeal following a trial court's granting of a motion for 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." As an appellate tribunal, "[w]e must decide whether the trial court erred in determining that

there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . A material fact is a fact which will make a difference in the result of the case. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Lathrop* v. *Malcolm Pirnie, Inc.*, 131 Conn. App. 204, 208, 25 A.3d 740 (2011).

"The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under 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. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 624–25, 57 A.3d 391 (2012).

The following relevant legal principles guide our analysis. "It is frequently stated in Connecticut's case law that, pursuant to Practice Book §§ 17-45 and 17-46, a party opposing a summary judgment motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence

outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . .

"An important exception exists, however, to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition, and that exception has been articulated in our jurisprudence with less frequency than has the general rule. *On a motion by* [*the*] *defendant for summary judgment the burden is on* [*the*] *defendant to negate each claim as framed by the complaint* . . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial. . . . Accordingly, [*w*]*hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue*." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 625–27.

In this appeal, Brunalli had the initial burden of showing the absence of any genuine issue of material fact raised by Close's amended counterclaim under applicable principles of workers' compensation law, entitling it to judgment as a matter of law. It is undisputed that the exclusivity provision of the act, § 31-284 (a), provides, for most purposes, that "workers' compensation payments are the exclusive source of remedy against an injured employee's employer. . . . In view of the exclusivity of workers' compensation relief, indemnity claims against employers as joint tortfeasors warrant the special additional limitation of an independent legal relationship." (Citations omitted.) *Skuzinski* v. *Bouchard Fuels, Inc.*, 240 Conn. 694, 699, 694 A.2d 788 (1997). *Ferryman* v. *Groton*, 212 Conn. 138, 561 A.2d 432 (1989), is illuminating on this point.

In *Ferryman*, our Supreme Court stated that "[w]hen the third party, in a suit by the employee, seeks recovery over against a contributorily negligent employer, contribution [or indemnification][8] is ordinarily denied on the ground that the employer cannot be said to be jointly liable in tort to the employee because of the operation of the exclusive-remedy clause. *But if the employer can be said to have breached an independent duty toward the third party, or if there is a basis for finding an implied promise of indemnity, recovery in the form of indemnity may be allowed.* The right to indemnity is clear when the obligation springs from a separate contractual relation, such as an employer-tenant's express agreement to hold the third-party landlord harmless, or a bailee's obligation to indemnify a bailor, or a contractor's obligation to perform his work with due care; but when the indemnity claim rests upon the theory that a primary wrongdoer impliedly promises to indemnify a secondary wrongdoer, the great majority of jurisdictions disallow this claim. 2A A. Larson, [Workmen's Compensation Law] § 76." (Emphasis added; footnote in original; internal quotation marks omitted.) Id., 144–45. Thus, for Brunalli to have an obligation to indemnify Close, it must be clear that Brunalli either breached an independent duty it owed to Close through an express agreement, or that there is a basis to find an implied promise of indemnity, and that this obligation arose "from a separate contractual relation." (Internal quotation marks omitted.) Id., 144.

In its amended counterclaim, Close alleged that Brunalli had a contractual agreement with the state, which incorporated by reference the standard specifications. Close also alleged that the specifications obligated Brunalli to " 'indemnify and save harmless' " *agents of the state*. Moreover, Close alleged that it had entered into

[8] "See *Malerba* v. *Cessna Aircraft Co.*, 210 Conn. 189, 194, 554 A.2d 287 (1989)." *Ferryman* v. *Groton*, supra, 212 Conn. 144 n.5.

a consulting agreement with the state in 2008, which also incorporated by reference the standard specifications, and that that agreement created an agency relationship between the state and Close. Thus, as alleged in the amended counterclaim, because Close was an agent of the state, it was entitled "to the indemnification provisions of the prime contract as an intended third-party beneficiary . . . ."

With its motion for summary judgment, Brunalli submitted no evidence that addressed Close's factual allegation that it was an agent of the state and that it was a third-party beneficiary of the prime contract's indemnification provision. To be sure, Brunalli and Close had not entered into a contractual relationship, as the appended affidavit avers. Close did not dispute this assertion. Rather, Close contended that, in essence, an implied promise of indemnity flowed from the prime contract to it because it was an agent of the state and entitled to indemnification. Brunalli, however, did not demonstrate in its motion for summary judgment and accompanying evidence that there was no issue of material fact that Close was not an agent of the state and was not a third-party beneficiary of the prime contract's indemnification provision. Indeed, the affidavit supporting Brunalli's motion for summary judgment did not address Close's allegation that it was an agent of the state and thus entitled to indemnification. Therefore, as the nonmoving party, Close was under no obligation to submit documents establishing the existence of this issue. See *Mott* v. *Wal-Mart Stores East, LP*, supra, 139 Conn. App. 627; see also id., 631–32 (where moving party's evidence submitted in support of motion for summary judgment failed to negate factual claim raised by nonmoving party's complaint, burden of proof did not shift to nonmoving party, and failure to file opposing affidavit or other supporting documents with opposition to summary judgment was not flaw fatal to objection). Hence, the affidavit provided by Brunalli "did not

even purport to show the nonexistence of all the issues of fact raised by the [amended counterclaim] . . . .'' (Internal quotation marks omitted.) *Fogarty* v. *Rashaw*, 193 Conn. 442, 445, 476 A.2d 582 (1984). Consequently, because that affidavit failed to address the factual issue of whether Close was an agent of the state and was entitled to indemnification, a genuine issue of material fact remained that could not be determined on summary judgment. See *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 543, 893 A.2d 389 (2006) (''[t]he existence of an agency relationship is a question of fact'' [internal quotation marks omitted]).

''A party seeking summary judgment has the considerable burden of demonstrating the absence of any genuine issue of material fact because litigants ordinarily have a constitutional right to have issues of fact decided by a [trier of fact] . . . .'' (Internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 654, 137 A.3d 1 (2016). In the present case, the court did not hold Brunalli to the strict standard of ''showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.'' (Internal quotation marks omitted.) *D.H.R. Construction Co.* v. *Donnelly*, 180 Conn. 430, 434, 429 A.2d 908 (1980). Rather, the court focused on the fact that no contractual relationship existed between Brunalli and Close and did not address how Brunalli's motion for summary judgment and accompanying affidavit negated Close's claim in its amended counterclaim that it was an agent of the state and entitled to indemnification.

Also, even if we assume, without deciding, that the court was correct in concluding that Ryan's assertions in his affidavit were conclusory and without an evidentiary basis because Close did not submit the consulting agreement, the court, nevertheless, improperly granted summary judgment. See *Mott* v. *Wal-Mart Stores East*,

LP, supra, 139 Conn. App. 626 ("only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial"). In failing to negate Close's claim, as framed in its amended counterclaim, that it was an agent of the state and that it was a third-party beneficiary of the prime contract's indemnification provision, Brunalli failed to meet its burden of establishing the absence of a genuine issue of material fact. See id., 628 ("[t]o prevail on a motion for summary judgment . . . the [counterclaim] defendant had an obligation to negate the factual claims as framed by the [amended counterclaim]"). Thus, we conclude that the court erred in concluding that Brunalli was entitled to summary judgment as a matter of law.[9]

[9] This court's reasoning in *Mott* v. *Wal-Mart Stores East, LP*, supra, 139 Conn. App. 618, illustrates why it was incumbent on Brunalli to negate Close's claim in its amended counterclaim that it was an agent of the state and that it was a third-party beneficiary of the prime contract's indemnification provision. In that case, the plaintiff initiated a negligence claim against the defendant after he allegedly slipped and fell in the defendant's parking lot. Id., 620. The defendant filed its answer denying all the allegations and asserted a special defense of contributory negligence. Id. Subsequently, the defendant moved for summary judgment, arguing "that it was 'readily evident' that the plaintiff could not demonstrate that the defendant had had actual or constructive notice of the spot of ice that the plaintiff allegedly fell on, and, because there was no genuine issue of material fact as to whether the defendant had actual or constructive notice of that specific defect, it was entitled to judgment as a matter of law . . . ." Id., 621. In support, the defendant provided, inter alia, copies of the plaintiff's notice of the filing of his revised complaint and a transcript of a portion of the plaintiff's deposition testimony. Id. The plaintiff filed an objection to the motion for summary judgment with a memorandum of law in which he argued that the defendant had actual or constructive notice. Id., 621–22. The plaintiff asserted that he had evidence to support this argument, but he did not provide an affidavit or other documentary evidence in support of those assertions. Id., 622. Ultimately, the trial court concluded that "[t]he materials submitted by the defendant indicate[d] that it had no notice of the alleged defect prior to the fall. The plaintiff's objection claims otherwise, but the problem is that the plaintiff has utterly failed to comply with [Practice Book] § 17-46 . . . . Given this complete failure to comply with the requirements of the rules of practice, the plaintiff's factual assertions cannot be

The judgment is reversed and the case is remanded with direction to deny Brunalli's motion for summary judgment as to Close's counterclaim and for further proceedings according to law.

In this opinion the other judges concurred.

GREAT COUNTRY BANK ET AL. *v.* JEFFREY OGALIN ET AL.
(AC 37905)

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

Syllabus

The plaintiff G Co. obtained a deficiency judgment against the defendant F in an action to foreclose a mortgage on certain real property. Thereafter, G Co. assigned its interest in the deficiency judgment to C Co. After postjudgment discovery revealed that F's employer, D Co., was in possession of certain debts due and owing to F, C Co. sought satisfaction of the deficiency judgment by serving D Co. with a personal property execution pursuant to statute ([Rev. to 2013] § 52-356a [a] [1]). After D Co. refused payment, C Co. filed an application with the trial court

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considered. Under these circumstances, the motion for summary judgment must be granted." (Internal quotation marks omitted.) Id., 623.

This court in *Mott* reversed the summary judgment because the defendant had not met its initial burden of establishing the absence of a genuine issue of material fact regarding notice by not negating the factual claims as framed by the plaintiff's complaint. Id., 628. Specifically, we stated that "it was incumbent on the defendant to provide the court with more than its belief that it was 'readily evident' that the plaintiff ultimately would be unable to meet his obligation at trial to produce evidence to prove that the defendant had actual or constructive notice of the alleged defect. In other words, before the plaintiff had acquired any obligation to produce evidence that would tend to show that the defendant, in fact, had notice of the defect, the defendant had the burden of producing evidentiary support for its assertion that its lack of notice was an undisputed fact." Id. The defendant in *Mott* failed to produce an affidavit averring that it lacked knowledge of the defect at issue prior to the plaintiff's fall. Id., 631. Moreover, the deposition testimony from the plaintiff that the defendant relied upon in its motion for summary judgment did not negate the issue of notice. Id. Thus, because the defendant did not meet its initial evidentiary burden, the plaintiff was not required to show that a genuine of issue of fact existed, and he was entitled to a denial of the defendant's motion for summary judgment. Id., 632.

seeking a turnover order requiring payment of F's debt pursuant to statute (§ 52-356b). During a hearing on that application, C Co. introduced certain business documents from D Co. and transcripts from various depositions of O, who is both D Co.'s president and F's daughter. During a deposition, O testified that she placed receipts representing obligations owed to F for unreimbursed business expenses into a dedicated bag and that she later itemized those expenses by using four envelopes. O further testified at the deposition that the amount, date, and vendor for each expense was listed on the face of these envelopes, and that she would only issue reimbursements for expenses once she had written a total on the outside of the corresponding envelope. At the hearing, however, O testified that each of these expenses was reimbursed prior to the creation of the envelopes, that each expense had been incurred by someone other than F, or that each expense was otherwise a nonbusiness expense. O also testified at the hearing with respect to a spreadsheet, which had been created from O's memory during the course of posttrial litigation, allocating each of the expenses between three individuals. On the basis of the evidence presented, the trial court concluded that D Co. owed F a debt for unreimbursed business expenses and, accordingly, rendered judgment granting C Co.'s application for a turnover order. On D Co.'s subsequent appeal, *held*:

1. The trial court's finding that D Co. owed F a debt for unreimbursed business expenses at the time of C Co.'s property execution was not clearly erroneous: this court concluded that, notwithstanding O's testimony at the posttrial hearing and the spreadsheet, the trial court's turnover order was supported by excerpts from O's deposition testimony, which were admitted into evidence for substantive purposes without objection, indicating that receipts reflecting F's business expenses were placed in a dedicated bag, itemized on the front of an envelope, and totaled prior to reimbursement; moreover, although the trial court did not set forth detailed findings with respect as to how it arrived at the precise amount of the turnover order, the evidence suggested that the court deducted the nonbusiness expenses identified by O from the sum of the totals listed on the outside of the four envelopes.
2. D Co.'s claim that the debt owed was exempt from execution because the expenses at issue constituted earnings for personal services was not reviewable, the claim not having been raised before the trial court: at no time during the proceedings before the trial court did D Co. argue or attempt to demonstrate that the expenses at issue were a form of wages owed for personal services, a review of the record having indicated that the factual issues before the trial court were limited to whether the expenses were incurred by F on behalf of D Co., whether the expenses were unreimbursed at the time of the execution, and whether the expenses were business expenses; moreover, even if that claim had been raised, D Co. failed to demonstrate that it had standing to raise

such a claim on behalf of F, who did not avail himself of his statutory (§ 52-361b) right to claim an exemption on that ground.

Argued April 11—officially released October 11, 2016

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Fairfield, where the defendants were defaulted for failure to appear; thereafter, the court, *Fuller*, *J.*, granted the plaintiff's motion for a judgment of foreclosure by sale and rendered judgment thereon; subsequently, the court, *Hauser*, *J.*, granted the plaintiff's motion for a deficiency judgment and rendered judgment thereon; thereafter, Cadle Company was substituted as the party plaintiff; subsequently, the court, *Kamp*, *J.*, granted the substitute plaintiff's application for orders in aid of execution to order Drywall Construction Corporation of Connecticut, Inc., to turn over certain moneys, and Drywall Construction Corporation of Connecticut, Inc., appealed to this court. *Affirmed.*

Roy W. Moss, for the appellant (Drywall Construction Corporation of Connecticut, Inc.).

Paul N. Gilmore, with whom, on the brief, was *Christopher A. Klepps*, for the appellee (substitute plaintiff).

Opinion

KELLER, J. In this foreclosure action, a third party, Drywall Construction Corporation of Connecticut, Inc. (Drywall), appeals from the judgment of the trial court awarding the plaintiff Cadle Company a turnover order in the amount of $19,887.27 to aid in the execution of a deficiency judgment rendered against the defendant

Frank Ogalin, Jr.[1] Drywall claims that (1) the court erroneously found that, as of the date on which the plaintiff served a property execution on Drywall, it owed the defendant unreimbursed business expenses, and (2) even if the court properly found that it owed the defendant unreimbursed business expenses, it improperly awarded the plaintiff a turnover order because the expenses at issue constituted earnings for personal services, which are not the proper subject of a property execution. We affirm the judgment of the trial court.

The relevant procedural history may be summarized as follows. In 1994, following a foreclosure by sale, the named plaintiff, Great Country Bank, obtained a deficiency judgment against the defendant. Later, Great Country Bank assigned its interest in the deficiency judgment to the plaintiff. In 2013, the plaintiff conducted postjudgment discovery and concluded that Drywall, a closely held family business, was in possession of debts that were due and owing to the defendant, one of its employees. In December, 2013, pursuant to General Statutes (Rev. to 2013) § 52-356a (a) (1),[2] the plaintiff

[1] This foreclosure action was commenced by the named plaintiff, Great Country Bank, against the following defendants: Jeffrey T. Ogalin; Frank Ogalin, Jr.; the Federal Deposit Insurance Corporation, as receiver for the Bank Mart; the Internal Revenue Service of the United States of America; and Benson Snaider, P.C. Great Country Bank obtained a judgment of foreclosure, and later a deficiency judgment following the sale, then assigned its interest in the deficiency judgment to Cadle Company, which subsequently appeared as a plaintiff in this action. In this opinion, we shall refer to Cadle Company as the plaintiff, to Frank Ogalin, Jr., as the defendant, and to other individuals by name. The plaintiff and Drywall are the only parties that participated in this appeal.

[2] General Statutes (Rev. to 2013) § 52-356a (a) (1) provides in relevant part: "On application of a judgment creditor or a judgment creditor's attorney, stating that a judgment remains unsatisfied and the amount due thereon, and subject to the expiration of any stay of enforcement and expiration of any right of appeal, the clerk of the court in which the money judgment was rendered shall issue an execution pursuant to this section against the nonexempt personal property of the judgment debtor other than debts due from a banking institution or earnings. . . ."

served on Drywall a personal property execution in an attempt to collect on the unsatisfied judgment. Drywall refused this demand for payment.

In 2014, the plaintiff sought a turnover order against Drywall. It filed an application for orders in aid of execution pursuant to General Statutes § 52-356b[3] and a claim for a determination of interests in the subject property pursuant to General Statutes § 52-356c.[4] It is not in

[3] General Statutes § 52-356b provides: "(a) If a judgment is unsatisfied, the judgment creditor may apply to the court for an execution and an order in aid of the execution directing the judgment debtor, or any third person, to transfer to the levying officer either or both of the following: (1) Possession of specified personal property that is sought to be levied on; or (2) possession of documentary evidence of title to property of, or a debt owed to, the judgment debtor that is sought to be levied on.

"(b) The court may issue a turnover order pursuant to this section, after notice and hearing or as provided in subsection (c) of this section, on a showing of need for the order. If the order is to be directed against a third person, such person shall be notified of his right pursuant to section 52-356c to a determination of any interest claimed in the property.

"(c) The court may issue a turnover order against a judgment debtor, without notice or hearing, upon affidavit by the judgment creditor or another competent affiant stating facts from which the court concludes that there is a reasonable likelihood that the judgment debtor is about to remove the property from the state or is about to fraudulently dispose of the property with intent to hinder, delay or defraud his creditors. The court shall expeditiously hear and determine any motion by the judgment debtor to dissolve such an ex parte order.

"(d) Unless directed to a person who is before the court, any turnover order shall be personally served and shall contain a notice that failure to comply therewith may subject the person served to being held in contempt of court."

[4] General Statutes § 52-356c provides: "(a) Where a dispute exists between the judgment debtor or judgment creditor and a third person concerning an interest in personal property sought to be levied on, or where a third person claims that the execution will prejudice his superior interest therein, the judgment creditor or third person may, within twenty days of service of the execution or upon application by the judgment creditor for a turnover order, make a claim for determination of interests pursuant to this section.

"(b) The claim, which shall constitute the appearance of any third-person claimant, shall be filed with the Superior Court, on a prescribed form as a supplemental proceeding to the original action. The claim shall contain a description of the property in which an interest is claimed and a statement of the basis for the claim or of the nature of the dispute.

dispute that Drywall was served with the application and claim. The court summoned Drywall to appear at a hearing on these matters, which took place over the course of three days, September 4, 2014, October 2, 2014, and November 5, 2014.[5] During the hearing, the

"(c) On filing of the claim, the clerk of the court shall assign the matter for hearing on a date certain and order that notice of the hearing be served by the claimant on all persons known to claim an interest in the disputed property.

"(d) Pending the hearing on the claim and subject to further order of the court, any property in dispute shall continue to be held by the person then in possession and shall not be transferred to any person who is not a party to the supplemental proceeding. If previously seized by or delivered to a levying officer, the property shall remain in the custody of the levying officer.

"(e) Unless the judgment creditor waives such rights as he may have to execute against the contested property, the claim shall be deemed controverted and the issues shall be joined without further pleading by any party. The court may permit or require such further pleadings, amendments and notices and may make such further orders as justice or orderly administration requires. Prior to hearing the claim, the court may in its discretion: (1) Require the judgment creditor to post a bond in favor of a third person claimant for any damages which may accrue as a result of the outstanding execution and any subsequent proceedings, (2) on substitution by the third person of a bond as security for the property, allow the third person to obtain release of the property pending determination of the claim, or (3) direct that other known nonexempt property of the judgment debtor first be executed against.

"(f) After hearing, the court shall render judgment determining the respective interests of the parties and may order the disposition of the property or its proceeds in accordance therewith.

"(g) This section does not affect any interest in property of any person who is not a party to a determination pursuant to the provisions of this section."

[5] We observe that Drywall, represented by counsel, appeared before the trial court as a "third party" and that it has brought the present appeal as a "third party." Drywall, which is not a party to the underlying action, nevertheless properly brings the present appeal because it indisputably was a party to the supplemental proceeding, initiated by the plaintiff under § 52-356c, in that original foreclosure action. General Statutes § 52-263 provides in relevant part: "Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . he may appeal to the court having jurisdiction from the final judgment of the court or of such judge . . . ." Our Supreme Court has observed that, for purposes of § 52-

plaintiff presented documentary evidence and testimony from Christina Ogalin (Ogalin), who is both Drywall's president and the defendant's daughter. Following the hearing, both the plaintiff and Drywall submitted posttrial briefs. Essentially, the plaintiff argued that the evidence, which included business records of Drywall, demonstrated that Drywall owed the defendant unreimbursed business expenses that he incurred on Drywall's behalf. Drywall, arguing that the evidence demonstrated that it had reimbursed the defendant for prior expenses and that not all of the expenses in evidence had been incurred by the defendant, contended that it did not owe the defendant any "significant obligation" in December, 2013, when the property execution was served on Drywall.

In relevant part, the court stated the following in its memorandum of decision: "During the hearing on the plaintiff's application, the only witness was [Ogalin], who testified in her capacity as president of Drywall. Her testimony largely focused on the creation of four manila envelopes that were marked as the plaintiff's exhibits 3, 4, 5, and 6. On the outside of each of these exhibits, Ogalin had written in red ink, in three separate columns, the amount of the expense, the date the expense was incurred, and the vendor to whom the expense was paid. Contained within each envelope [were] the expense receipt[s] . . . itemized on the face

263, an underlying action encompasses judicial proceedings in a court of justice and "include *any proceeding* in such a court for the purpose of obtaining such redress as the law provides. . . . It includes not only the usual civil action instituted by process but also proceedings initiated by petition . . . stipulation . . . or motion." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Board of Education* v. *Tavares Pediatric Center*, 276 Conn. 544, 554–55, 888 A.2d 65 (2006). Moreover, "[a]ny court decision on a determination of interest in property under section 52-356c . . . shall be a final decision for the purpose of appeal." General Statutes § 52-400d; see, e.g., *PB Real Estate, Inc.* v. *Dem II Properties*, 50 Conn. App. 741, 742, 719 A.2d 73 (1998) (nonparty appealed from turnover order directed against it).

of the envelope. It was estimated that among all four envelopes, more than 700 individual expenses were itemized. The court finds that Drywall's accounting and record keeping practices were sloppy at best and performed in a manner that defies even basic accounting standards.

"On October 29, 2013, Ogalin was deposed by the plaintiff in postjudgment proceedings. During that deposition, the following colloquy took place:

" 'Q. And all of these . . . receipts . . . in these four folders that are exhibits 3, 4, 5, and 6 and the front pages, that represents obligations owing from [Drywall] to [the defendant]?

" 'A. Yes. All this will be owed. If not already paid, some.' . . .

"On March 13, 2014, in her continued deposition, Ogalin testified as follows with regard to the creation of the envelopes:

" 'Q. You testified a couple of minutes ago that you never wrote the first check for expense reimbursement concerning a document, such as an exhibit, which is now exhibit 9, until the front face of the document was complete.

" 'A. I normally would generate the receipts and have a total on the manila [envelope], and from that total would write out checks when the business had money, and then that total would be wiped out once I hit that total. And then would go to the next manila [envelope] and next manila [envelope] and so on. Everything has been paid and accounted for but, like I said, that would be an amount, and that's how I would do it. . . .'

"During the hearing on the plaintiff's application, Ogalin testified contrary to her prior sworn deposition

testimony. Most significantly, she claimed [at the hearing] that all the expenses had been reimbursed *prior* to her creating the manila envelopes, not before. In addition, it was her testimony that the expenses were not incurred by the defendant alone. Rather, they were expenses incurred by her brother [Frank F. Ogalin III], who is also an officer in the corporation, as well as herself and [the defendant]. There was also conflicting testimony as to how those receipts were maintained. At one point, Ogalin testified that receipts were kept in separate bags depending upon who incurred the expense. There was also testimony that all the receipts were comingled, regardless of who incurred the expense. Again, as the court noted previously, the accounting and record keeping methods employed by Ogalin and Drywall were so poor that it is almost impossible to place any credibility in their accuracy.

"After [posttrial] litigation [had] commenced, Ogalin attempted to create a spreadsheet in which she allocated each individual expense to either herself, [the defendant], or [Frank Ogalin III]. The court does not find this testimony credible. First, when deposed, Ogalin made clear that she only issued reimbursement after she totaled the expenses on the outside of each envelope and knew the aggregate total of those expenses. Such a process would be the logical method of issuing reimbursement, as one would need to know how much needs to be reimbursed before issuing any payment. To now claim that payments were made to reimburse expenses before the actual value of those expenses was determined is not logical [or] credible. Moreover, to now assert that these expenses were comingled expenses incurred by the defendant, [Frank Ogalin III], and herself also lacks credibility. [Ogalin] previously testified under oath that the receipts contained in these individual envelopes were expense reimbursements owed to the defendant alone. Her

testimony, that in 2014 she created a spreadsheet allocating those expenses between three individuals, based on her memory of approximately 700 individual receipts from a multitude of different vendors, also lacks credibility. No individual is capable of recalling who incurred a specific expense out of all of the many individual expenses [at issue], some dating back as many as five years. . . .

"[W]hen the court evaluates the credibility of the testimony of Ogalin, scrutinizes all the exhibits, and considers the business practices of Drywall and its accounting methods, the court finds that as of December 3, 2013, the date of the plaintiff's property execution issued to Drywall, Drywall owed the defendant unreimbursed business expenses in the amount of $19,887.27. The court has reduced the total sum by those expenses not attributable to the business of Drywall.

"With regard to the plaintiff's claim of a $4300 loan repayment obligation due the defendant from Drywall, the plaintiff has not met its burden of proof that this was still owed to the defendant as of the date of the property execution. This portion of the turnover order is denied.

"For the foregoing reasons, the court grants the plaintiff's [application for a] turnover order in the amount of $19,887.27." (Emphasis in original.)

This appeal by Drywall followed. We will address each of Drywall's claims, in turn.

I

First, Drywall claims that the court erroneously found that, as of the date on which the plaintiff served the property execution on Drywall, it owed the defendant unreimbursed business expenses totaling $19,887.27. We disagree.

Drywall expressly invokes our clearly erroneous standard of review, which governs our review of the findings of fact made by the trial court. "It is the province of the trier of fact to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . On appellate review, therefore, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . It is not within the power of this court to find facts or draw conclusions from primary facts found by the trial court. As an appellate court, we review the trial court's factual findings to ensure that they could have been found legally, logically and reasonably. . . . Appellate review under the clearly erroneous standard is a two-pronged inquiry: [W]e first determine whether there is evidence to support the finding. If not, the finding is clearly erroneous. Even if there is evidence to support it, however, a finding is clearly erroneous if in view of the evidence and pleadings in the whole record [this court] is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Morgan Buildings & Spas, Inc.* v. *Dean's Stoves & Spas, Inc.*, 58 Conn. App. 560, 564, 753 A.2d 957 (2000).

In relevant part, Drywall argues: "The only witness presented by [the plaintiff], Drywall's president, [Ogalin], testified that Drywall owed the defendant nothing at the time of [the plaintiff's] levy. The documentary evidence fully supported and in no manner did it contradict Ogalin's testimony. This includes Ogalin's relevant deposition testimony, wherein [she] indicated nothing more than Drywall's general intention or practice of paying reimbursement to an employee, such as [the defendant] for actual business expenses incurred for Drywall's benefit." (Emphasis omitted.) Additionally, Drywall argues that the evidence did not support

the court's reliance on receipts included in the envelopes, as there was no evidence that these envelopes, or the receipts therein, had "any specific connection to [the defendant]" or that the debts reflected therein were owed the defendant on the date of the execution or within the four months following the execution.[6]

We readily conclude that the evidence supports the trial court's finding that the four envelopes at the center of its findings contained receipts for expenses incurred by the defendant on behalf of Drywall. Although, in the context of this claim, Drywall appears to rely entirely on Ogalin's testimony at the posttrial hearing, critical evidence in the present case came in the form of her *deposition* testimony, which was offered by the plaintiff and admitted into evidence for substantive purposes by the court without objection.[7] She was deposed, first, on October 29, 2013, and, later, on March 13, 2014, after the plaintiff served the property execution and filed an application for a turnover order against Drywall. In her deposition testimony of October 29, 2013, Ogalin stated that the envelopes contained receipts for unreimbursed expenses incurred by the defendant for Drywall. She testified at length with respect to the manner in which she recorded the expenses incurred by the defendant for Drywall, which included, among other things, food purchases, items used by workers and office supplies. She testified that she kept records at Drywall's place

[6] See General Statutes (Rev. to 2013) § 52-356a (a) (4) (C) (ii) ("if a debt is not yet payable, payment shall be made when the debt matures if within four months after issuance of the execution").

[7] Section 8-5 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial:

"(1) A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement . . . ."

of business, which was located in a portion of her home. She testified that as the defendant provided her with receipts for his business expenditures, which were always cash expenditures, it was her procedure to place such receipts into a shopping bag that was dedicated to the defendant's expenditures. Ogalin testified that receipts for business expenditures incurred by Frank Ogalin III were stored in a separate shopping bag.

In her October 29, 2013 deposition testimony, Ogalin testified that, between 2011 and 2013, she removed receipts from the shopping bag dedicated to the defendant's unreimbursed expenses. Then, she engaged in a laborious process of itemizing the expenses by using four envelopes. Each envelope contained between 165 and 174 receipts. For each receipt, Ogalin recorded on the front of the envelope the name of the vendor, the date the expense was incurred, and the amount of the expense. Ogalin proceeded to testify that, once she was unable to fit any additional receipts into an envelope, it was her practice to create a total for all of the receipts in the envelope and to write that total on the outside of each envelope near the columns listing the individual expenses. Photocopies of the front of each of the four envelopes were introduced as exhibits both at the time of Ogalin's depositions and at the posttrial hearing. Added together, the four totals listed on the envelopes amount to $25,080.41.[8]

In addition to demonstrating that the envelopes and the receipts therein reflected business expenses incurred by the defendant on behalf of Drywall, the evidence supported a finding that these expenses were unreimbursed on December 3, 2013, when the property execution was served on Drywall. During her deposition

[8] Each envelope reflected a different total. One envelope was marked with a total of $7603.37, another with a total of $5155.45, another with a total of $5920.05, and the final with a total of $6401.54.

testimony of October 29, 2013, which, obviously, preceded the execution, Ogalin was asked if the four envelopes represent obligations owed to the defendant by Drywall. She replied, "Yes. All this will be owed. If not already paid, some."

In both her March 13, 2014 deposition testimony and her testimony at the time of the posttrial hearing, Ogalin testified that her process of totaling the receipts in the envelopes occurred *prior* to her making reimbursements for such expenses. She testified that reimbursements for the amount totaled on one envelope are completed *prior* to her making reimbursements for expenses reflected on another envelope.

Ogalin's testimony at the March 13, 2014 deposition, which occurred *after* the execution had been served and *after* the plaintiff applied for a turnover order, as well as her subsequent testimony at the posttrial hearing, differed in material ways from her original deposition testimony. Essentially, both in her later deposition and at the posttrial hearing, Ogalin testified that, upon her further review, the envelopes contained receipts that reflected her own expenses, not just those of the defendant, as well as obligations that had been paid. As is detailed in the court's discussion of Ogalin's testimony at the posttrial hearing, she testified that, after her initial deposition testimony, she created a spreadsheet in which, on the basis of her recollection of the hundreds of business expenses at issue, she reflected that many of the receipts at issue were her own expenses. Also, referring to specific reimbursements that had been made by Drywall prior to the execution, she testified that, prior to the creation of the envelopes, reimbursements had been made to the defendant for receipts in the envelopes.

For a variety of reasons, the court found that Ogalin did not testify credibly at the posttrial hearing. Although

Drywall does not explicitly challenge the court's credibility determination, upon which the court's decision is based, its arguments concerning the evidence implicitly invite us to rely solely upon Ogalin's testimony at the posttrial hearing. It suffices to observe that in our review we need only look to whether the evidence supports the court's factual determinations; we will not relitigate the court's credibility findings because such determinations are wholly within the province of the court as the trier of fact.[9] See, e.g., *Somers* v. *Chan*, 110 Conn. App. 511, 530, 955 A.2d 667 (2008).

With respect to the precise amount of the court's turnover order, $19,887.27, we observe that the court stated that it had reached this final amount after it carefully evaluated Ogalin's testimony and all of the exhibits presented in evidence. As stated earlier, Ogalin's deposition testimony from October 29, 2013, as well as documentary evidence consistent therewith, supported a finding that, at the time of execution, Drywall

[9] Insofar as Ogalin testified in a manner contrary to her initial deposition testimony, the court resolved such conflict in favor of the earlier deposition testimony. It suffices to observe that there were ample factors that supported the court's finding that Ogalin's later testimony, concerning debts owed from her family's business to the defendant, generally was not credible. The court explained that Ogalin's later deposition testimony and her posttrial testimony were not logical and likely had been influenced by the fact that they occurred after the posttrial litigation was initiated by the plaintiff. The court also explained why it did not credit as accurate the spreadsheet generated by Ogalin, by memory, after the commencement of the posttrial litigation. As the plaintiff correctly argues, Ogalin's testimony that Drywall had reimbursed the defendant for expenses that appear on the envelopes, and Drywall's attempt to demonstrate this by presenting evidence of payments that allegedly had been made to the defendant, was incompatible with the court's finding, supported by Ogalin's initial deposition testimony, that reimbursements were made by Drywall, if at all, only *after* Ogalin had prepared each envelope and had totaled the receipts contained therein. Thus, although there was testimony from Ogalin concerning several payments that had been made to the defendant by Drywall, the court did not rely on such evidence because many of these alleged payments predated the preparation of the envelopes that, according to Ogalin's testimony, contained the receipts for the expenses reimbursed to the defendant.

owed the defendant business expenses in a higher amount, $25,080.41. The court did not set forth detailed findings with respect to how it arrived at its turnover order in the amount of $19,887.27, and the record does not reflect that Drywall, which bears the burden of demonstrating that the trial court committed reversible error, asked the court to provide the manner by which it calculated the amount of the debt owed the defendant. As the plaintiff argues before this court, however, the evidence readily provides a rationale for the court's award. It is clear from our review of the court's decision that its award was directly based on its finding that, as of the date on which the plaintiff served a property execution on Drywall, it owed the defendant unreimbursed business expenses totaling $19,887.27. As stated previously in this opinion, "[o]n appellate review . . . we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . It is not within the power of this court to find facts or draw conclusions from primary facts found by the trial court. As an appellate court, we review the trial court's factual findings to ensure that they could have been found legally, logically and reasonably." (Citation omitted; internal quotation marks omitted.) *Morgan Buildings & Spas, Inc.* v. *Dean's Stoves & Spas, Inc.*, supra, 58 Conn. App. 564.

In its decision, the court stated that it had determined the amount of its turnover order after it had "reduced the total sum by those expenses not attributable to the business of Drywall." In her initial deposition testimony in which she described the unreimbursed expenses detailed on the envelopes, Ogalin admitted that she had not reviewed the receipts contained in the envelopes for the purpose of determining whether they reflected valid business expenses because she believed that "many things could be for the company." At the time of the posttrial hearing, Ogalin testified with respect to

the spreadsheet concerning the receipts which, as was discussed previously in this opinion, she prepared prior to the posttrial hearing. Although the court did not find this evidence and the testimony concerning it be credible insofar as it was introduced to demonstrate, for example, that expenses had been reimbursed or that certain expenses were not attributable to the defendant, it appears that the court found this testimony and evidence credible insofar as it was introduced to demonstrate that certain of the expenses at issue simply were not *business expenses* of Drywall. "[T]he trial judge . . . is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Antonucci* v. *Antonucci*, 164 Conn. App. 95, 131, 138 A.3d 297 (2016).

The spreadsheet contained information concerning the receipts reflected on the envelopes. Referring to the spreadsheet, Ogalin testified that sixty-five of the expenses detailed thereon, totaling $3819.14, had been "rejected" by her because they were not business expenses of Drywall.[10] Deducting this $3819.14 from $25,080.41, the total amount reflected on the envelopes, results in $21,261.27, an amount that is $1374 *greater* than the amount of the court's turnover order, $19,887.27. Thus, the evidence suggests that the court deducted the expenses that Drywall claimed were not attributed to its business and, to Drywall's benefit, awarded a turnover order in an amount that was lower than the total amount reflected on the envelopes minus such nonbusiness expenses.[11]

[10] In addition to Ogalin's testimony that these expenses were not business expenses of Drywall, we observe that the spreadsheet reflects that many of the expenses were incurred in retail stores, including but not limited to T.J. Maxx, Toys R Us, Perfume World, Champs, Old Navy, Game Stop, Macy's, Petco, American Eagle, Sephora, Hallmark, Kohl's, and Hollister. Consistent with Ogalin's testimony, it would have been reasonable for the court to have inferred that expenses incurred at such retail stores were unlikely to have been related to Drywall's construction business.

[11] The plaintiff argues, and we agree, that the court's further reduction of $1374 may be the result of the court having credited other evidence favorable

As the foregoing analysis reflects, there is evidence to support the court's findings and its turnover order. The plaintiff demonstrated that, at the time of the execution, Drywall held "nonexempt personal property of the judgment debtor other than debts due from a banking institution or earnings." General Statutes (Rev. to 2013) § 52-356a (a) (1).[12] Such debts are a proper subject of a turnover order. See General Statutes § 52-356b.[13] With respect to the court's findings, our review of the evidence and pleadings in the whole record does not leave us with the definite and firm conviction that a mistake has been committed. Accordingly, this claim is not persuasive.

II

Next, Drywall claims that even if the court properly found that it owed the defendant unreimbursed business expenses, it improperly awarded the plaintiff a turnover order because the expenses at issue constituted earnings for personal services and, therefore, were not the proper subject of a property execution. We reject this claim.

Drywall observes that, under General Statutes (Rev. to 2013) § 52-356a (a) (1), the plaintiff was entitled to an execution "against the nonexempt personal property of the judgment debtor other than debts due from a banking institution or earnings. . . ." Moreover, Drywall observes that " '[e]arnings' " are defined by statute as "any debt accruing by reason of personal services,

to Drywall, including evidence presented at the posttrial hearing that on October 11, 2013, prior to the date on which the execution was served on Drywall, Drywall had reimbursed the defendant by check in the amount of $1274, for his purchase of "small tools and supplies." Ogalin, referring to a "Vendor Activity Report" that reflected payments made to the defendant, testified that such payment, for business expenses of Drywall, had been made to the defendant.

[12] See also footnote 2 of this opinion.

[13] See also footnote 3 of this opinion.

including any compensation payable by an employer to an employee for such personal services, whether denominated as wages, salary, commission, bonus or otherwise." General Statutes § 52-350a (5). Drywall argues that "assuming Drywall owed [the defendant] a debt by reason of expenses [he] incurred as an employee on behalf of [his employer], then the expenses were incurred by [the defendant], a fortiori, by reason of his performance of personal services, and therefore the debt owed comes squarely within the plain statutory definition of earnings." Drywall goes on to argue: "Where in the course of rendering personal services to an employer, an employee incurs substantial reimbursable expenses, the actual reimbursement of such expenses is conceptually similar to wages, [salary], bonuses, commissions, etc., and is . . . deserving of the protections of the statutory wage execution provisions." Thus, Drywall argues, "the alleged debt owed by Drywall to [the defendant] was not subject to ordinary property execution [and] it was error to enter the turnover order."

The plaintiff argues that there is no support in the law for Drywall's argument that any moneys it owed the defendant for expenses that he incurred on Drywall's behalf should be characterized as wages for personal services. On a more fundamental level, however, the plaintiff argues that Drywall is not entitled to review of this claim because it was not raised before the trial court. We agree with the plaintiff.

The record reflects that, at no time during the proceedings before the trial court did Drywall argue or attempt to demonstrate that the expenses at issue were a form of wages owed the defendant for personal services; the factual issues were limited to whether the expenses were incurred by the defendant on behalf of Drywall, whether the expenses were unreimbursed at the time of the execution, and whether the expenses

were business expenses. Before this court, Drywall, in a conclusory manner that is not supported by reference to relevant facts in the record, raises a factual issue that it did not ask the court to resolve expressly and which, unsurprisingly, the trial court did not address in its memorandum of decision.

We need not consider this claim. "Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties. . . . These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act." (Citations omitted; footnote omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014).

Alternatively, we observe that Drywall has failed to set forth any authority in support of the proposition that, on behalf of the defendant, it had standing to claim before the trial court that the debts at issue were exempt from execution because they constituted wages owed the defendant as compensation for personal services. The record reflects that the defendant and Drywall were served with the execution in accordance with § 52-356a, which included a notice of judgment debtor rights as required by General Statutes § 52-361b. The defendant, who is the judgment debtor in this proceeding, did not avail himself of his statutory right to claim an exemption on the ground that the execution was directed at wages, which were exempt from execution, by returning the exemption claim form to the clerk of the Superior Court.

For the foregoing reasons, we conclude that Drywall is unable to prevail with respect to this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

LEONARDO NOGUEIRA *v.* COMMISSIONER OF CORRECTION
(AC 38119)

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

Syllabus

The petitioner, who had been convicted of several crimes, including kidnapping in the first degree and sexual assault in the first degree, sought a writ of habeas corpus challenging his kidnapping conviction after a trial to the court. He claimed that the trial court had not applied the rule of *State* v. *Salamon* (287 Conn. 509), which required that to find him guilty of kidnapping in the first degree, the court had to make a specific factual finding that his restraint of the victim was not merely incidental to his sexual assault of her, and that he had intended to prevent her liberation for a longer period of time than was necessary to commit the sexual assault. The petitioner further claimed that his right to due process was violated as a result of the trial court's having failed to make that factual finding in accordance with *Salamon*, which had not been decided at the time of his criminal trial and subsequent direct appeal. The respondent Commissioner of Correction alleged as a special defense that the petitioner's claim was procedurally defaulted. The habeas court granted the habeas petition, concluding that the petitioner had demonstrated sufficient cause for his procedural default, and that he had suffered actual prejudice because the evidence in the record failed to show that the result of his criminal trial would have been the same had the trial court applied the *Salamon* standard. The petitioner had dragged the victim 113 feet along a sidewalk and forced her into a rock-lined window well, where he sexually assaulted her for two hours. After the victim had escaped from the window well and fled, the petitioner caught her, and then strangled her and dragged her to a nearby area where he attempted to sexually assault her again. The habeas court vacated the petitioner's kidnapping conviction and remanded the case for a new trial on that charge. Thereafter, on the granting of certification, the respondent appealed to this court. *Held* that the failure of the trial court to make a finding in accordance with *Salamon* was harmless error, as a reasonable fact finder, under the proper interpretation of our kidnapping

law, could not have found that the petitioner's restraint of the victim was merely incidental to or an inherent part of the sexual assault crimes of which he was convicted, the uncontested and overwhelming evidence before the trial court having shown that its judgment would have been the same had it applied the law set forth in *Salamon* in that the petitioner had dragged the victim along a sidewalk to a rock-lined window well where he confined and sexually assaulted her for two hours, and later dragged her to an area nearby where he attempted to sexually assault her again; moreover, the confinement of the victim in the window well had independent criminal significance, as a reasonable fact finder could not conclude that that additional restraint was necessary to complete the sexual assault crimes, that the window well was more conducive for the crime of sexual assault, or that the victim's confinement in the window well was merely incidental to and necessary for the commission of the sexual assault crimes, and the petitioner's actions after the victim attempted to escape were further evidence of his intent to prevent her escape and to restrain her more than was necessary to sexually assault her or attempt to commit that crime.

Argued April 13—officially released October 11, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb, J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellant (respondent).

Michael W. Brown, for the appellee (petitioner).

Opinion

DiPENTIMA, C. J. The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court granting the petition for a writ of habeas corpus filed by the petitioner, Leonardo Nogueira. On appeal, the issue before this court is whether the habeas court properly determined that the respondent had failed to

establish, beyond a reasonable doubt, that the result in the petitioner's 2002 criminal trial for kidnapping in the first degree would have been the same had the criminal trial court applied the interpretation of kidnapping subsequently adopted by our Supreme Court in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008).[1] We disagree with the conclusion of the habeas court, and, accordingly, reverse the judgment granting the petition for a writ of habeas corpus.

The following facts and procedural history are relevant to our discussion. Following a trial to the court, the petitioner was convicted of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), attempt to commit

[1] In his main and reply briefs, the respondent also argued that the habeas court improperly (1) considered the petitioner's due process claim before addressing the cause and prejudice test to defeat the affirmative defense of procedural default and (2) determined that the petitioner had established "good cause" for failing to raise his *Salamon* claim on direct appeal.

After oral argument, our Supreme Court released its decision in *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 136 A.3d 596 (2016), which we will discuss extensively. The *Hinds* decision held that the petitioner's *Salamon* claim was not subject to the procedural default doctrine. Id., 76. Following publication of the *Hinds* decision on the Judicial Branch website, we ordered the parties, sua sponte, to file simultaneous supplemental briefs, addressing the effect of the *Hinds* decision on the present case. We received the briefs from the parties on May 9, 2016.

In the respondent's supplement brief, he stated: "Assuming the holding of *Hinds* is final, it is binding. Thus the [respondent's] claims in his main and reply briefs that the habeas court incorrectly applied the standards under the procedural default doctrine fail." The respondent further explained that *Hinds* was decided incorrectly and did not "withdraw his claims addressed in his main and reply briefs."

As an intermediate appellate court, we, of course, are bound by the decisions of our Supreme Court. See *State* v. *Madera*, 160 Conn. App. 851, 861–62, 125 A.3d 1071 (2015); *State* v. *Grant*, 149 Conn. App. 41, 54, 87 A.3d 1150, cert. denied, 312 Conn. 907, 93 A.3d 158 (2014). We agree with the respondent that his claims regarding the procedural default doctrine must fail in the present case. The only issue left, therefore, is whether the respondent established that the court's failure to apply the *Salamon* standard in the petitioner's 2002 criminal trial was harmless error.

sexual assault in the first degree in violation of General Statutes §§ 53a-70 (a) (1) and 53a-49 (a) (2), assault in the third degree in violation of General Statutes § 53a-61 (a) (1) and threatening in violation of General Statutes (Rev. to 1999) § 53a-62 (a) (1). *State* v. *Nogueira*, 84 Conn. App. 819, 820, 856 A.2d 423 (2004), cert. denied, 273 Conn. 927, 873 A.2d 1000 (2005). Following the petitioner's conviction, the court, *White*, *J.*, sentenced him to thirty-five years incarceration. Id., 822.

These criminal charges stemmed from an incident that occurred on November 11, 2000, in Danbury when the victim was attacked by the petitioner at approximately 9 p.m. Id., 821. The petitioner grabbed the legs of the victim, dragged her along the sidewalk and forced her into a window well where he sexually assaulted her for two hours. Id. The victim escaped from the window well and fled from the petitioner, who pursued her. Id. She grabbed onto a telephone pole, but the petitioner strangled her, causing her to loosen her grip. Id. He then hauled her between two houses, and kept her in that location for a period of five to ten minutes. The petitioner absconded upon the arrival of the police. Id.[2] We affirmed the judgment of conviction on direct appeal. Id., 826.

Following his conviction and direct appeal, our Supreme Court "issued two watershed decisions pertaining to kidnapping crimes, *State* v. *Salamon*, [supra, 287 Conn. 509], and *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011)." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730,

[2] In *State* v. *Nogueira*, supra, 84 Conn. App. 820, the issue before this court was whether the denial of a motion to suppress the out-of-court identification of the petitioner by the victim violated his due process right to a fair trial. Therefore, our recitation of these facts originated from the victim's testimony at the hearing on the motion to suppress. In this opinion, we will set forth the facts found by the criminal trial court that supported the petitioner's conviction.

736, 129 A.3d 796 (2016). Stated succinctly, "[p]ursant to the holdings of these decisions, a defendant who has been convicted of kidnapping may collaterally attack his kidnapping conviction on the ground that the trial court's jury instructions failed to require that the jury find that the defendant's confinement or movement of the victim was not merely incidental to the defendant's commission of some other crime or crimes." Id.[3]

The petitioner filed a petition for a writ of habeas corpus alleging ineffective assistance of both his trial and appellate counsel. Following a habeas trial, the court, *Nazzaro*, *J.*, issued a memorandum of decision denying the petition. *Nogueira* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-06-4001062, 2011 WL 3890968 (July 22, 2011).[4] The habeas court then denied certification to appeal. We subsequently dismissed the petitioner's appeal. *Nogueira* v. *Commissioner of Correction*, 142 Conn. App. 906, 64 A.3d 1289, cert. denied, 309 Conn. App. 902, 68 A.3d 657 (2013).

The petitioner commenced a second habeas action and filed an amended petition for a writ of habeas

[3] Other cases during this time period that altered the interpretation of our kidnapping statutes include *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), 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), overruled in part by *State* v. *Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012).

[4] Judge Nazzaro determined, in the context of the issue raised in the petitioner's first habeas trial, that there was more than incidental restraint in this case. Specifically, he stated: "[T]here was overwhelming evidence of a struggle, of a dragging of the body, of the pleas for help, the screaming, the re-assaults if you will, the oral violation of the victim, the attempted vaginal violation, the constant withholding of the liberty of the victim, so there is no question there is sufficient evidence of guilt on all the charges." *Nogueira* v. *Warden*, supra, 2011 WL 3890968, *10. He later noted in the memorandum of decision that "because of the abundance of evidence that the restraint was far more than incidental," an appeal based on *State* v. *Salamon*, supra, 287 Conn. 509, would not have succeeded. *Nogueira* v. *Warden*, supra, 2011 WL 3890968, *13.

corpus on April 8, 2015. In count one, the petitioner alleged that his conviction of kidnapping in the first degree violated his right to due process because there was no specific finding by Judge White in his criminal trial that he had intended to prevent the victim's liberation for a longer period of time than was necessary to commit the crime of sexual assault in the first degree. In counts two and three, the petitioner alleged ineffective assistance of his first habeas counsel and his appellate habeas counsel.[5] The respondent filed an answer and raised the affirmative defense of procedural default as to count one. The petitioner filed a response, arguing that (1) he was not procedurally defaulted and (2) in the alternative, if count one of the petition was subject to a procedural default, then he satisfied the cause and prejudice requirement.

At the habeas trial on May 27, 2015, the parties agreed that the court should consider the "criminal trial transcripts, direct appeal materials, first habeas trial transcripts, and pleadings and the habeas appeal materials as well." Additionally, the parties agreed that no additional testimony was necessary. Counsel for the petitioner explained that because the petitioner's conviction occurred in a trial to the court, rather than a jury, his claim was not a jury instruction issue, but rather a "*Salamon* fact-finding issue."

On June 10, 2015, the court, *Cobb*, *J.*, issued its memorandum of decision, concluding that the petitioner's constitutional right to due process was violated as a result of the criminal court's failure to apply the *Salamon* standard for kidnapping that was made retroactive to habeas proceedings in *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740. The habeas court granted the petition for a writ of habeas corpus, vacated

[5] The petitioner subsequently abandoned his claims of ineffective assistance of his prior habeas counsel.

the petitioner's conviction of kidnapping and remanded the case to the criminal trial court for a new trial on the kidnapping charge.

The habeas court stated the petitioner's claim as follows: "[H]is rights to due process of law pursuant to the fourteenth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution were violated because he was convicted of kidnapping absent a finding by the fact finder, in this case the [criminal] trial court, that the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the crime of sexual assault, and other crimes, as now required by *State* v. *Salamon*, supra, 287 Conn. 509."

The habeas court stated that it was undisputed in the present case that Judge White, in 2002, had not applied the *Salamon* standard, which was not part of our law until 2008, in finding the petitioner guilty of kidnapping in the first degree. "In particular, the [criminal] trial court did not consider whether the petitioner intended to move or confine the victim in a way that had independent criminal significance, that is, that the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime, in this case the sexual assaults and other crimes." The habeas court, therefore, concluded that the petitioner had suffered a violation of his due process rights. It then rejected the respondent's affirmative defense of procedural default.[6] For a remedy, it followed *Luurtsema* v.

[6] On the basis our decisions in *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016), and *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 108 A.3d 1128 (2014), the habeas court concluded that the petitioner had satisfied the cause and actual prejudice prongs, and therefore was not procedurally defaulted. With respect to the latter, the court stated: "Having reviewed the entire record in this case, the court is not satisfied beyond a reasonable doubt that the omitted element was uncontested or supported by overwhelming evidence, such that the jury verdict would have been the same had the correct instruction on the charge of kidnapping applied by the [criminal]

Commissioner of Correction, supra, 299 Conn. 740, and ordered that the case be returned to the criminal trial court for a new trial on the charge of kidnapping in the first degree. On June 22, 2015, the respondent filed a petition for certification to appeal, which the habeas court granted. This appeal followed. Additional facts will be set forth as necessary.

After this court heard oral argument in the present case, our Supreme Court released its decision in *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 136 A.3d 596 (2016). That decision contains a historical review of the changes to our kidnapping law and establishes the proper test for determining whether the failure to apply the *Salamon* standard constituted harmless error. Accordingly, a detailed review of *Hinds* will facilitate our analysis of the respondent's appeal in the case before us.

In *Hinds*, the court began by noting that the hallmark of the crime of kidnapping "is an abduction, a term that is defined by incorporating and building upon the definition of restraint." Id., 66–67. It then turned to *State*

trial court. Although the incident took place over an extended period of time, the evidence and findings of the [criminal] trial court indicate that the victim was assaulted during that time, except for short periods when he was interrupted or the victim escaped. When the victim escaped and was caught by the petitioner, he again restrained her and assaulted her during that time until the police arrived. Thus, given the proximity in time and location of the restraint and abduction to the sexual assault and other charges, there is a reasonable probability that absence of the proper charge prejudiced the petitioner and subsequently impacted the trial. Although the evidence supporting the other charges was overwhelming, this cannot be said of the charge of kidnapping, making it a question properly for a jury or trier of fact to decide."

It then concluded that "the petitioner's due process rights were violated by the absence of the application of the [criminal] trial court of the *Salamon* charge on kidnapping. In addition, the court rejects the respondent's affirmative defense of procedural default finding that the petitioner has established cause for not raising the issue in his direct appeal, and prejudice, in that the absence of the proper kidnapping instruction significantly impacted the trial such that the petitioner suffered actual prejudice."

v. *Chetcuti*, 173 Conn. 165, 170–71, 377 A.2d 263 (1977), in which the court had rejected the claim that if the abduction and restraint of a victim are merely incidental to another crime, that abduction and restraint cannot support a conviction of kidnapping. *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 67. "The court pointed to the fact that our legislature had declined to merge the offense of kidnapping with sexual assault or with any other felony, as well as its clearly manifested intent in the kidnapping statutes not to impose any time requirement for the restraint or any distance requirement for the asportation." Id. Despite a number of challenges over the years, our Supreme Court consistently maintained that position with respect to the kidnapping statute. Id., 67–68.

In *State* v. *Salamon*, supra, 287 Conn. 509, however, our Supreme Court reexamined its interpretation of the crime of kidnapping, and reached a conclusion contrary to three decades of its prior holdings. *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 68. The court in *Salamon* explained: "Upon examination of the common law of kidnapping, the history and circumstances surrounding the promulgation of our current kidnapping statutes and the policy objectives animating those statutes, we now conclude the following: 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 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." (Emphasis in original; internal quotation marks omitted.) Id., 68–69.

The court in *Hinds* then turned to *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740, which had concluded "as a matter of state common law that policy considerations weighed in favor of retroactive application of *Salamon* to collateral attacks on judgments rendered final before that decision was issued." *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 69. With those principles in mind, the court addressed the issue of whether the petitioner's *Salamon* claim was subject to the doctrine of procedural default[7] as a result of his failure to challenge the kidnapping instruction at his criminal trial. Id., 70. Ultimately, our Supreme Court concluded that a *Salamon* claim, as raised by the petitioner, was not subject to procedural default. Id., 76.

The court proceeded to the question of whether the petitioner was entitled to a new trial as a result of the omission of the proper instruction on kidnapping pursuant to *Salamon*. Id. It determined that the proper test to apply was the harmless error standard applied on a direct appeal to a claim that an essential element is absent from a jury instruction. Id., 76–77. "On direct appeal, [i]t is well established that a defect in a jury

[7] The court in *Hinds* noted that the procedural default standard set forth in *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), had been adopted in Connecticut. "Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . [T]he cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . . The cause and prejudice requirement is not jurisdictional in nature, but rather a prudential limitation on the right to raise constitutional claims in collateral proceedings." (Citation omitted; internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 71.

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 quotation marks omitted.) Id., 77–78. Following a consideration of the factors set forth in *Salamon* as applied to the facts, the court in *Hinds* concluded that the omission of the required instruction was not harmless beyond a reasonable doubt. Id., 78–81.

Before considering the present case in light of the controlling principles set forth in *Hinds*, we address one characteristic distinguishing it from the majority of post-*Salamon* appellate cases. In this matter, the petitioner was convicted following a trial to the court, whereas most of the post-*Salamon* cases have involved jury trials. One exception, however, is *State* v. *Thompson*, 118 Conn. App. 140, 983 A.2d 20 (2009), cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010). In that case, the defendant was convicted of kidnapping in the first degree, sexual assault in the first degree and attempt to commit sexual assault in the first degree. Id., 142–43. On appeal, he argued, inter alia, that his conviction of kidnapping in the first degree should be reversed following the new interpretation of that crime. Id., 143. In the context of a trial to the court, we stated that

"the court was required to have made a specific factual finding, if it determined that such a finding was justified by the evidence, that the defendant . . . must have intend[ed] to prevent the victim's liberation for a longer period of time or to a greater degree than that which [was] necessary to commit the other crime." (Internal quotation marks omitted.) Id., 161. We also described a "*Salamon* finding" as "one that, when reasonably supported by the evidence, the restraint was or was not merely incidental to some other, separate crime." Id., 161 n.10.

Our task, therefore, is to examine the facts of the present case through the analytical lens of *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 56, to determine if the absence of a specific factual finding as required by *Salamon* constituted harmless error. Our standard of review is well established. "[W]hile [t]he underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous . . . [q]uestions of law and mixed questions of law and fact receive plenary review." (Internal quotation marks omitted.) Id., 65; see also *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 459, 139 A.3d 767 (2016) (applicability of *Salamon* and whether trial court's failure to give *Salamon* instruction was harmless error constitute issues of law subject to plenary review).

The issue of whether the movement or confinement of a victim merely was incidental to and necessary for another crime, such as sexual assault, is dependent on the facts and circumstances of each case. *State* v. *Salamon*, supra, 287 Conn. 547; see also *State* v. *Hampton*, 293 Conn. 435, 460, 988 A.2d 167 (2009); *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 743; *Eric M.* v. *Commissioner of Correction*, 153 Conn. App. 837, 843–44, 108 A.3d 1128 (2014), cert. denied, 315 Conn. 915, 106 A.3d 308 (2015). Accordingly, we

begin with a detailed recitation of the facts of the present case.

In a long form information dated October 25, 2001, the state charged the petitioner with kidnapping in the first degree as follows: "In the Superior Court of the State of Connecticut at Danbury, Warren Murray, Supervisory Assistant State's Attorney for the Judicial District of Danbury, accuses [the petitioner] of the crime of Kidnapping in the First Degree. It is further charged that in the city of Danbury, Connecticut, on or about the 11th day of November 2000, the said [petitioner], abducted another person, and restrained the person abducted with the intent to sexually abuse that person in violation of Connecticut General Statutes Section 53a-92 (a) (2) (A). This crime occurred in the vicinity of West and Harmony Streets." The state also charged the petitioner with sexual assault in the first degree by means of fellatio, attempt to commit sexual assault in the first degree by means of vaginal penetration, assault in the third degree and threatening.

On April 12, 2002, at the conclusion of the petitioner's criminal trial, the court issued an oral decision finding him guilty on all charges. Specifically, the court stated: "I will indicate that my decision's based on my review of the entire evidence, the testimony of all the witnesses, as well as the exhibits, and I will make some general findings of fact here. And I want to make it clear that my decision isn't limited to the findings I'm going to make now, but I will mention some factual findings specifically, but I've relied on others as well.

"On or about November 11, 2000, at between 8 p.m. and 9 p.m. in the evening, on the—on or near the corner of West Avenue and Harmony Street here in Danbury, the victim . . . was walking in the direction of the Food Bag store and encountered the [petitioner] while he was riding on his bicycle.

"At that time, the [petitioner] attempted to engage the victim in conversation. The victim indicated that she was not interested in engaging in a conversation and attempted to leave. And at that time the [petitioner] got off of his bicycle, physically grabbed the victim by the legs, dragged her along the ground for a distance of approximately 113 feet to a window well adjacent to a nearby church. The [petitioner] forced the victim into the window well and kept her there for a period of time between an hour-and-a-half and two hours.

"Now, during that encounter, the victim was forced to remove her clothing. She lowered her pants part way, and after she did that the [petitioner] knocked her to the ground and got on top of her and tried to insert his penis into her vagina. As he was doing that, the victim was struggling and screaming, scratching and clawing, but the [petitioner] use[d] superior strength to hold her down in this effort to, as I said, insert his penis into her vagina.

"During the course of their time in the window well, the [petitioner] also grabbed the victim by the hair and forced her head down to his groin area. And on a minimum—or at a minimum of three times, forced her head on—or her mouth onto his penis and inserted in—his penis was inserted into her mouth.

"Also, during the course of the encounter, the victim attempted to escape, repeatedly, and repeatedly the [petitioner] physically stopped her from leaving and, in fact, at one point threatened to kill her and told her that he wasn't going to let her leave until he was finished.

"Well, at some point after, a dark-haired Hispanic male encountered the [petitioner] and the victim, and engaged the [petitioner] in some altercations. The victim finally managed to escape, but was chased by the [petitioner]. And at or about the corner of West Street and Harmony Street, the victim threw herself on the

hood of a maroon car driven by Michelle Emmanuel, who was with her boyfriend at the time, and who saw the [petitioner] chasing after the victim. The victim at the time was screaming for help.

"Michelle Emmanuel locked the doors to her car, but continued to watch what was going on. And she says that the—well, the evidence establishes that the victim again tried to get away from the [petitioner]. She ran to a nearby telephone pole or utility pole and held onto it. The [petitioner] pried her from the pole, dragged her to a nearby area between a white house and a detached garage, and appeared to again attempt to sexually assault her.

"At the time of the encounter between the house and the garage, Ms. Emmanuel was flashing her lights in the [petitioner's]—in the victim's direction and honking her horn. [The petitioner] looked at her but continued doing what he was doing. Ms. Emmanuel called the police who arrived shortly thereafter. . . .

"So, those are some preliminary findings—or general findings of facts. As I indicated, I want to make it clear those aren't the only facts that I'm relying on in making my decision, but I will mention those things specifically. . . .

"Now, the [petitioner] is charged with the crime of kidnapping in the first degree in violation of § 53a-92 (a) (2) of the Penal Code, which provides as follows: A person is guilty of kidnapping in the first degree when he abducts another person and he restrains the person abducted with the intent to abuse her sexually. . . .

"In this case, the credible evidence establishes beyond a reasonable doubt that the [petitioner] abducted the victim, unlawfully restrained her, and restrained her with the intent to sexually abuse her. The [petitioner], without the victim's consent, and

against her will, physically held her by her legs, dragged her body from a sidewalk on West Street into a window well of a nearby church and forced her to remain there for close to two hours while he repeatedly forced his penis into her mouth. He told her that he would not let her leave until he was finished and said he would kill her if she did not stop screaming.

"In addition, the [petitioner], while in the window well with the victim, initiated contact between his penis and her vagina in an attempt to engage in sexual intercourse with her. The evidence clearly establishes each of the elements of kidnapping in the first degree, and the court therefore finds the [petitioner] guilty of that charge. That's the first count. . . .

"The credible evidence in this case establishes that the [petitioner] compelled the victim to engage in sexual intercourse in the form of fellatio and that the sexual intercourse in the form of fellatio was accomplished by the use of force against the victim.

"When the [petitioner] and the victim were in the window well together for nearly two hours, the [petitioner] on three occasions held the victim by the hair, physically forced her head down to his groin area and inserted his penis into her mouth. The victim screamed for help, struggled with the [petitioner], and repeatedly tried to escape, but the [petitioner] used violence to prevent her from leaving, as he repeatedly forced her to engage in sexual intercourse by way of fellatio. . . .

"The [petitioner] dragged the victim against her will from an area on West Street into a window well of a nearby church and threw her to the ground after she lowered her pants. He then held her down by placing his body on top of her, and initiated contact between her vagina and his penis without her consent. When the [petitioner's] penis touched the victim's vagina, the

victim was moving around in order to prevent him from penetrating her vagina with it.

"During the course of the attack the [petitioner] told the victim that if she did not stop screaming he would kill her and that he would not release her until he was finished. When the victim repeatedly tried to escape from the window well, the [petitioner] physically prevented her from leaving. . . .

"During the encounter between the [petitioner] and the victim, the [petitioner] dragged the victim's body along the ground, pulled her hair, threw her to the ground, bit her breasts, choked her, physically fought with her, and attempted to insert his penis into her vagina. As a result of the [petitioner's] conduct, the victim suffered numerous scrapes, bruises, abrasions, trauma, and experienced pain. The [petitioner's] conscious objective to engage in the aforementioned conduct, causing physical injury to the victim, was his desire to sexually assault her—or, I should say, the [petitioner's] motivation in consciously engaging in the conduct that I mention, was to sexually assault her. . . .

"In this case, the credible evidence establishes beyond a reasonable doubt that the [petitioner] is guilty of [the crime of threatening]. The [petitioner] used physical force to keep the victim in the church window well for close to two hours while he forced her to perform oral sex on him and attempted to have vaginal intercourse with her, all against her will and without her consent.

"During the course of the attack, the [petitioner] told the victim he would not release her until he was finished and that he would kill her if she did not stop screaming. The victim repeatedly tried to escape from the [petitioner], but was unable to do so because he used violence to stop her. When the [petitioner] told the victim

he would kill her, it was his conscious objective to place her in fear of imminent serious physical injury. She was frightened by the [petitioner's] conduct, and his actions in sexually assaulting her and physically assaulting her indicated his intent and ability to carry out his threat."

Certain evidence not mentioned in the court's oral decision describing the window well is pertinent to our analysis. One of the police officers testified that the window well in question was eight feet long, two feet and four inches wide, and four and one-half feet deep. The bottom of the window well was lined with rocks. This testimony was not challenged or refuted during the trial.

We now return to the seminal case of *State* v. *Salamon*, supra, 287 Conn. 509, which established the new interpretation of our kidnapping statutes. In that case, our Supreme Court concluded that the legislature "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 merely are 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., 542. It also noted that its holding did not amount to a "complete refutation" of the principles established in our prior kidnapping law. Id., 546.

"First, in order to establish a kidnapping, the state is not required to establish any minimum period of confinement or degree of movement. When 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. 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 defendant, 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 defendant'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. (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 546–48.

The court in *Salamon* also affirmed the general principle that an individual could be charged with and convicted of more than one crime arising from the same act or acts, so long as all of the elements of each crime were proven. Id., 548. Last, it noted the limited applicability of the new rule established: "[O]ur holding is relatively narrow and directly affects only those cases in which the state cannot establish that the restraint involved had independent significance as the predicate conduct for a kidnapping. We therefore do not anticipate that our holding will force a major shift in prosecutorial decision making." Id.

As previously stated, the question of whether the movement or confinement of a victim merely was incidental to and necessary for another crime, such as sexual assault, is dependent on the facts and circumstances of each case. To that end, we examine the decisions from our Supreme Court and this court that have considered the issue of whether the failure to apply *Salamon* constituted harmless error. We first discuss the cases that have determined that the absence of the *Salamon* rule amounted to harmless error, and then consider those that reached a contrary conclusion and required a new trial.

We begin with *State* v. *Hampton*, supra, 293 Conn. 438, in which the defendant claimed in his direct appeal that his convictions for kidnapping in the first degree and conspiracy to commit kidnapping in the first degree should be reversed on the basis of *Salamon*. In *Hampton*, the defendant was with his friend, James Mitchell, who received a telephone call from the victim

requesting a ride home. Id., 439. After picking her up, the three individuals went to a restaurant. Despite telling the victim that he would drive her home, Mitchell began angrily asking her about her brother. Id. Despite the pleas of the victim, the defendant and Mitchell refused to take her home and instead drove around for approximately three hours. Id. After parking at a closed gas station, where it was dark, Mitchell ordered her out of the car and the defendant pointed a shotgun at her face. Id. Mitchell then sexually assaulted her, and, afterward, both Mitchell and the defendant shot her. Id., 440.

On appeal, our Supreme Court agreed with the state that the failure to give the *Salamon* instruction was harmless because it was clear "beyond a reasonable doubt that the jury's verdict would have been the same in the absence of the impropriety." Id., 462. It reasoned that there was no evidence in the record that could rationally lead a jury to a reach a contrary finding that the restraint of the victim by the defendant was incidental to or inherent in the other crimes. Id., 463. There was a three hour time period from when the defendant and Mitchell had picked up the victim to the commission of the sexual assault and shooting. Id., 463–64. "The passage of this substantial period of time, which was uncontested by the defendant at trial, clearly shows the defendant's intent to prevent the victim's liberation for a longer period of time or to a greater degree than that necessary to commit the subsequent crimes. His restraint of the victim was *not* incidental to any additional offenses." (Emphasis in original.) Id., 464.

In *Eric M.* v. *Commissioner of Correction*, supra, 153 Conn. App. 839, the petitioner and the victim were in the process of ending their marriage. The petitioner lured the victim into the basement of the marital home where, after forcing her to the ground, he ordered her to put on handcuffs. Id. After binding and gagging her for a period of time, he released her to use the bathroom,

and then sexually assaulted her. Id., 839–40. The victim was able to run out of the bathroom, but was tackled and choked unconscious by the petitioner, at which point she fell through a glass storm door. Id., 840. The petitioner then tied her to a bed, where the victim was able to call the police. Id. The petitioner was convicted of two counts of kidnapping in the first degree, unlawful restraint in the first degree, assault in the second degree and sexual assault in a spousal relationship, and this court affirmed his conviction. *State* v. *Eric M.*, 79 Conn. App. 91, 829 A.2d 439 (2003), aff'd, 271 Conn. 641, 858 A.2d 767 (2004).

The petitioner then commenced a habeas action, arguing that his constitutional right to due process was violated because had the jury in his criminal trial been given a *Salamon* instruction, it would not have found him guilty of two counts of kidnapping in the first degree. *Eric M.* v. *Commissioner of Correction*, supra, 153 Conn. App. 841–42. Both the petitioner and the Commissioner of Correction filed motions for summary judgment, and the habeas court granted the latter's motion. Id., 842. It concluded that there was sufficient evidence in the record to show that the restraints imposed on the victim were not incidental to any other crime, and, therefore the failure to give the *Salamon* instruction was harmless beyond a reasonable doubt. Id.

On appeal, we noted that the test for determining harmlessness was "whether it appears beyond a reasonable doubt that the [impropriety] complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) Id., 845. We also noted the observation in *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 769–70, that "courts will be able to dispose summarily of many cases where it is sufficiently clear from the evidence presented at trial that the petitioner was guilty of kidnapping, as properly defined, [and] that

any error arising from a failure to instruct the jury in accordance with the rule in *Salamon* was harmless." (Internal quotation marks omitted.) *Eric M.* v. *Commissioner of Correction*, supra, 153 Conn. App. 845. In reviewing the facts from the criminal trial, we noted that the petitioner had sexually assaulted the victim for a few minutes, while the restraint had lasted for approximately five hours. Id., 846. Thus, under these facts, the failure to give the *Salmon* instruction was harmless beyond a reasonable doubt. Id., 847.

In *State* v. *Jordan*, 129 Conn. App. 215, 217, 19 A.3d 241, cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011), the defendant entered the bedroom of his former romantic partner, D, and her new boyfriend, E. The defendant beat E with a stick, and pulled D back into the bedroom by her hair. Id. He then incapacitated D by striking her in the head with the stick. Id. The defendant continued to savagely assault E by using a mop handle to sodomize him while D was directed to clean the blood off the walls. Id., 217–18. The defendant threatened D with a gun and struck E in the head with it. Id., 218. He subsequently was convicted of one count of burglary, two counts of kidnapping in the second degree, two counts of assault in the first degree and one count of sexual assault in the first degree. Id., 216.

On appeal, the defendant claimed that he was entitled to a new trial on the kidnapping charges as a result of the failure of the court to provide the jury with a *Salamon* instruction. Id., 219. The state countered that although such an instruction was required, the court's failure to do so amounted to harmless error "because the state offered sufficient evidence such that no reasonable jury could have concluded that the restraint of the victims by the defendant was merely incidental to the other crimes of assault and sexual assault." Id.

The defendant argued that "the entire forty-five minute confinement of the victims was comprised of

the defendant's assaultive action. There was, therefore, no period of time during which the victims were restrained for a greater degree than was necessary to commit the assaults." Id., 222. We iterated that, even subsequent to *Salamon*, the crime of kidnapping does not require a minimum period of confinement. Id. Instead, we determined that the evidence reasonably could not support the conclusion that the restraint of the victims by the defendant was merely incidental to the assaults and the sexual assault. Id. Specifically, we concluded that he had restricted the movement of the victims to a far greater degree than necessary to assault them. Id. Further, while he was assaulting one victim, the other was not free to leave, and when neither was being assaulted, he controlled their movement by not allowing them to leave. Id., 222–23.

In *State* v. *Strong*, 122 Conn. App. 131, 134, 999 A.2d 765, cert. denied, 298 Conn. 907, 3 A.3d 73 (2010), the defendant was convicted of a multitude of crimes, included kidnapping in the first degree and threatening in the second degree. The victim and the defendant, whose marriage was "plagued by violence," had separated. Id. The defendant requested the victim to meet him in a parking lot. Id. Eventually he retrieved a pistol and threatened to kill her if she did not follow his instructions. Id., 134–35. After ordering her to drive to a desolate area, the defendant then ordered her to drive to the home of one of his friends. Id., 135. The defendant told the victim that his friends were "going to rape her." Id. The defendant held her there for more than one hour before returning her to the parking lot. Id., 135–36. The defendant continued terrorizing her that night and the next morning, including running her car off the road when she was driving to work. Id., 136.

On appeal, we considered the issue of whether the lack of the *Salamon* instruction, under these facts, amounted to harmless error. Id., 139. In answering that

question in the affirmative, we concluded that the verdict would have been the same in the absence of the claimed impropriety. Id., 142. Specifically, we pointed to the overwhelming evidence of kidnapping as a result of the defendant's having ordered the victim to drive from the parking lot to the friend's house and having held her against her will in the car. Id., 143. The evidence of threatening consisted of his threat to kill her, repeatedly yelling at her, and the threat that his friends would sexually assault her. Id. "The defendant's prolonged restraint of the victim in her car while forcing her to drive . . . and while forcing her to remain in the car reasonably could not be considered merely incidental to either of the threatening charges." Id. Put another way, there was no evidence that rationally could have led the jury to conclude that the restraint was inherent in or incidental to the threatening. Id.

In *State* v. *Nelson*, 118 Conn. App. 831, 833, 986 A.2d 311, cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010), the defendant was convicted of the crimes of kidnapping, assault and burglary. As the victim entered his apartment, he was ambushed by the defendant and an accomplice, and was bound at the hands and feet. Id., 834. The assailants struck the victim, demanded money, and tortured him by burning his face and abdomen. Id. After approximately one hour, the assailants placed the victim in an automobile and drove around looking for an individual who owed the victim money. Id., 835. After an additional assault, the victim was left partially bound in his automobile near a high school. Id., 836. These events occurred over nearly five hours. Id.

On appeal, we agreed with the defendant that the jury should have received the *Salamon* instruction. Id., 860. The state argued that this error was harmless because the victim had been restrained for several hours after the completion of the assault. Id. In affirming the defendant's conviction of kidnapping, we noted:

"The substantial length of the victim's restraint following the assaultive conduct by the defendant is significant to our analysis. The defendant's restraint during such a substantial amount of time is overwhelming evidence of the defendant's intent to prevent the victim's liberation for a longer period of time than that necessary for the commission of any other crime. Stated otherwise, after reviewing all of the evidence presented, we do not believe that a rational jury could find that the defendant's restraint of the victim was inherent in, or incidental to, assault or any other crime." Id., 861.

We also are guided by our Supreme Court's decision in *State* v. *Ward*, 306 Conn. 718, 725–26, 51 A.3d 970 (2012), a case in which the trial court granted the defendant's motion for a judgment of acquittal following the jury's finding of guilt on the charges of sexual assault in the first degree and kidnapping in the first degree. In *Ward*, the victim was alone in her rural home when the defendant, who was nearly double her size, requested water for his overheated vehicle. Id., 722. When he returned for additional water, he pushed open the door, grabbed a metal knife sharpening tool, wrapped his arms around the victim and threatened to kill her if she did not follow his instructions. Id. 723. With the sharpening tool held to the victim's neck, the defendant dragged her down the hallway and into the master bedroom. Id. Once there, he pushed the victim onto the bed, removed some of her clothes, and then pulled her to the floor. Id., 723–24. He then sexually assaulted her. Id., 724.

The trial court provided the jury with the *Salamon* instruction. Id., 726. After the jury found the defendant guilty on both counts, the court granted the defendant's motion for a judgment of acquittal as to the kidnapping charge on the basis of *Salamon*. Id., 725. Specifically, the trial court concluded that "no reasonable jury could have found under [the facts adduced at trial] that the

defendant kidnapped the victim as defined by our statutes." (Internal quotation marks omitted.) Id., 725–26. The trial court emphasized that the incident occurred during a ten to twenty minute time period, the relatively small size of the victim's home, the minimal movement from the kitchen to the bedroom, and the incidental and minimal use of the weapon. Id., 728.

In reviewing the granting of the motion for a judgment of acquittal, our Supreme Court, after noting that it was a close case, concluded that the jury, having received the *Salamon* instruction, reasonably could have found that the confinement or movement of the victim was not merely incidental to the sexual assault. Id., 736. Specifically, it noted that the victim could not escape from the defendant, who was twice her size and who held her very tightly. Id. The movement of the victim from the kitchen door made the chance of escape more remote. Id. The defendant could have sexually assaulted her without threatening to kill her or without holding the weapon to her neck, and therefore, the force used by the defendant exceeded that which was necessary to commit the sexual assault. Id. The conduct of the defendant was intended to frighten and subdue the victim so as to prevent her from struggling, seeking assistance or attempting to escape. Id. Further, the use of the weapon increased the risk of harm to the victim, and movement from the kitchen door made it less likely that the criminal conduct would be detected. Id., 736–37. Last, had the defendant intended to move her to a location more comfortable for him, he could have placed her on the bed; instead, he eventually pulled her to the floor before sexually assaulting her. Id., 737.

"In short, although the defendant did not confine the victim for a lengthy period of time or move her a significant distance, the facts and circumstances of the present case, considered as a whole, support the jury's determination that the restraint of the victim was not

merely incidental to or an inherent part of the sexual assault. Our decision is not based on any single fact, but on the cumulative effect of the evidence adduced at trial." (Footnote omitted.) Id., 738. Our Supreme Court noted that in the absence of even one of the facts relied upon by the state in its argument, it may have reached a different result. Id., 738 n.12.

To complete our analysis of the parameters of the harmless error inquiry under *Hinds*, we now turn to the cases in which a reviewing court determined that the failure to apply the *Salamon* standard was not harmless and required a new trial. For example, in *State* v. *Fields*, 302 Conn. 236, 238, 24 A.3d 1243 (2011), the defendant was convicted, inter alia, of two counts of kidnapping in the second degree and one count of assault in the first degree. One of the victims, Marilyn Cortes, ended an abusive relationship with the defendant and lived with, inter alia, her daughter and her daughter's brother-in-law, Taoufik Razek. Id., 239–40. The defendant entered Cortes' new residence without permission and stole $500. Id., 240–41. The next day, the defendant promised to return the money to Razek at a coffee shop; this, however, was a ruse to get him out of the residence. Id., 241–42. The defendant then went to the residence and forced Cortes at gunpoint to the bedroom, where he bound her wrists and covered her mouth with duct tape. Id., 242. He then drove Cortes to a gas station to pick up an accomplice, and then returned to the residence. Id.

Razek subsequently returned to the residence and was physically assaulted by the defendant. Id., 242–43. The defendant then struck Cortes in the face after she had been prevented by the accomplice from calling the police. Id., 243. After the defendant threatened to kill Razek, a towel was wrapped over Razek's head and he

was placed into the backseat of a car. Id. Razek managed to escape from the car and call the police. Id., 243–44.

On appeal, the defendant argued that he was entitled to a new trial with respect to the kidnapping charge as to Razek as a result of the court's failure to instruct the jury in accordance with *Salamon*. Id., 244–45. Our Supreme Court rejected the state's argument that *Salamon* did not apply and turned to the issue of harmlessness. Id., 248–50. In rejecting the state's argument, the court noted that there was conflicting testimony from the two victims as to whether it was the defendant or the accomplice who forcibly moved Razek to the car. Id., 250. If the jury had credited Cortes' version of events, it might have found the defendant guilty of kidnapping solely on the basis of the restraint during the actual assault. Id., 251. It further noted that the state had charged the defendant with the kidnapping of Razek, and not with conspiracy to commit kidnapping or being an accessory to kidnapping. Id., 252. Under these circumstances, the lack of a *Salamon* instruction was not harmless beyond a reasonable doubt. Id., 253.

In *State* v. *Flores*, 301 Conn. 77, 79–80, 17 A.3d 1025 (2011), the defendant was convicted of numerous offenses, including kidnapping in the first degree and robbery in the first degree. The defendant and two accomplices, wearing dark clothes and ski masks, entered the bedroom of the victim and her boyfriend. Id., 80–81. The defendant tapped the victim on the shoulder with a gun and asked her where she kept her money. Id., 81. The defendant attempted to cover her mouth with duct tape, but she resisted. Id. The victim, who knew the defendant socially and deduced his identity, believed his statement that he was not going to hurt her. Id. One of the defendant's accomplices placed the gun in the mouth of the victim's boyfriend, and the other accomplice struck the boyfriend in the head after

he attempted to escape out of a window. Id., 81–82. After taking some of the possessions from the apartment, the defendant and his accomplices left. Id., 82. The time frame of the incident was between five and twenty minutes. Id.

On appeal, the state conceded that a *Salamon* instruction should have been given, but argued that it was harmless error. Id., 83. In reviewing this claim, our Supreme Court noted that, due to the manner in which the state had charged the defendant, the kidnapping charge applied only to the victim, and not the victim's boyfriend. Id., 85. Additionally, the state did not claim that the period of restraint exceeded the time necessary to commit the robbery, so its appellate argument was limited to the issue of the amount of force used to restrain the victim. Id. Because the victim was not bound or moved physically during the commission of the robbery, which lasted for no more than five minutes, and was released immediately upon the conclusion of the robbery, our Supreme Court determined that it would have been reasonable for a jury to find, if instructed properly, that the restraint did not rise to the level of a kidnapping apart from the armed robbery. Id., 87. In short, under the facts and circumstances presented, "at what point the force used to commit the robbery [became] so excessive as to have independent criminal significance [was] a quintessential question of fact for determination by the jury." Id., 89.

In *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 731, 108 A.3d 1128 (2014), the petitioner had been convicted of kidnapping and assault. The petitioner and the victim had been engaged, but the victim wanted to end the relationship after learning that the petitioner had contracted a sexually transmitted disease. Id., 732. While in the petitioner's van, the victim ended the relationship, at which time he pulled her into the backseat and attempted to choke her several times.

Id. Eventually, she returned to the front seat, at which time the petitioner poured gasoline on her and set her on fire. Id. The petitioner testified that he only had hit her in self-defense and that after he left the van, the victim had set herself on fire. Id., 733.

In his habeas petition, the petitioner claimed error in his criminal trial because the jury had not received the *Salamon* instruction. Id. In addressing the issue of prejudice as a result of inadequate kidnapping instructions, we applied the harmless error standard subsequently mandated by our Supreme Court in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 256. *Epps* v. *Commissioner of Correction*, supra, 153 Conn. 740. In concluding that the state had not met its burden, we stated: "This is not a case in which the allegations that gave rise to the kidnapping charge, or any of the charges, were uncontested and supported by overwhelming evidence. Although the incident endured longer than it took to commit the assault, the evidence is not undisputed or overwhelming that the victim's movements were restricted by the petitioner during all or portions of that incident, if at all. The victim testified that the petitioner repeatedly held her down, by sitting on top of her and pinning her down with his knees to restrain her, even when he was not hitting or choking her. The petitioner disputed those allegations. In proceeding through an iteration of the evidence presented at trial, and the permissible inferences that may be drawn from that evidence, concerning the duration of the subject incident, the actions of the petitioner and the actions of the victim, the commissioner is asking this court to weigh that evidence, little of which was undisputed, and the majority of which consisted of the testimony of the petitioner versus the testimony of the victim. Such is not a task that is properly ours to undertake." Id., 741.

In *State* v. *Thompson*, supra, 118 Conn. App. 142–43, the defendant, following a court trial, was convicted of kidnapping in the first degree, sexual assault in the first degree and attempt to commit sexual assault in the first degree. The defendant, a drug dealer, entered the vehicle driven by the victim, who was seeking to purchase drugs. Id., 143–44. The victim previously had purchased drugs on credit from the defendant but had not yet paid for them. Id. The defendant refused the victim's offer to pay him, slapped her, and ordered her to pull the vehicle over. Id., 144. After the defendant removed the keys from the ignition, the victim attempted to flee but was grabbed by the defendant and pulled to the side of a nearby building. Id. The victim, after receiving several punches, complied with the defendant's demand that she remove her clothes. Id. The defendant then sexually assaulted her. Id. The entire episode lasted fifteen to twenty minutes. Id. The defendant forced the victim into the passenger's seat and drove on several streets. Id. At some point, the victim escaped. Id., 144–45.

On appeal to this court, the defendant claimed that his conviction of kidnapping should be reversed on the basis of *Salamon* and its progeny. Id., 154. After reviewing the relevant cases from our Supreme Court; see id., 154–60; we noted that our review was limited to the defendant's conduct up to the completion of the sexual assault because § 53a-92 (a) (2) requires the intent to either physically injure or violate or abuse the victim sexually. Id., 160–61. Thus, under the facts of the case, our analysis was limited to the conclusion of the sexual assault. Id. We further noted that the trial court, as the finder of fact, "was required to have made a specific factual finding, if it determined that such a finding was justified by the evidence, that the defendant in this matter must have intend[ed] to prevent the victim's liberation for a longer period of time or to a greater

degree than that which [was] necessary to commit the other crime." (Internal quotation marks omitted.) Id., 161.

We determined that this court could not supply the required findings. Id., 162. "Put simply, we are unable to conclude that the evidence before us does not reasonably support a finding that the defendant's restraint of the victim was or was not so inextricably linked to the underlying crime itself. . . . Contrary to the state's contention, it is not clear beyond a reasonable doubt that the verdict would have been the same in the absence of the alleged impropriety. The state's evidence was not so overwhelming that it would prevent a converse finding by the fact finder as to whether the defendant's restraint of the victim was inherent in, or merely incidental to, the sexual assault." (Citation omitted.) Id.

We conclude our review of the relevant cases, with facts that fairly can be described as a literal parade of horribles, with *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 56. As we previously detailed, our Supreme Court eliminated the application of the procedural default doctrine in cases involving a collateral attack on a final judgment rendered prior to the *Salamon* decision. Id., 76. We also, however, must consider the facts, as well as the reasoning that supported the conclusion that the lack of the *Salamon* instruction was not harmless error. In *Hinds*, the victim left a grocery store and was walking to a friend's apartment located nearby. Id., 61. The victim cut through a parking lot where she was followed by the petitioner, causing her to run. Id., 61–62. The petitioner pursued and grabbed her, putting one hand around her waist and the other briefly over her mouth. Id., 62. After threatening to kill the victim if she screamed, he threw her to the ground and dragged her by the legs to a grassy area, behind a bush, where it was darker. Id. The petitioner sat on the victim's chest with his legs outside her arms

so that she could not move, and ordered her to open her mouth. Id. He forced her to perform fellatio on him, and after ejaculating in her mouth, patted her on the cheek and told her that she could leave. Id. The victim, frozen in fear, remained; so the petitioner entered his vehicle and left. Id. During his trial, the jury was not given the *Salamon* instruction. See id.

Addressing the issue of harmlessness, the court noted that it was required to "consider the legal parameters set forth in *Salamon*, and the standard for assessing whether the omission of such guidance to the jury requires reversal of the petitioner's kidnapping conviction." Id., 76–77. It stated that if the evidence regarding a defendant's intent was susceptible to more than a single interpretation, then the question was one for the fact finder. Id., 79. "The petitioner's actions in the present case were a continuous, uninterrupted course of conduct lasting minutes. The petitioner could not accomplish the sexual assault without grabbing [the victim] and bringing her to the ground. He released [the victim] as soon as the sexual assault was completed. Thus, the essential fact is the movement of [the victim]. [The victim's] asportation from the spot where she was grabbed to the site of the sexual assault, however, appears to be a matter of yards and accomplished in a matter of seconds. Although that movement took [the victim] from the lit parking lot to the adjacent dark ground by a bush, an act that undoubtedly reduced the risk of detection in one regard, it also brought [the victim] in very close proximity to an occupied residence in the lot adjacent to the parking lot. There is no evidence that the risk of harm to [the victim] was made appreciably greater by the asportation in and of itself. A properly instructed jury reasonably could conclude that the petitioner's intention in moving [the victim] from the lit lot to the dark, grassy area was to prevent her from being able to get a good look at his face,

because he could not perform in the lit space, or simply to avoid the hard paved surface while kneeling on the ground." (Footnotes omitted.) Id., 79–80.

The court later noted that the victim's ability to escape was not diminished as a result of the movement from the parking lot to the grassy area and, aside from the brief moment when the petitioner placed his hand over her mouth, the victim's physical ability to summon help was impaired solely due to the nature of the sexual assault. Id., 87. It also quoted, with approval, from a decision by the Superior Court: "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. . . . Thus . . . 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. Conversely, multiple offenses occurring in a much shorter or more compressed time span make the same determination more difficult and, therefore, more likely to necessitate submission to a jury for it to make its factual determinations regarding whether the restraint is merely incidental to another, separate crime. In those scenarios, where kidnapping and multiple offenses occur closer in time to one another, it becomes more difficult to distinguish the confinement or restraint associated with the kidnapping from another substantive crime. The failure to give a proper *Salamon* instruction in those scenarios is more likely to result in harmful error precisely because of the difficulty in determining whether each crime has independent criminal significance." (Citations omitted; internal quotation

marks omitted.) Id., 92–93; see also *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 743–46.

Against this backdrop we now consider the present case. As made abundantly clear by our review of the precedents from this court and our Supreme Court, this determination requires a detailed consideration of the facts and circumstances relating to the criminal conduct. Here, the criminal trial court found that the petitioner encountered the victim on a street corner, got off his bicycle, physically grabbed the victim by the legs, dragged her along the ground for approximately 113 feet to the window well of a nearby church.[8] The petitioner forced the victim into a window well, which, according to the uncontested evidence, was four and one-half feet deep[9] and lined with rocks. The petitioner kept her in the window well for a period of time between ninety and one hundred and twenty minutes.

While in the window well, the petitioner forced the victim to lower her pants, at which time he knocked her to the ground. He got on top of her and attempted to insert his penis into her vagina. The victim struggled and screamed[10] while scratching and clawing the petitioner. Her attempts at self-defense, however, were unsuccessful, as the petitioner used his superior strength to hold the victim down during his attempt

[8] The victim also testified that she struggled "[t]he whole time, at every moment" during the time period that the petitioner dragged her to the window well. This testimony was not contested by the petitioner.

[9] The depth of the window well is significant because the victim testified that she was five and one-half feet tall, so being placed in this window well made escape substantially more difficult as she not only had to break away from the physical restraint of the petitioner, but also had to climb out of what amounted to a deep hole in the ground. Additionally, the depth reduced the risk of detection of the petitioner's criminal conduct. These factors were not present in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 59.

[10] The victim stated that she implored the petitioner to "leave her alone" and to let her go, but he instructed her to "shut up" and ordered her not to cry. Again, this testimony was not disputed during the criminal trial.

at sexual assault by way of vaginal penetration.[11] The petitioner grasped the victim's hair and forced his penis inside her mouth on three separate occasions during the encounter. The victim testified that the total time of oral penetration was five minutes, and this was not contradicted at any point by the petitioner.

The criminal trial court found that the victim repeatedly tried to escape and that the petitioner repeatedly prevented her from doing so. At some point, a third party interrupted the petitioner, and, at this point the victim was able to escape from the window well. While being chased by the petitioner, the victim jumped onto the hood a car located at the corner of West Street and Harmony Street. The victim pleaded for help from the occupants of the car, and then, in an effort to get away from the petitioner, ran to a nearby telephone pole and held onto it. At that point, the petitioner pried her off,[12] dragged her to a nearby area between a house and detached garage, and again attempted to sexually assault her. The police arrived shortly thereafter,[13] at which point the petitioner fled from the scene.

We conclude that the present case is more analogous to the cases where a reviewing court concluded that the lack of the *Salamon* instruction was harmless error and distinguishable from those cases[14] in which the

[11] The victim testified that she tried on several occasions to get out, but that she was not able. She also stated that the petitioner punched her and threatened to kill her. During this point, she pleaded with the petitioner to not "hurt me anymore."

[12] The victim testified that while she clung to the telephone pole, the petitioner demanded that she let go, and then pulled on her arms in an effort to remove her from the pole before strangling her, which caused her to release her grip.

[13] The victim indicated that period of time was "not even five or ten minutes . . . ."

[14] See *State* v. *Fields*, supra, 302 Conn. 253; *State* v. *Flores*, supra, 301 Conn. 83; *Epps* v. *Commissioner of Correction*, supra, 153 Conn. App. 742; *State* v. *Thompson*, supra, 118 Conn. App. 161.

absence of the *Salamon* instruction or finding required a new trial. In order to reach this conclusion, we carefully have reviewed and considered both the facts and the legal reasoning of the precedent cited herein. We are satisfied that the respondent has met his burden.[15]

To answer the question of whether the absence of the *Salamon* standard constituted harmless error requires us to examine the factors and principles enunciated in that case. We iterate that "[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. . . . For the purposes of making that determination, the [fact finder should] consider the various relevant factors, including the nature and duration

[15] We note that we were not presented with a case in which the time of the underlying offense was brief and was either preceded or followed by an extended period of restraint. See, e.g., *State* v. *Hampton*, supra, 293 Conn. 435 (victim restrained for three hours prior to assaults); *Farmer* v. *Commissioner of Correction*, supra, 165 Conn. App. 462 (victim restrained for six to seven hours following assault); *Eric M.* v. *Commissioner of Correction*, supra, 153 Conn. App. 846 (sexual assault lasted few minutes and entire period of restraint occurred during a period spanning at least five hours); *State* v. *Kirby*, 137 Conn. App. 29, 51, 46 A.3d 1056 (defendant assaulted victim with stun gun in her home and then took victim for circuitous drive on back roads of New London County with time spent at his home), cert. denied, 307 Conn. 908, 53 A.2d 222 (2012); *State* v. *Strong*, supra, 122 Conn. App. 131 (defendant restrained victim for prolonged period and made two brief threats to kill victim and permit his friends to sexually assault her); *State* v. *Nelson*, supra, 118 Conn. App. 831 (significant period of restraint following assault).

Although the events of the present case lasted for a period of up to two hours, the facts do not indicate any demarcation between the time of the assault and the overall incident. In other words, under the record before us, we are unable to determine the amount of time in which the sexual assault and attempt to commit sexual assault occurred vis-à-vis the overall period of time of the incident.

of the victim's movement or confinement by the defendant, 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 defendant'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." *State* v. *Salamon*, supra, 287 Conn. 547–48; see also *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 78–79.

Here, the petitioner pulled the victim to the ground and dragged her 113 feet to the window well, but it is unclear how long this process took, as the evidence indicates that the victim was resisting this movement. The petitioner's movement of the victim in this case is distinguishable from the facts in *Hinds*, where the victim was moved "only a matter of yards," which occurred in a matter of seconds. *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 80. Furthermore, while the events of *Hinds* were described as a "continuous, uninterrupted course of conduct lasting minutes"; id., 79; in the present case, the petitioner's criminal conduct continued for nearly two hours and was interrupted by both the actions of a third party and the victim's attempts to escape. Moreover, the petitioner dragged the victim more than 100 feet from the site of their initial encounter to the window well, and then moved her from the telephone pole to the area between the white house and detached garage. In contrast to the facts of *Hinds*, there was no evidence that one area was lit or that there was an occupied building. See id., 80. Additionally, the risk of harm to the victim in the present case was appreciably greater as a result of the movement to the restrictive area within the window well, which was lined with rocks. Cf. id. This movement

to the window well also served to reduce the likelihood of detection. Nor could a reasonable fact finder conclude that the window well was more conducive for the crime of sexual assault. See *State* v. *Ward*, supra, 306 Conn. 737.

Most significantly, the asportation of the victim to the window well diminished her ability to escape.[16] See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 87. The victim was placed in an area, essentially a deep hole, that served as a secondary restraint on her movement, the first being the physical restraint by the petitioner. The confines of the window well severely limited the victim's escape routes. By limiting the direction in which she could flee, the petitioner had a greater ability to control her movement. Additionally, even when the five and one-half foot tall victim was able to escape from the physical custody of the petitioner, the depth of the window well, which measured four and one-half feet, appreciably debilitated her ability to escape because of the inherent and obvious difficulty in climbing out.[17] In other words, the window well served as a second level of restraint on the victim, orchestrated by the petitioner, and a reasonable fact finder could not conclude that this additional restraint was necessary to complete the crime of sexual assault or attempt to commit sexual assault. See id., 92; see also *State* v. *Wilcox*, supra, 162 Conn. App. 748; *Eric M.* v. *Commis-*

[16] The placement of the victim in the window well also served to frighten and subdue her to prevent her from summoning assistance despite the fortunate and timely arrival of the third parties in this case. See *State* v. *Ward*, supra, 306 Conn. 736. It also made detection less likely. Id., 737.

[17] The victim testified that when the petitioner briefly left to fight with a third party, she tried to get out of the window well, but the depth impeded her departure and allowed the petitioner to throw her back down. Only following another altercation between the petitioner and the third party was the victim able to get out of the window well. The petitioner, however, was able to quickly hunt her down and resume his felonious conduct.

sioner of Correction, supra, 153 Conn. App. 846–47; *State* v. *Jordan*, supra, 129 Conn. App. 222–23. Moreover, a fact finder reasonably could not conclude that the confinement of the victim in the window well was merely incidental to and necessary for the commission of the sexual assault charges. Simply put, the confinement of the victim in the window well had independent criminal significance.

Furthermore, after the victim was able to escape from the window well, the petitioner chased after her. The victim threw herself on the hood of a car and then clutched a telephone pole, at which point the petitioner ordered her to let go of the telephone pole, grabbed her arms, and choked the victim until she was left with no choice but to release her grip. The petitioner then dragged the victim to an area between the white house and detached garage and again attempted to sexually assault her. These additional acts by the petitioner further evidence an intent to frighten the victim, to prevent her escape, and to restrain her more than was necessary to sexually assault her or attempt to commit that crime.

The facts of the present case also are distinguishable from those found in *Salamon*, *DeJesus* and *Sanseverino*, the trilogy of cases in which our Supreme Court reconsidered its interpretation of our statutes and determined that restraint incidental to the commission of another offense no longer constituted the crime of kidnapping. In *State* v. *Salamon*, supra, 287 Conn. 514–15, the fifteen year old victim disembarked a train in Stamford after falling asleep. The defendant followed her into a stairwell in the train station. Id., 515. The defendant grabbed the victim by the back of her neck, causing her to fall to the ground and injure her elbow. Id. The defendant then positioned himself next to the victim and held her down by the hair. Id. After the victim screamed, the defendant punched her in the mouth and

attempted to place his fingers in her throat. Id. The victim was able to escape. Id. A jury found the defendant guilty of kidnapping in the second degree, unlawful restraint in the first degree and risk of injury to a child. Id., 512–13.

In *State* v. *DeJesus*, supra, 288 Conn. 423–24, the defendant, a manager of a supermarket, instructed the victim to go into a room in the upper level of the store. The defendant entered the room, removed the victim's pants and underwear and instructed her to sit on a desk. After ignoring the victim's statement that she did not want to do this, the defendant sexually assaulted the victim. Id., 423. Afterward, the victim moved away from the defendant, put on her clothes, and left the room. Id. The defendant was convicted of two counts of sexual assault in the first degree and one count of kidnapping in the first degree. Id., 420–21.

In *State* v. *Sanseverino*, supra, 291 Conn. 581, the defendant, the owner of a bakery, followed the victim, G, into the back room and grabbed her. He pushed the victim against the wall and forced her arms over her head. Id. The victim could not move because the defendant pressed his body against her. Id. After pulling down her pants, and then his, the defendant sexually assaulted the victim. Id. He then released the victim. Id. The defendant subsequently was convicted of kidnapping in the first degree and sexual assault in the first degree. Id., 583.

In *Salamon*, *DeJesus* and *Sanseverino*, the jury reasonably could have found that the restraint of the victims was incidental to the commission of another offense, and therefore the convictions of kidnapping could not stand. In this case, however, the petitioner's restraint and movement of the victim had independent criminal significance to support his conviction of kidnapping. Moreover, we are mindful of our Supreme

Court's observations that the *Salamon* rule did not constitute a "complete refutation"; *State* v. *Salamon*, supra, 287 Conn. 546; of the principles in its prior kidnapping jurisprudence and that its holding was "relatively narrow and directly affects only those cases in which the state cannot establish that the restraint involved had independent significance as the predicate conduct for a kidnapping." Id., 548.

Under the facts and circumstances of this case, we conclude that a reasonable fact finder, under the proper interpretation of our kidnapping law, could not find that the restraint of the victim was merely incidental to or an inherent part of the sexual assault crimes. Given the uncontested and overwhelming evidence before the criminal trial court, we conclude that that judgment would have been the same had Judge White applied the law set forth in *Salamon*. The evidence presented by the state, considered as a whole; see *State* v. *Ward*, supra, 306 Conn. 738; would prevent a finding that the restraint in this case was inherent in, or merely incidental to, the crimes of sexual assault and attempt to commit sexual assault. See *State* v. *Thompson*, supra, 118 Conn. App. 162. The failure of the criminal trial court to make the *Salamon* finding was harmless error.

The judgment is reversed and the case is remanded with direction to deny the petitioner's amended petition for a writ of habeas corpus.

In this opinion the other judges concurred.

JACQUELINE O. JUMA *v.* TOM M. AOMO
(AC 37880)

Lavine, Mullins and Mihalakos, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for upward modification of alimony and

child support. The trial court previously had modified the defendant's obligations downward during his period of unemployment. *Held* that the trial court did not err in reinstating the defendant's financial obligations pursuant to the dissolution judgment, that court having found that the defendant had obtained new employment.

Argued September 7—officially released October 11, 2016

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Olear*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Ficeto*, *J.*, granted the plaintiff's motion to modify alimony and child support, and denied the defendant's motion for contempt, and the defendant appealed to this court. *Affirmed.*

Tom M. Aomo, self-represented, the appellant (defendant).

Opinion

PER CURIAM. The self-represented defendant, Tom M. Aomo, appeals from the postdissolution judgment of the trial court, reinstating the financial orders issued at the time of dissolution.[1] The trial court, *Olear*, *J.*, dissolved the marriage of the defendant and the self-represented plaintiff, Jacqueline O. Juma,[2] on July 1, 2011, and issued financial orders with respect to the defendant's child support and alimony obligations. See *Juma* v. *Aomo*, 143 Conn. App. 51, 54, 68 A.3d 148 (2013). The defendant subsequently became unemployed, and the parties agreed that his financial obligations should be modified downward. On November 5, 2013, the court, *Ficeto*, *J.*, revised its financial orders

[1] The defendant also claims that the court, *Ficeto*, *J.*, improperly denied his motion for contempt.

[2] The plaintiff filed a statement in lieu of brief and did not appear at oral argument. We therefore have decided the appeal on the basis of the record and the defendant's brief and oral argument. See, e.g., *Goss* v. *Bella Notte of West Hartford, Inc.*, 99 Conn. App. 449, 450, 915 A.2d 881 (2007).

downward and entered certain orders regarding the arrearage the defendant owed the plaintiff. Thereafter, defendant found new employment, and, on December 10, 2014, the plaintiff filed a motion to modify child support and alimony asking the trial court to reinstate its original financial orders in the judgment of dissolution. Following a hearing, Judge Ficeto granted the plaintiff's motion to modify child support and alimony, reinstating the defendant's financial obligations pursuant to the judgment of dissolution. On the basis of our thorough review of the record, and after considering the record and the defendant's brief and argument, we conclude that there is no error. We, therefore, affirm the judgment of the trial court.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* ANTHONY COLLYMORE
(AC 37703)

Gruendel, Lavine and Mullins, Js.*

Syllabus

Convicted of several crimes as a result of the shooting death of the victim during an attempted robbery, the defendant appealed. The defendant, B and V had driven to an apartment complex where the defendant and V attempted to rob the victim while B waited in the car. The victim was shot to death when he resisted and attempted to flee. B then drove the defendant and V to O's apartment where they discussed the attempted robbery and shooting. On appeal, the defendant claimed, inter alia, that the trial court improperly allowed the state to revoke the statutory (§ 54-47a) immunity from prosecution that it had granted to B, V and O in exchange for their testimony in its case-in-chief, when those witnesses were thereafter called to testify in his case-in-chief. During their testimony in the state's case-in-chief, B, V and O repudiated certain recorded statements they made before trial that inculpated the defendant, and testified so as to exonerate him. B, V and O reiterated their exculpatory testimony when the defendant cross-examined them, but then invoked

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

their fifth amendment right to remain silent when he later called them as witnesses in his case-in-chief. The defendant claimed that he was unconstitutionally denied the exculpatory testimony of B, V and O when the court refused to compel them to testify in his case-in-chief. *Held*:

1. The defendant could not prevail on his claim that the trial court misapplied § 54-47a and thus denied him his constitutional rights to due process and a fair trial by allegedly permitting the state to revoke its grant of immunity to B, V and O when he later called them as defense witnesses in his case-in-chief:

   a. The state lacked the power to revoke the immunity it had granted to B, V and O, as there was nothing in § 54-47a that suggested that it could revoke that immunity to the extent that they were compelled to testify about certain matters during the state's case-in-chief, and the state's action was best understood as a refusal to extend to them additional transactional immunity and use or derivative use immunity that would bar the state from prosecuting them for transactions they had discussed for the first time in the defendant's case-in-chief.

   b. The state was not constitutionally required to grant additional immunity to B, V and O when they testified as defense witnesses, either under the prosecutorial misconduct theory, as the defendant failed to show that the excluded testimony would not have been cumulative and that he had no other source to get that evidence, or under the effective defense theory, as he failed to show that any additional testimony they may have provided was essential to his defense.

   c. The court did not abuse its discretion in sustaining the invocation by B, V and O of their fifth amendment rights when the defendant questioned them during his case-in-chief about certain matters for which they lacked immunity, as the answer to one question could have incriminated B, and the record shed little light on the significance of the other questions; moreover, although the court abused its discretion in sustaining the invocation by B, V and O of their fifth amendment rights as to certain other questions that the defendant asked them, that error was harmless because the improperly excluded testimony was cumulative, as they had testified and had been cross-examined on the same issues during the state's case-in-chief.

2. This court found unavailing the defendant's claims that the trial court improperly admitted certain uncharged misconduct evidence and a prior inconsistent statement by B, and improperly permitted a detective to testify about certain witnesses' statements to the police:

   a. Even if the court improperly had admitted uncharged misconduct evidence that the defendant possessed a gun on two occasions other than the night of the shooting, such evidence was harmless because the defendant failed to show that it substantially swayed the jury's verdict, as the testimony was superfluous and ancillary to whether the defendant participated in the robbery and shooting, there was evidence from multiple witnesses that he possessed a gun on the night of the shooting, he

was able to adequately cross-examine the witnesses at issue, and the state's case was strong.

b. The court did not abuse its discretion by admitting certain testimony from B's cousin that B had confessed to him several weeks after the attempted robbery and shooting, as the testimony was admitted for the limited purpose of impeaching B's credibility, and B's confession to the police was substantially inconsistent with certain of his other testimony and was material to the defendant's guilt or innocence.

c. The court properly admitted the detective's testimony for the limited purpose of explaining how the police investigation proceeded, as the detective testified only as to individuals who already had testified, the defendant had an opportunity to cross-examine those witnesses, the detective's testimony was not admitted for substantive or credibility purposes, and the court properly instructed the jury as to its use.

3. Contrary to the defendant's unpreserved claim that certain of the trial court's remarks during sentencing showed that it improperly lengthened his sentence as punishment for having elected to go to trial, that court's statement that the defendant was unwilling to accept responsibility for his actions was a proper comment on his remarks at sentencing in which he blamed his predicament on his quality of life and on the prosecutor.

Argued January 14—officially released October 11, 2016

Procedural History

Substitute information charging the defendant with two counts of the crime of attempt to commit robbery in the first degree, and with the crimes of felony murder, conspiracy to commit robbery in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cremins*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Susan M. Hankins, assigned counsel, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Cynthia S. Serafini*, senior assistant state's attorney, for the appellee (state).

Opinion

GRUENDEL, J. It is well established that the state may immunize from prosecution a witness called in its

case-in-chief. See generally General Statutes § 54-47a. The primary question in this appeal is whether the state, after immunizing such a witness for testimony given during the state's case-in-chief, may decline to extend that immunity to the same witness in connection with his testimony during the defense case-in-chief. Here, we conclude that the state was not required to grant three prosecution witnesses additional immunity for their testimony during the defense case-in-chief, and that the court's refusal during the defense case-in-chief to compel those witnesses to testify when they invoked their fifth amendment right to remain silent was proper as to some testimony and harmless as to the rest. Accordingly, because we conclude that the remainder of the defendant's claims—three evidentiary claims and a claim that the court improperly penalized the defendant at sentencing for electing to go to trial—also lack merit, we affirm the judgment of conviction.

The defendant, Anthony Collymore, appeals from that judgment, rendered after a jury trial, of (1) felony murder in violation of General Statutes § 53a-54c; (2) attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2); (3) conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a); and (4) criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).[1]

At trial, the jury reasonably could have found the following facts. On January 18, 2010, the defendant and two of his friends, Rayshaun Bugg and Vance Wilson (Vance), were driving around Waterbury in a white, four door, rental Hyundai that the defendant's aunt and uncle had lent to him, looking to rob someone. Eventu-

[1] The defendant was also found guilty of a second count of attempted robbery in the first degree in violation of §§ 53a-49 (a) (2) and 53a-134 (a) (4), but the court vacated that finding at sentencing, pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013).

ally the three men drove into the Diamond Court apartment complex, which comprises eight apartment buildings. Halfway down the main road of the complex, the men saw an expensive-looking, black Acura sport utility vehicle (SUV) and decided to rob its driver.

They drove down a small road behind the apartments, where the defendant and Vance pulled out their guns and exited the Hyundai, saying that they were going to rob the driver of the SUV. The defendant had a .38 revolver and Vance had a .357 revolver. Bugg drove to the end of the small road and waited. The defendant and Vance reached the SUV, saw two young children running toward its driver, and decided to call off the robbery. The SUV drove away.

The defendant and Vance then saw seventeen year old John Frazier (victim) and decided to rob him. As they were trying to rob him, he slapped away one of their guns and ran toward his apartment, at the entrance to the complex. The defendant and Vance both fired shots at the victim.

Bugg drove up, the defendant and Vance ran over to the Hyundai and got in, and they sped off to the apartment of Jabari Oliphant, a close friend who lived in Waterbury. There, the defendant and Vance explained to Bugg and Oliphant what had just transpired at Diamond Court, namely, that they had intended to rob the man in the SUV but decided not to when they saw his young children; instead, they tried to rob the victim and shot him when he resisted. They then asked Oliphant if he had something to clean their guns.

Police arrived at Diamond Court within minutes of the shooting and found the fatally wounded victim in front of his family's apartment. An autopsy revealed that a single .38 class bullet through the victim's heart had killed him.[2] The defendant was arrested and tried.

[2] The state's ballistics expert noted that a .38 class bullet could be fired from a nine millimeter pistol, a .38 Special revolver, or a .357 Magnum revolver.

At trial, the state's case included more than thirty witnesses, who testified over the course of fifteen days. A jury found the defendant guilty, and the court imposed a sentence of eighty-three years in prison. The defendant now appeals from that conviction.

I

The defendant's first claim is that the court improperly failed to compel three defense witnesses to testify. Specifically, the defendant argues that the court improperly allowed the state to revoke the immunity of three prosecution witnesses when they were called as defense witnesses, then improperly allowed those witnesses to invoke their fifth amendment right and refuse to testify, and that these two errors combined to unconstitutionally deny the defendant these witnesses' exculpatory testimony.

A

The following additional facts and procedural history are relevant to this claim. At the defendant's trial, the state granted immunity to three witnesses—Bugg, Vance, and Oliphant—in exchange for their testimony during the state's case-in-chief. Although they were called as prosecution witnesses, once they began to testify, these witnesses repudiated prior statements inculpating the defendant and testified so as to exonerate him, reiterating their exculpatory testimony when the defense cross-examined them. The defendant sought to examine those witnesses again during his case-in-chief but, this time, each witness invoked his fifth amendment right and refused to answer many or all questions asked.

The inculpatory evidence from these three witnesses came from recorded statements they gave before trial to various authorities, which the court admitted for substantive purposes.[3] The statements differed mark-

[3] See *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86 ("[w]e, therefore, adopt today a rule allowing the substantive use of prior written inconsistent

edly from the trial testimony, and each of the three witnesses repudiated his statements at length during the state's direct examination and the defendant's cross-examination. We discuss each witness in turn.[4]

1

Bugg was the first of the three witnesses granted immunity. When the state called him to testify in its case-in-chief, he communicated through his attorney that he would be invoking his fifth amendment right against self-incrimination, fearing that the state might bring drug charges against him for his activities on the night of the shooting and perjury charges if he contradicted the testimony he had given at the defendant's probable cause hearing. The state told the court: "Your Honor, based on our review of the statute, the state intends to give [Bugg] use immunity for any drug activity he was engaged in on January 18, 2010. . . . [In addition] the state does not intend to prosecute [Bugg] for any perjury that he may have committed at the probable cause hearing." The court informed Bugg that as a result, "your [immunity under the statute] doesn't exist, because the state has removed [the possibility of prosecution that] would otherwise allow you to [claim the immunity]." Bugg indicated that he understood. The court instructed the jury that "under [§] 54-47a, [Bugg] has been compelled to testify . . . ."

a

Bugg's Testimony during State's Case-in-Chief

When the state examined Bugg during its case-in-chief, he testified that on January 18, 2010, he, the

statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross examination"), cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

[4] The multiple, overlapping nature of these witnesses' testimony requires a more detailed presentation of the facts than is ordinarily necessary.

defendant and Vance drove to Diamond Court to buy drugs from "the weed man," and then drove to Oliphant's apartment. Bugg acknowledged under questioning that this story differed from the police statement he gave on February 10, 2011, and from his testimony at the defendant's probable cause hearing on August 30, 2011. In repudiating his earlier statements, he claimed, however, that the police had forced him to sign the statement after writing it themselves and that he had testified falsely at the probable cause hearing in exchange for a plea deal.

On cross-examination, Bugg reiterated that, on January 18, 2010, there was never any plan to rob someone, they were "going to get some weed, that was the whole thing," and he did not see the defendant or Vance with a gun that night. Bugg testified that he signed the police statement in exchange for a plea deal and because the police beat him, and that his testimony at the probable cause hearing was part of the same plea deal.

b

Bugg's Prior Inconsistent Statements

The state submitted the two statements made by Bugg prior to his testimony at trial, both of which were admitted into evidence for substantive purposes under *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).

First, the state introduced Bugg's police statement, made on February 10, 2011, through Lieutenant Michael Slavin, one of the detectives who had taken it. Slavin testified that Bugg had agreed with the statement he had given to the police and that the police did not beat or threaten Bugg. The court admitted the statement as a full exhibit.

Bugg stated to the police that on January 18, 2010, he, the defendant and Vance were driving around when

the defendant and Vance saw a black Acura SUV at Diamond Court, pulled out their guns, told Bugg that they were going to rob its driver, and got out of the car. Bugg saw the defendant with a .38 revolver and Vance with a .357. Soon, Bugg heard five or six gunshots and saw the defendant and Vance running up. They got into the Hyundai and told Bugg to drive, and he sped away. When they arrived at Oliphant's apartment, Vance and the defendant explained to Bugg that "the guy in the Acura had a baby in it, so they felt bad; instead [they] took the young nigga." The defendant told Bugg that Vance "ha[d] his gun to the [victim's] chest" while they were trying to rob him, "and the [victim] tried to grab it and they started to tussle over the gun, [and] that is why he shot him." While the defendant was talking, Vance asked for some ammonia so that he could clean off his gun.

Second, Bugg's probable cause hearing statement, made on August 30, 2011, was admitted into evidence through the testimony of the court reporter who had recorded and transcribed it. At the probable cause hearing, Bugg had testified that the defendant and Vance decided to rob the man in the Acura SUV, that they went to do so, that he heard gunshots, that the defendant and Vance came running to the Hyundai, that they got in and he drove off, and that at Oliphant's apartment they had stated that they robbed someone else instead.

c

Bugg's Testimony during Defense Case-in-Chief

When the defense told the court that it would be calling Bugg as a witness, the state told the court that "the state's granting of immunity to the—the prosecution witnesses does not extend to them as defense witnesses . . . ." The court told Bugg that there was "an issue as to whether or not the immunity that the state gave [him] when [he was] here before applie[d] to [his]

testimony now, because now [he was] being called by the defendant . . . and that issue, whether or not the immunity attache[d] [was] unclear," so "what [he] should do is be guided by what [his] attorney," who would be sitting next to him during his testimony, "advise[d] [him] as to answering any of the questions." When the state added that, "notwithstanding the court's position, it is the state's that [Bugg] is not being given . . . immunity for his testimony at this point in time," the court clarified, "I want to be sure this is clear for the record. I believe what I said to [Bugg] is that the law is unclear as to whether or not the immunity he was given by the state relates to his testimony as a defense witness."

In response to questions about the night of January 18, 2010, Bugg testified that he was driving the Hyundai that night, that he "thought they was going to get some weed," and that he did not know where the shooting occurred because he "was in a car." Bugg asserted his fifth amendment rights when asked where he drove after the defendant and Vance exited the car, and where he was when he heard gunshots. Bugg also answered defense counsel's questions about various phone calls he had made from prison and asserted his fifth amendment rights for only one such question—after testifying that his cousin, Marquise Foote, had stolen from him, he asserted his fifth amendment rights when asked what was stolen.

As to his testimony at the probable cause hearing, Bugg agreed with the defense counsel that he had testified at that hearing "for the purpose of getting a deal," but asserted his fifth amendment rights when asked if his testimony at that hearing was true.

2

Vance was the second of the three witnesses granted immunity. When the state called him to testify, he

waived his fifth amendment right against self-incrimination. The state later clarified that it had granted Vance immunity "for a claim of false statement . . . ."

a

Vance's Testimony during State's Case-in-Chief

During the state's case-in-chief, Vance testified that on January 18, 2010, he and Bugg accompanied the defendant to Diamond Court to collect $3000 from someone so that the defendant could repay Vance for heroin Vance had given the defendant. Vance believed that they were "going to ask [the man] where the money is. That's all." When they arrived, that man drove off, Vance punched the defendant in the jaw and, believing that the defendant was "reaching for something," Vance shot at the defendant with a .357 Taurus Magnum revolver as he ran away. Vance testified that he had never seen the defendant with a gun but had seen him with a knife. Soon, the defendant got back into the car with Vance and Bugg, and they drove off.

The state asked Vance about his two prior accounts of the shooting—his statement to police on February 22, 2011, and his guilty plea on February 21, 2012—both of which differed from his trial testimony. Vance claimed that he signed the police statement only because he had been threatened with the death penalty and that he entered his guilty plea in exchange for a sentence of only thirty to fifty years' incarceration. When questioned about his police statement and guilty plea, Vance repudiated both and persisted in his story about driving to Diamond Court to collect money owed him for heroin.

On cross-examination, Vance essentially reiterated his testimony given on direct examination.

b

Vance's Prior Inconsistent Statements

The state submitted the two statements made by Vance prior to his testimony at trial, both of which were admitted into evidence for substantive purposes under *State* v. *Whelan*, supra, 200 Conn. 753.

First, the state introduced Vance's police statement, made on February 22, 2011, through Slavin, who testified that Vance had signed at the bottom of each page and that no one threatened or forced him to do so. In Vance's statement, he said that on January 18, 2010, he, the defendant and Bugg drove to Diamond Court where they saw a black Acura SUV and decided to rob its driver. Vance took out a .357 revolver, the defendant took out a .38 revolver, and they exited the car and ran up to the SUV, but they then saw two young children, causing them "to let it go." The SUV drove off. Vance and the defendant then saw the victim walking by and decided to rob him. The defendant stuck his gun in the victim's chest, saying, "you know what it is," but the victim slapped the gun away and took off running. The defendant and Vance each fired two or three shots in the victim's direction before getting into their car and driving to Oliphant's apartment. There, the defendant asked for Vance's gun so he could dispose of it and his gun.

Second, Vance's guilty plea statement was admitted into evidence through the testimony of the court monitor who recorded and transcribed it. At the guilty plea hearing, Vance had admitted that the defendant asked him to commit a robbery; that he, the defendant, and Bugg decided to rob the man in the SUV; that both he and the defendant had guns; that the defendant's gun was a .38; that they decided against robbing the SUV when they saw its driver had young children; that they tried to rob the victim instead; that the defendant ran

up to the victim first and put a gun to his chest; that Vance fired two or three shots when the victim ran; that the defendant fired shots as well; and that back at Oliphant's apartment on Walnut Street, Vance gave his gun to the defendant when asked.

c

Vance's Testimony during Defense Case-in-Chief

When the defense called Vance as a witness, the state asserted that "it is the state's position that any testimony that he gives at this portion of the proceeding is not covered by . . . immunity." The court repeated to Vance the same advisement it had given Bugg concerning immunity and told him to "be guided by the advice of your attorney and that's—that's the way we should proceed."

The court asked for an offer of proof outside the presence of the jury, during which defense counsel asked what the police said when they took Vance's statement, whether Vance shot the victim, and whether Vance called a person named Karen Atkins in June, 2012. Vance replied: "Based on the advice of my counsel, I'm going to invoke my fifth amendment right."

Although the defendant argued that Vance had no valid fifth amendment right to assert, the state and Vance's attorney argued that Vance had yet to be sentenced on a guilty plea to various charges arising from the January 18, 2010 shooting; that the plea deal allowed a sentence in the range of thirty to fifty years; and that until Vance was sentenced his fifth amendment right against self-incrimination continued to apply to the events of January 18, 2010. The court held that Vance's fifth amendment right continued to apply until after sentencing and that, because the state "sa[id] on the record that [Vance] is not being immunized with respect to his testimony as a defense witness," therefore he

"properly, in my view, invoked his fifth amendment privilege." Because it would be improper to call a witness for the sole purpose of having him invoke the fifth amendment in front of the jury; see *State* v. *Person*, 215 Conn. 653, 660–61, 577 A.2d 1036 (1990), cert. denied, 498 U.S. 1048, 111 S. Ct. 756, 112 L. Ed. 2d 776 (1991); the court excused Vance without having him testify as a defense witness.

3

Oliphant was the third of the three witnesses granted immunity in connection with the defendant's trial. When the state called him to testify, he communicated through his attorney that he would be invoking his fifth amendment right against self-incrimination. Oliphant's attorney discussed with the court Oliphant's fear that the state might bring false statement charges against him if he contradicted his statement to police, and hindering prosecution charges for his interactions with the defendant, Vance, and Bugg after the shooting. After a colloquy with the prosecutor, the court told Oliphant, "you don't have a fifth amendment privilege because . . . you have been given transactional immunity by the state." Oliphant said that he understood.

a

Oliphant's Testimony during State's Case-in-Chief

During questioning in the state's case-in-chief, Oliphant testified that on the night of January 18, 2010, he was at the apartment on Walnut Street when the defendant, Vance, and Bugg came over. Privately, Vance told Oliphant that he had just killed someone, and wanted to kill Bugg and the defendant "because he didn't want to leave no witnesses." A couple of days later, Bugg told Oliphant that the defendant, Vance, and he had been driving around drinking and smoking that night, when Vance "saw somebody walking down the

street, hopped out [of] the car, [and] tried to rob him. The [victim] fought [Vance] off and [Vance] shot [the victim]. [Vance] jumped back in the car and they sped off." Oliphant further testified that the defendant never talked about the shooting with him, and that Oliphant had never seen the defendant with a gun, but that he had seen Vance with a .357 caliber gun before the January 18, 2010 shooting.

Oliphant acknowledged that this story differed from the statement he had given to the police on February 2, 2011. He claimed, however, that the police made him sign that statement after beating him for hours, while he was high on PCP and alcohol. When the state questioned Oliphant line by line, he again repudiated his statement and persisted in his story that he was told that Vance got out of the car alone and robbed a passerby.

On cross-examination, defense counsel examined Oliphant extensively about his statement, which Oliphant repudiated and said he signed only because police beat him and a prosecutor "was offering [him] deals to perjure [him]self . . . ."

b

Oliphant's Prior Inconsistent Statement

The state submitted Oliphant's police statement into evidence and the court admitted it for substantive purposes under *State* v. *Whelan*, supra, 200 Conn. 753. The state again called Slavin as a witness, who testified that he had taken Oliphant's police statement in the same manner he had taken Bugg's and Vance's statements, and that no one forced or threatened Oliphant to sign.

In the statement, Oliphant said that on the night of January 18, 2010, at the apartment on Walnut Street, Vance and the defendant both told Oliphant that they had been driving around with Bugg looking to rob someone when they saw the victim in the Diamond Court

apartment complex. They told Oliphant that they tried to rob the victim, but when he fought back and ran toward his apartment, Vance shot him in the back. At some point, Bugg also spoke with Oliphant and told him that the defendant, Vance, and he were driving around in the white car on January 18, 2010, looking for someone to rob, that they saw the victim in the Diamond Court apartment complex, and that Vance shot the victim as he ran away. Oliphant previously had seen Vance with a .357 caliber gun and the defendant with a .38 caliber revolver.

c

Oliphant's Testimony during Defense Case-in-Chief

When the defense tried to call Oliphant as a witness, the state told the court that "it's the state's position that the immunity that was given to Mr. Oliphant when he testified as a prosecution witness in the state's case-in-chief . . . ended . . . and he has no immunity for anything that goes on today." The court advised Oliphant concerning immunity as it had Bugg and Vance and told him to "be guided . . . by [his] attorney's advice . . . ." Oliphant's attorney said that Oliphant would not answer any questions "[b]ased on the representation that immunity will not be extended to him being called as a defense witness."

During an offer of proof outside the presence of the jury, defense counsel asked several questions about Oliphant's February 2, 2011 statement to the police. Oliphant invoked the fifth amendment when asked if he was beaten on that date and what he had meant by part of his trial testimony as a prosecution witness,[5]

[5] The following colloquy occurred during defense counsel's questioning of Oliphant:

"[Defense Counsel]: Now, you testified at the trial that you felt guilty, that—you felt guilty about Vance Wilson. Can you explain that?

"[The Witness]: I plead the fifth. . . .

"[Defense Counsel]: You indicated during your direct testimony that you felt guilty. What was that reference?

"[Oliphant's Counsel]: He took the fifth amendment to that question."

but he did testify that, on February 2, 2011, he was arrested with a man named Jamel, whom he had not known for long. The state asked three questions on cross-examination—how, and for how long, had Oliphant known Jamel before their arrest; and did they have narcotics when arrested. Oliphant asserted his fifth amendment rights in response to each question.

The state argued that Oliphant could not selectively assert his fifth amendment rights, testifying about a subject for the defense but refusing to answer the state's questions about the same subject. Defense counsel agreed that if Oliphant did so, then he would be unavailable for cross-examination and so the court would have to strike his testimony. See *State* v. *Marsala*, 44 Conn. App. 84, 92–93, 688 A.2d 336 (court properly struck defendant's entire testimony where he refused to answer questions on cross-examination), cert. denied, 240 Conn. 912, 690 A.2d 400 (1997). The court held that, because Oliphant "indicated he is not going to respond to any of the questions asked on cross-examination by the state," it would be futile to call him as a witness only to have his testimony stricken. Accordingly, the court released Oliphant from the subpoena with which he had been served, and he did not testify as a defense witness.

B

With that factual history in mind, we now turn to the defendant's first claim on appeal, which is that the court improperly (1) allowed the state to revoke the immunity of Bugg, Vance, and Oliphant, three prosecution witnesses, when they were called as defense witnesses; and (2) failed to compel those three witnesses to testify when they asserted their fifth amendment rights as defense witnesses, thus denying the defendant crucial, exculpatory testimony. We address each argument in turn.

1

The defendant argues that the court improperly allowed the state to "revoke" its grant of immunity to Bugg, Vance, and Oliphant when they were called as defense witnesses and, that the revocations violated the defendant's rights to due process and a fair trial under the fourteenth amendment to the United States constitution, as well as his rights to compulsory process and to present a defense under the sixth amendment[6] to the United States constitution.[7] As we have noted, the state initially had granted each witness immunity during the prosecution's case-in-chief, pursuant to § 54-47a.[8] When the defendant called those same witnesses for his case-in-chief, the state told each of them that they no longer had immunity.

The defendant characterizes this as a "revocation" of immunity and argues that such a revocation violated his constitutional rights because it effectively prevented the witnesses from testifying. By contrast, the state

[6] The sixth amendment rights to compulsory process and to present a defense are made applicable to the states through the fourteenth amendment's due process clause. *State* v. *Andrews*, 313 Conn. 266, 272 n.3, 96 A.3d 1199 (2014).

[7] Although the defendant argues in his brief that the state's conduct violated both the federal and state constitutions, he has provided no independent analysis under the state constitution, as required by *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), and so we limit our review to the federal constitutional claim. See *State* v. *Allen*, 289 Conn. 550, 580 n.19, 958 A.2d 1214 (2008).

[8] At trial, the state never specified by what authority it immunized the three witnesses. The state asserts on appeal, however, that it relied on § 54-47a for Bugg and Oliphant. As to Vance, the state argues that the record of his immunity is inadequate to review, but argues in the alternative that its grant of immunity to Vance was proper, citing a § 54-47a case, *State* v. *Giraud*, 258 Conn. 631, 635 n.3, 638, 783 A.2d 1019 (2001). At no point before the trial court or this court has the state asserted any other source for its authority to immunize witnesses. Accordingly, we confine our review to § 54-47a. See *Furs* v. *Superior Court*, 298 Conn. 404, 411–13, 3 A.3d 912 (2010) (declining to review claim that state has "inherent authority" to immunize witnesses, because it was not raised before trial court).

argues that it "did not *revoke* grants of immunity to any of its witnesses" and that the real question is whether the court properly held that the state need not grant *additional* immunity to those witnesses. (Emphasis added.) We agree with the state that, because it did not revoke the witnesses' immunity and the court properly held that the state was under no obligation to grant them additional immunity, the defendant's constitutional rights were not violated.

First, to the extent that the defendant claims that the court violated his constitutional rights by misapplying § 54-47a to permit the state to *revoke* immunity previously granted under § 54-47a, we must interpret that statute. "To the extent that the [defendant's] claim requires us to interpret the requirements of [a statute], our review is plenary." *In re Nevaeh W.*, 317 Conn. 723, 729, 120 A.3d 1177 (2015). We begin with the statute's text and relationship to other statutes, and consider other evidence of its meaning only if the text itself is either ambiguous or yields absurd results. Id., 729–30.

Section 54-47a has two parts. Section 54-47a (a) provides in relevant part: "Whenever in the judgment of . . . a state's attorney . . . the testimony of any witness . . . in any criminal proceeding involving . . . felonious crimes of violence . . . or any other class A, B or C felony . . . [is necessary to obtain] sufficient information as to whether a crime has been committed or the identity of the person or persons who may have committed a crime . . . [and] is necessary to the public interest . . . the state's attorney . . . may, with notice to the witness, after the witness has claimed his privilege against self-incrimination, make application to the court for an order directing the witness to testify . . . ."

Section 54-47a (b) provides in relevant part: "Upon the issuance of the order such witness shall not be

excused from testifying . . . on the ground that the testimony . . . may tend to incriminate him or subject him to a penalty or forfeiture. No such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify . . . and no testimony . . . so compelled, and no evidence discovered as a result of or otherwise derived from testimony . . . so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony . . . ."[9]

The plain language of § 54-47a (b) thus provides that, if a witness is compelled to testify about a "transaction, matter or thing," then the witness cannot be "prosecuted or subjected to any penalty or forfeiture for or on account of" that transaction, matter, or thing. Nothing in the statute suggests that a prosecutor may later revoke that immunity, before or after the witness testifies, and decide to prosecute the witness after all. Indeed, if the state had such power, then the immunity promised under § 54-47a would be an empty gesture. We conclude that, in the absence of special circumstances, once the state grants a witness immunity under § 54-47a, it plainly lacks the power to revoke that immunity. Accordingly, to the extent that Bugg, Vance, or Oliphant was compelled under § 54-47a to testify about a transaction, matter, or thing during the state's case-in-chief, then, from that point on, the state could no longer prosecute them for or on account of it.[10]

[9] Here, the state proceeded in the opposite order, first telling the court that it was granting the witnesses immunity and then having the court instruct the witnesses that they could no longer refuse to testify on the basis of their fifth amendment right against self-incrimination.

[10] Because a grant of immunity pursuant to § 54-47a necessarily includes transactional immunity, all three witnesses received such immunity when the state immunized them during its case-in-chief. See *Furs* v. *Superior Court*, 298 Conn. 404, 411, 3 A.3d 912 (2010) ("the General Assembly intended to provide both transactional and derivative use immunity to witnesses compelled under the statute to testify"). Section 54-47a also confers use

The state argues, and we agree, that it "did not *revoke* grants of immunity to any of its witnesses." (Emphasis added.) Given the constraints imposed by § 54-47a, the state's comments to the three witnesses are best understood not as a "revocation" of the immunity that they already had, but rather as a refusal to grant those witnesses *additional* immunity.[11] To wit, the state did not wish to grant them both transactional immunity from prosecution for any transactions discussed for the first time during the defense case-in-chief, and use or derivative use immunity that would bar the state from using their defense testimony—or evidence derived from it—in any potential prosecutions against them that the state could still legally pursue.

The question is not one of revocation. Rather, the question is whether any of the constitutional provisions cited by the defendant required the state to grant that additional immunity to those witnesses.

We therefore turn to whether the state was required to grant the three witnesses additional immunity for their testimony as defense witnesses. "As a threshold matter, we must first determine the applicable standard of review that governs our examination of the defendant's claims. The issue of whether a defendant's rights to due process and compulsory process require that a defense witness be granted immunity is a question of law and, thus, is subject to de novo review. . . .

"[A] defendant has a right under the compulsory process and due process clauses to present [his] version

and derivative use immunity, meaning that, in addition, the state cannot use testimony compelled under § 54-47a—or evidence found as a result of that testimony—to prosecute the witness for another offense about which the witness did not testify. See id.; but see *Cruz* v. *Superior Court*, 163 Conn. App. 483, 490 n.5, 136 A.3d 272 (2016) (treating use and derivative use immunity as wholly contained subset of transactional immunity).

[11] For its part, the trial court never explicitly stated whether it viewed the issue as one of revoking existing immunity or granting additional immunity, but its comments suggest that it took the latter view.

of the facts as well as the prosecution's to the jury so [that] it may decide where the truth lies. . . . The compulsory process clause of the sixth amendment generally affords an accused the right to call witnesses whose testimony is material and favorable to his defense . . . .

"We begin our analysis with the statutory provision concerning prosecutorial immunity for witnesses. [Section] 54-47a authorizes the prosecution to grant immunity to state witnesses under certain circumstances. We explicitly have held that § 54-47a confers no such authority upon the courts with regard to defense witnesses. . . . Indeed, this court has held repeatedly that there is no authority, statutory or otherwise, enabling a trial court to grant immunity to defense witnesses. . . . We have no occasion to revisit those holdings today.

"We recognize that other courts have held that under certain compelling circumstances the rights to due process and compulsory process under the federal constitution require the granting of immunity to a defense witness. The federal Circuit Courts of Appeals have developed two theories pursuant to which the due process and compulsory process clauses entitle defense witnesses to a grant of immunity. They are the effective defense theory, and the prosecutorial misconduct theory. . . .

"Under the effective defense theory . . . the trial court has the authority to grant immunity to a defense witness when it is found that a potential defense witness can offer testimony which is clearly exculpatory and *essential to the defense case* and when the government has no strong interest in withholding . . . immunity . . . . The Third Circuit [Court of Appeals] has held explicitly that under the effective defense theory [i]mmunity will be denied if the proffered testimony is

found to be ambiguous [or] not clearly exculpatory . . . .

"The prosecutorial misconduct theory of immunity is based on the notion that the due process clause [constrains] the prosecutor to a certain extent in [its] decision to grant or not to grant immunity. . . . Under this theory, however, the constraint imposed by the due process clause is operative only when the prosecution engages in certain types of misconduct, which include forcing the witness to invoke the fifth amendment or engaging in discriminatory grants of immunity to gain a tactical advantage, and the testimony must be material, exculpatory and *not cumulative*, and the defendant must have *no other source to get the evidence*." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 403–404, 908 A.2d 506 (2006).

Our Supreme Court previously has declined to decide whether either of these theories is correct, in the absence of circumstances that would then warrant reversal of a judgment on that basis. Id., 405. The present case again provides no occasion to reach the correctness of either theory.

To succeed under the effective defense theory, a defendant must show that the testimony at issue was " 'essential' " to the defense. Id., 404; see, e.g., *United States* v. *MacCloskey*, 682 F.2d 468, 475, 479 (4th Cir. 1982) (reversing judgment of conviction where "primary defense witness" refused to answer some questions before jury as to certain directly relevant details of alleged conspiracy, although "testimony she gave in . . . voir dire was detailed and contradicted, or offered innocent explanations to, [the] damaging testimony" of state's primary witness). Here, by contrast, there is no reason to believe that the three witnesses' testimony

during the defense case-in-chief would have been anything other than a rehash of their prosecution testimony, which, if believed, already tended to exonerate the defendant from each of the crimes charged. Each testified at length, favorably to the defendant, both when the state examined them during its case-in-chief and when the defendant cross-examined them. Although it is possible that the witnesses would have provided additional exculpatory details when called as defense witnesses, nothing in the record indicates what those details would have been.[12] See *United States* v. *Triumph Capital Group, Inc.*, 237 Fed. Appx. 625, 630 (2d Cir. 2007) ("[N]o one knows what [the witnesses] would have testified to since they refused to comment on the matter. [The defendant's] speculation that [they] would have testified in [his] favor is not sufficient to prove that their testimony would have been exculpatory."). The defendant has failed to show that any additional testimony the three witnesses may have provided as defense witnesses was essential to his defense.

[12] At oral argument before this court, the defendant did argue that trial counsel was barred during cross-examination in the state's case-in-chief from asking certain questions, as they were beyond the scope of the state's direct examination, then barred from asking those same questions during the defense case-in-chief because the witnesses asserted their fifth amendment rights, and that this sufficed to show that the defense was denied essential testimony. We disagree, for two reasons.

First, as a legal matter it is not potentially exculpatory questions but actually exculpatory answers that the defendant must show to sustain his burden under the effective defense theory. See *United States* v. *Triumph Capital Group, Inc.*, 237 Fed. Appx. 625, 629–30 (2d Cir. 2007) (questions alone not sufficient); see also *United States* v. *MacCloskey*, supra, 682 F.2d 475–77, 479 (reversing conviction where witness *had* previously answered questions during voir dire outside jury's presence and answers were detailed and exculpatory). Here, we cannot speculate as to what the answers to the defendant's questions might have been. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009) ("speculation and conjecture . . . have no place in appellate review" [internal quotation marks omitted]).

Second, as a factual matter, even if we could speculate as to the answers to the questions that were asked, we would conclude that such testimony was cumulative or otherwise obtainable because, here, the witnesses did

Likewise, under the prosecutorial misconduct theory, a defendant must show that the testimony at issue was "not cumulative" and that he had "no other source to get the evidence." *State* v. *Kirby*, supra, 280 Conn. 404. The defendant has provided no indication of what new exculpatory testimony he would have elicited from these three witnesses during his case-in-chief. At oral argument before this court, the defendant's counsel was specifically asked what additional details the defendant was prevented from eliciting from these three witnesses, and she provided none. Accordingly, the defendant has failed to show that the witnesses' excluded testimony would not have been cumulative and that he had no other source to get the evidence.

We thus conclude that the state was not constitutionally required to grant additional immunity to Bugg, Vance, and Oliphant when they testified as defense witnesses.

2

The defendant also argues that the court improperly failed to compel Bugg, Vance, and Oliphant to testify when they asserted their fifth amendment rights as defense witnesses, because at that point, as a result of the immunity that the state had granted them during its case-in-chief, they were no longer exposed to prosecution and thus had no valid fifth amendment right to assert.[13] We conclude that the court properly refused to compel these witnesses to answer some questions, that the court improperly refused to compel them to

answer the vast majority of questions at some point during the trial, and the only questions that remained unanswered were highly tangential to the actual issues at hand. See part I B 2 of this opinion.

[13] We note that the state, in its brief, did not address the defendant's argument that the court improperly sustained these witnesses' invocation of their fifth amendment rights.

answer other questions, and that any error was harmless because all of the testimony improperly excluded was cumulative.

We begin with our standard of review. "A ruling on the validity of a witness' fifth amendment privilege is an evidentiary determination that this court will review under the abuse of discretion standard. . . . It is well settled that the trial court's evidentiary rulings are entitled to great deference. . . . The trial court is given broad latitude in ruling on the admissibility of evidence, and we will not disturb such a ruling unless it is shown that the ruling amounted to an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Luther*, 152 Conn. App. 682, 699, 99 A.3d 1242, cert. denied, 314 Conn. 940, 108 A.3d 1123 (2014).

"[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant [also] bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper exclusion of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as . . . whether the testimony was cumulative . . . [and] the extent of cross-examination otherwise permitted . . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 558–59, 34 A.3d 370 (2012).

"The standard for determining whether to permit invocation of the privilege against self-incrimination is well established. To reject the invocation it must be *perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have [a] tendency to incriminate the witness. . . . The right to the

privilege does not depend upon the likelihood of prosecution but upon the possibility of prosecution." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Giraud*, 258 Conn. 631, 640, 783 A.2d 1019 (2001).

Here, all but three of the questions as to which Bugg, Vance, and Oliphant asserted their fifth amendment rights during the defendant's case-in-chief were questions that they had already answered during the state's case-in-chief. The three new questions were: (1) to Bugg, what his cousin stole from him; (2) to Vance, whether he called a person named Karen Atkins in June, 2012; and (3) to Oliphant, what he meant when he testified during the state's case-in-chief that he felt guilty about Vance.

As to the three new questions, we are unable to conclude that the court abused its discretion in sustaining the witnesses' invocation of their fifth amendment rights. We note that "[i]n appraising a fifth amendment claim by a witness, a judge must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." (Internal quotation marks omitted.) *Martin* v. *Flanagan*, 259 Conn. 487, 495–96, 789 A.2d 979 (2002). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (Internal quotation marks omitted.) Id., 495. As to the first question, the nature of what Bugg's cousin stole from him could have incriminated Bugg if the item was contraband. As to the second and third questions, the record sheds little light on their significance. Accordingly, on this record, we cannot second-guess the determination of the trial court. We conclude that the court did not abuse its discretion in sustaining the witnesses' invocation of

their fifth amendment rights when they were asked about these three transactions, as to which they lacked immunity.[14]

By contrast, as to those questions that the witnesses had already answered during the state's case-in-chief, § 54-47a foreclosed any possibility of prosecution for the transactions, matters, and things at issue. Accordingly, further questions about those same issues did not implicate the witnesses' fifth amendment right against self-incrimination.[15] The court abused its discretion in sustaining the witnesses' invocations of their fifth amendment rights as to those issues.[16]

We conclude, however, that this error was harmless.[17] Here, each witness already had testified and been cross-examined at length, on the same issues, during the

[14] As to the three new questions, the court's failure to compel Bugg, Vance, and Oliphant to testify did not violate the defendant's constitutional rights because the witnesses asserted a valid fifth amendment right. See *State* v. *Simms*, 170 Conn. 206, 209–10, 365 A.2d 821 (in conflict between witness' fifth amendment right against self-incrimination and defendant's right to compulsory process, fifth amendment right prevails), cert. denied, 425 U.S. 954, 96 S. Ct. 1732, 48 L. Ed. 2d 199 (1976).

[15] The defendant also claims, as a procedural matter, that the court erred by not individually assessing whether each question implicated the witness' fifth amendment right to remain silent, and instead permitting a "blanket" assertion of that right. We do not address this claim because we conclude that, even if the procedure was improper, these questions did not implicate the fifth amendment.

[16] As to these questions, the court's failure to compel Bugg, Vance, and Oliphant to testify did not violate the defendant's constitutional rights because the same testimony already had been presented during the state's case-in-chief, and the defendant has identified no compelling tactical reason why that testimony needed to be repeated in the defense case-in-chief. See *State* v. *West*, 274 Conn. 605, 624–25, 877 A.2d 787 ("[t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense . . . [which is] in plain terms the right to . . . present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies" [internal quotation marks omitted]), cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005).

[17] The defendant argues that this error was structural and thus not subject to harmlessness analysis. We disagree. "[W]e forgo harmless error analysis only in rare instances involving a structural defect of *constitutional magni-*

state's case-in-chief. We thus conclude that the defendant has failed to meet his burden of proving that the improper exclusion of these witnesses' testimony to the same effect during his case-in-chief was harmful.

Because the court did not permit the state to revoke these witnesses' immunity and properly held that the state need not grant them additional immunity when they were called as defense witnesses, and because the court's failure to compel these three witnesses to reiterate testimony as defense witnesses was harmless, the defendant's first claim fails.

II

The defendant's second group of claims entails three alleged evidentiary errors: (1) that the court improperly admitted uncharged misconduct evidence suggesting that the defendant had a gun one week before the shooting and four months after the shooting; (2) that the court improperly admitted a prior inconsistent statement by Bugg to impeach his trial testimony that he had never discussed the shooting with his cousin; and (3) that the court improperly permitted the state's lead detective, Slavin, to testify, in the course of describing how the

tude. . . . Structural defect cases defy analysis by harmless error standards because *the entire conduct of the trial, from beginning to end, is obviously affected* . . . ." (Emphasis altered; internal quotation marks omitted.) *State* v. *Artis*, 314 Conn. 131, 150, 101 A.3d 915 (2014). "[S]tructural defect cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. . . . Such errors infect the entire trial process . . . and necessarily render a trial fundamentally unfair . . . . Examples of such structural errors include, among others, racial discrimination in the selection of a grand jury or petit jury and the denial of a defendant's right to counsel, right to a public trial, or right to self-representation." (Citations omitted; internal quotation marks omitted.) Id., 151. Here, the court's various *evidentiary rulings* improperly excluding testimony that the jury had already heard neither were an error of *constitutional* magnitude nor "infect[ed] the entire trial process . . . necessarily render[ing] [the] trial fundamentally unfair . . . ." (Internal quotation marks omitted.) Id.

investigation proceeded, about various witnesses' statements to the police.

We begin by setting forth the standard of review. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007); see also *State* v. *Douglas F.*, 145 Conn. App. 238, 246, 73 A.3d 915 (because "[t]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion" [internal quotation marks omitted]), cert. denied, 310 Conn. 955, 81 A.3d 1181 (2013). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the trial court's rulings on evidentiary matters." (Internal quotation marks omitted.) *State* v. *Gauthier*, 140 Conn. App. 69, 79–80, 57 A.3d 849, cert. denied, 308 Conn. 907, 61 A.3d 1097 (2013).

"[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was

substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 558–59.

We address each of the defendant's three evidentiary claims in turn.

A

The defendant first challenges the court's admission of testimony from two witnesses about whether he possessed a gun on two occasions other than the night of the shooting, arguing that such evidence of uncharged misconduct was more prejudicial than probative. Even if the court improperly admitted this testimony, which we do not conclude, nevertheless, it was harmless.

In this regard, the defendant first challenges the court's admission of a portion of Oliphant's testimony during which the prosecutor asked if Oliphant had told the police about an incident on January 9, 2010, when the defendant allegedly shot someone in the groin at a bar fight. Initially, the state sought to admit this testimony for substantive purposes, to prove that the defendant possessed a gun nine days before the Diamond Court robbery and thus had the means to commit the Diamond Court robbery. The defense objected that it was more prejudicial than probative. The court ruled that the state could ask Oliphant only whether the defendant had a gun on January 9 because gun possession then was relevant to "an element of the fifth count of the information,"[18] and "[t]hat is an exception where [the evidence is relevant to] an element of the crime,

[18] The fifth count of the information, which charged the defendant with criminal possession of a firearm in violation of § 53a-217 (a) (1), alleged that "on or about January 18, 2010, at approximately 9:42 p.m., at or near [Diamond Court, the defendant] possessed a firearm and had been convicted of a felony."

[and that] is one of the reasons why uncharged misconduct can be allowed." See Conn. Code Evid. (2009) § 4-5 (b) ("[e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove . . . an element of the crime").

The state, however, sought to ask about the details of the January 9, 2010 incident as well, to the extent that Oliphant had described them in his statement to the police but repudiated that statement at trial. The prosecutor made an offer of proof outside the presence of the jury, during which she examined Oliphant line by line on his police statement about the January 9 incident. Oliphant categorically denied that he ever gave such a statement and added that he had "never seen [the defendant] with a gun." After the proffer, the defense renewed its objection to the testimony. The court ruled that it would allow the questions "only for purposes of [the] impeachment and credibility of Mr. Oliphant," and, when the jury returned to the courtroom, the court instructed it accordingly. The state then examined Oliphant line by line on the statement he had given to police about the defendant shooting another person in the groin one week before the Diamond Court shooting. Oliphant categorically denied giving such a statement to the police and added that he had "never seen [the defendant] with a gun ever."

The second piece of uncharged misconduct evidence that the defendant claims the court improperly admitted is the portion of his uncle Omar's testimony in which Omar said that he saw the defendant with a gun on May 8, 2010. Initially, the state sought to admit the testimony to prove that the defendant possessed a gun four months after the Diamond Court shooting; the defense objected that such testimony was more prejudicial than probative; and the court ruled that the testimony was admissible under § 4-5 (b) of the (2009) Connecticut Code of Evidence as relevant to an element

of the fifth count of the information.[19] After an extensive offer of proof by the state, the defense also objected that the testimony was not relevant to the gun possession charge in count five because the May 8, 2010 gun was not the gun that the defendant allegedly possessed on January 18, 2010. The state argued that the defendant's possession of a different gun four months later was still relevant to whether the defendant possessed a gun on the night of the Diamond Court shooting. The court ruled that Omar's testimony that the defendant possessed a different gun four months after the Diamond Court shooting was not relevant to establish an element of the fifth count of the information but was admissible together with the testimony about gun possession on January 9, 2010, and January 18, 2010, as evidence of "a system of criminal activity" of gun possession engaged in by the defendant, offered to prove the defendant's intent to rob the victim at Diamond Court.[20] See Conn. Code Evid. (2009) § 4-5 (b) ("[e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove . . . a system of criminal activity"). Omar then testified that he saw the defendant with a handgun on May 8, 2010. In its jury charge, the court instructed the jury that the testimony about gun possession on May 8, 2010, was admitted "solely to show or establish a system of criminal activity being engaged in by the defendant."

Even if the court had improperly admitted both of these portions of testimony, which we do not conclude, we hold that the defendant has nevertheless failed to carry his burden of proving that the jury's verdict was substantially swayed by its admission. See, e.g., *State*

[19] See footnote 18 of this opinion.

[20] The defendant was charged with two counts of attempted robbery in the first degree in violation of §§ 53a-49 and 53a-134, one count of conspiracy to commit robbery in the first degree in violation of §§ 53a-48 and 53a-134, and one count of felony murder with a predicate felony of robbery.

v. *Sanseverino*, 287 Conn. 608, 637, 949 A.2d 1156 (2008) ("[e]ven if we were to assume, without deciding, that the trial court improperly admitted the evidence . . . we conclude that the defendant failed to meet his burden of providing that such impropriety was harmful"), overruled in part on other grounds 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), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012).

The defendant acknowledges that his claim is evidentiary, not constitutional, in nature. "[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 558–59.

First, this testimony was not particularly important to the prosecution's case. Whether the defendant had

a gun on January 9, 2010,[21] or on May 8, 2010, was ancillary to the central issue of the case, namely, whether the defendant participated in the robbery and shooting of the victim on January 18, 2010. The state presented ample evidence of the robbery, as discussed subsequently in connection with the strength of the prosecution's case.

Second, evidence that the defendant possessed a gun weeks before or months after the shooting was largely superfluous because there was also evidence that he possessed a gun on the night of the shooting.

Third, as to corroborating or contradictory evidence, multiple witnesses either testified or admitted in statements to the police, which the state previously had submitted into evidence, that they saw the defendant with a gun on the night of the shooting or on other nights, while several witnesses—most notably Bugg and Vance, in direct contradiction to their police statements—testified that they had never seen the defendant with a gun. Neither Oliphant's nor Omar's testimony was unique or pivotal in this regard.

[21] The court instructed the jury that it could use the testimony about January 9, 2010, only to assess Oliphant's credibility, not for substantive purposes. The defendant argues that the jury would have ignored this clear instruction and instead used the evidence substantively. "[I]t is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010). Nevertheless, in determining whether evidence is more prejudicial than probative, a court must assess the risk that a jury will ignore such instructions and use evidence for an improper purpose. See *State* v. *Busque*, 31 Conn. App. 120, 124–25, 129–32, 623 A.2d 532 (1993) (reversing conviction where evidence was such that jury likely used it for improper purpose, despite court's clear instruction), appeal dismissed, 229 Conn. 839, 643 A.2d 1281 (1994). Because the defendant here does not challenge the admission of the January 9 gun possession testimony to the extent that the jury properly used it to assess Oliphant's credibility, in our analysis of harmlessness we consider the risk that the jury improperly used that testimony for substantive purposes.

Fourth, the defendant was able adequately to cross-examine both Oliphant and Omar. Oliphant testified favorably to the defense during both direct and cross-examination.

Fifth and finally, the prosecution's case was strong. The state's case comprised more than thirty witnesses and more than 200 exhibits over the course of fifteen days of testimony.

The victim's mother testified that, from the family apartment, she saw two people with physiques similar to the defendant and Vance both shoot at the victim at approximately 9:40 p.m. on January 18, 2010. The victim's brother testified that, from the family apartment, he saw the defendant and a second man both shoot at the victim a little after 9:30 p.m. on January 18, 2010.

The state submitted the prior statements and testimony of the defendant's two accomplices, Bugg and Vance, both of whom initially confessed to the armed robbery in those statements and testimony. Although they recanted their confessions once they received plea deals and testified favorably to the defense at trial, the state impeached them with phone call recordings in which Bugg seemingly asked various relatives to help him coordinate his testimony with Vance, saying at one point that Vance had agreed to "take the whole charge" in exchange for some money.

Oliphant and his then girlfriend, Sade Stevens, both gave statements to police that they had heard the defendant and Vance confess to robbing and shooting the victim when they came to Oliphant's apartment on the night of January 18, 2010, although they, too, partially recanted those statements at trial and claimed instead that Vance alone confessed that he robbed and shot the victim.

The state's crime scene technicians and its ballistics expert determined that the four bullet cores recovered

from the crime scene plus the intact bullet recovered from the victim's body were .38 class bullets, fired from a .38 Special revolver, a .357 Magnum revolver, or a nine millimeter pistol. Because pistols eject bullet casings when fired, however, the state's ballistics expert testified that the lack of casings found at the crime scene was consistent with the shots being fired from a revolver. Multiple witnesses either testified or gave statements to police that were admitted into evidence to the effect that the defendant had a .38 revolver and that Vance had a .357 revolver, which they had with them on the night of the shooting.

Phone records showed that, at approximately the time of the shooting, the defendant's cell phone reflected several calls from the area of Diamond Court. Various neighbors saw a four door white car driving through Diamond Court just before the shooting and speeding out of Diamond Court just after the shooting. The defendant's aunt testified that, on the night of the shooting, she had lent the defendant her rental car—a four door, white Hyundai—and that they returned the car to the rental company the next day.

The defendant himself testified that, on the night of the shooting, he and Vance dressed all in black and drove to Diamond Court with Bugg in the defendant's white rental car; that they parked behind the apartments; that the defendant and Vance exited the car and walked first toward the man in the SUV, then toward the victim after they realized the man in the SUV had children; that Vance fired shots in the victim's direction; that Bugg pulled up in the car; that the defendant and Vance got in; and that Bugg drove off. The defendant claimed, however, that they never agreed or tried to rob anyone; Vance had gotten into an unrelated altercation with the victim, on his own, and shot him for that reason. The state introduced into evidence phone call recordings in which the defendant repeatedly told his

mother to convince one of the prosecution witnesses to invoke her fifth amendment rights if called to testify.

As a result, we conclude that the defendant has failed to carry his burden of proving that the jury's verdict was substantially swayed by the admission of evidence that he had a gun one week before or several months after the shooting.

B

As to Bugg's prior inconsistent statement, the defendant challenges the court's admission of the testimony of Bugg's cousin, Foote, about Bugg's confession to him during a car ride several weeks after the shooting. We conclude that the court properly admitted that testimony for the limited purpose of impeaching Bugg's credibility.

The following additional facts and procedural history are relevant to this claim. Initially, the state sought to admit the challenged testimony for substantive purposes, arguing that, although it was hearsay, it fell under the coconspirator exception to the prohibition on hearsay,[22] but the state later conceded that the coconspirator exception did not apply. Instead, the state sought to admit the testimony solely for impeachment purposes, as extrinsic evidence of a prior inconsistent statement by Bugg. The state argued that, under the Connecticut Code of Evidence, "it's within the judicial discretion of the trial court whether to admit the impeaching statements where no foundation has been laid." See Conn. Code Evid. § 6-10 (c) ("[i]f a prior inconsistent statement made by a witness is not . . . disclosed to the witness at the time the witness testifies, and if the

[22] See Conn. Code Evid. § 8-3 ("[t]he following are not excluded by the hearsay rule . . . [1] . . . [a] statement that is being offered against a party and is . . . [D] a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy").

witness admits to making the statement, extrinsic evidence of the statement is inadmissible, *except in the discretion of the court*" [emphasis added]). The defense objected to the testimony as hearsay and argued that, if the state wished to use it as an inconsistent statement, then it should have disclosed it to Bugg when he testified.

After reviewing the transcript of Bugg's earlier trial testimony, the court noted that Bugg twice had denied confessing to Foote, once when asked directly if "there came a point in time where [he] told [Foote] what had happened on Diamond Court"—Bugg replied, "[n]o"—and, second, when Bugg was asked if his statement to police that "[t]he only one [he] told about this [was his] cousin Marquis[e] Foote" was true—Bugg replied, "[n]o." The court ruled that Foote could testify to Bugg's prior inconsistent statement, but that such testimony would be admissible only for the limited purpose of impeaching Bugg.

Accordingly, before Foote testified to his conversation with Bugg, the court instructed the jury as follows: "Ladies and gentlemen, I talked to you when we first began the trial about evidence admitted for a limited purpose. Any comments that Mr. Bugg made to Mr. Foote, they can be used by you only for purposes of evaluating the credibility of Mr. Bugg; you can't use them for any other purpose. So, to the extent that you find them [relevant] you can use them, but only insofar as they relate to the credibility of Mr. Bugg; they are not to be used by you . . . these statements are not to be used by you for substantive purposes. So, this is a limit[ed] inquiry, credibility only, not for substantive purposes."

Foote testified that three or four weeks after the shooting, he and Bugg were driving around smoking pot when Bugg confided in him what had happened on

the night of the shooting. Foote recalled that Bugg had said that he, Vance, and the defendant were out looking to rob someone that night. They saw the victim and decided to rob him. The defendant and Vance got out of the car and put a gun in the victim's face, which he pushed away. The victim then ran away and the defendant and Vance shot him. The state asked if Bugg had ever told Foote that, on the night of the shooting, he, the defendant, and Vance were there to buy marijuana, or to settle a debt. Foote testified that Bugg had not told him such a story.

At the end of the trial, the court again instructed the jury: "The testimony of Marquise Foote was admitted only for impeachment purposes as to Rayshaun Bugg. Any other use of that testimony would be improper."

We begin by setting forth the applicable law. Section 6-10 (a) of the Connecticut Code of Evidence provides: "The credibility of a witness may be impeached by evidence of a prior inconsistent statement made by the witness." Our Supreme Court has held that "[i]mpeachment of a witness by the use of a prior inconsistent statement is proper only if the two statements are in fact inconsistent. . . . Moreover, the inconsistency must be substantial and relate to a material matter." (Citations omitted; emphasis omitted.) *State* v. *Richardson*, 214 Conn. 752, 763, 574 A.2d 182 (1990).

Section 6-10 (c) of the Connecticut Code of Evidence provides in relevant part that "[i]f a prior inconsistent statement made by a witness is not . . . disclosed to the witness at the time the witness testifies, *extrinsic evidence* of the statement is inadmissible, *except in the discretion of the court*." (Emphasis added.) This court has held that "[w]e have no inflexible rule regarding the necessity of calling the attention of a witness on cross-examination to his alleged prior inconsistent statements before either questioning him on the subject

or introducing extrinsic evidence tending to impeach him." (Internal quotation marks omitted.) *State* v. *Gauthier*, supra, 140 Conn. App. 79. Rather, trial "[c]ourts have wide discretion whether to admit prior inconsistent statements that have not satisfied the typical foundational requirements in § 6-10 (c) of the Connecticut Code of Evidence . . . ." (Internal quotation marks omitted.) Id., 80.

Here, the defendant argues that the court abused its discretion in admitting Foote's testimony under § 6-10 (c) of the Connecticut Code of Evidence, as extrinsic evidence of a prior inconsistent statement by Bugg. In view of all the circumstances, we conclude that the court reasonably decided (1) that Bugg's confession to Foote was substantially inconsistent with both his denial of having made such a confession and with his testimony at trial about driving to Diamond Court only to buy marijuana from the "weed man" on the night of the shooting; and (2) that the issue of whether the jury should believe Bugg's statement to police that the defendant and Vance committed the crimes charged, or Bugg's testimony at trial that they merely attempted to buy marijuana, was material to the defendant's guilt or innocence. Accordingly, the court did not abuse its discretion in admitting the challenged testimony for the limited purpose of impeaching Bugg.[23]

[23] The defendant also argues that Foote's testimony was improper hearsay. We disagree. "An out-of-court statement *offered to prove the truth of the matter asserted* is hearsay and is generally inadmissible unless an exception to the general rule applies." (Emphasis added; internal quotation marks omitted.) *State* v. *Rosario*, 99 Conn. App. 92, 108, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007). Evidence offered for another purpose, however, "is admissible not as an exception to the hearsay rule, but because it is not within the rule." *State* v. *Sharpe*, 195 Conn. 651, 661, 491 A.2d 345 (1985). Here, the court twice instructed the jury that the evidence was admitted solely for impeachment. "It is a fundamental principle that jurors are presumed to follow the instructions given by the judge." (Internal quotation marks omitted.) *State* v. *Williams*, 258 Conn. 1, 15 n.14, 778 A.2d 186 (2001).

C

The defendant dresses his third and final evidentiary claim in constitutional garb, arguing that "the trial court erred in permitting lead detective . . . Slavin to testify about and comment on hearsay information police received from the state's witnesses, [that the admission of this testimony] violated the defendant's rights to confrontation and cross-examination, [that the admission of this testimony] invaded the province of the jury as to both witness credibility and critical disputed facts, and [that the admission of this testimony] was contrary to the rules of evidence." (Internal quotation marks omitted.) The defendant argues that the court permitted Slavin to testify as a "super-witness" who filtered the testimony of other witnesses for the jury. We conclude that the court properly admitted Slavin's testimony for the limited purpose of explaining how the police investigation proceeded.

The following additional facts and procedural history are relevant to this claim. Near the end of the state's case-in-chief, the state recalled Slavin as a witness so that he could testify about how the police investigation of the January 18, 2010 shooting proceeded. As part of this testimony, the state planned to ask Slavin about the statements that various witnesses had given to police. The defense objected that such testimony would be both improper hearsay and improper commentary on the testimony of other witnesses. The court ruled that such testimony was admissible, but only "with respect to individuals that have already testified," and "only for the purpose of [showing] how that affected the [police] investigation . . . [not] for any other purpose." The court added that it would be giving the jury a limiting instruction and, accordingly, instructed the jury as follows:

"You're also going to hear testimony about what some of the witnesses said to the police—witnesses that have

already testified here in front of you. That—those comments by Lieutenant Slavin about what a witness said, *that is not intended in any way to affect your individual determination of the credibility of that witness as they—as they sat here on the* [*witness*] *stand and testified. The whole purpose of this testimony by Lieutenant Slavin is to give you, in context, how the police investigation proceeded.* So, there are going to be some comments about other things you've heard here from other witnesses. *That's not to be used for any purpose other than how the police reacted to those responses.* So, you've got—we talked about compartments. You've got a compartment for the witness and what the witness testified to. Then you've got a compartment, comments that Lieutenant Slavin may make about what those witnesses said. *Again, only to give you the context of the police investigation.*

"You've got to separate that so the fact that I'm going to allow him to make comments on what somebody else said *doesn't mean in any way, shape, or form that you should treat that testimony any differently than I instructed you to treat all the testimony, which is to take everybody individually and treat them by the same standard.*" (Emphasis added.) The court clarified, "[and] if I said, what they said, I didn't mean in any [way] to support anything that anybody said. I'm just trying to apply the rules as best I can. You've got to determine the credibility. That's your job, not my job."

Slavin testified as follows about the investigation and the role that various witnesses' police statements played in it. Ten days after the shooting, the police received a tip. On the basis of that tip, he entered two nicknames into a police database and came up with the names of the defendant and Oliphant. He searched the Judicial Branch website for those names and found that the defendant received a ticket a few days before the shooting. From the police report of that incident, he

obtained the defendant's phone number and a description of the car he drove, which matched the car seen on the night of the shooting. He also learned of a third individual, Vance, who was with the defendant when he was ticketed.

One year later, on January 5, 2011, Foote was arrested on unrelated charges and told police that he had information about the January 18, 2010 shooting. Foote confirmed that the defendant, Oliphant, and Vance were involved and added a fourth name—Bugg. Foote told police that those individuals tried to rob the victim on the night of the shooting, that the victim "disrespected" the attempted robbery, that they shot him for that reason, and that Bugg was the getaway driver. Foote did not give the police a written statement at that time.

The police next interviewed Oliphant and his then girlfriend, Stevens, who both gave written statements on February 2, 2011, denying that Oliphant was involved and asserting that the defendant, Vance, and Bugg were the culprits. On February 10, 2011, the police interviewed Bugg, who gave a written statement confessing that he, the defendant, and Vance, but not Oliphant, attempted the robbery on the night of January 18, 2010. Bugg's statement that the defendant and Vance initially planned to rob a man in an Acura SUV, but changed plans when they saw he had two children caused one of the detectives to remember a phone call he received shortly after the shooting from a friend who was at Diamond Court picking up his children on the night of the shooting. On February 16, 2011, police interviewed him and took a written statement. On February 18, 2011, the police interviewed Vance's then girlfriend, Vondella Riddick, who gave a written statement. Finally, police traveled to North Carolina where they interviewed Vance, who gave a written statement on February 22, 2011, confessing that he, the defendant, and Bugg attempted to rob the victim and ended up shooting him.

At that point, the police arrested the defendant, Vance, and Bugg. Prior to trial, the police conducted additional interviews, including a second interview with Stevens and an interview with the defendant's aunt, both of whom gave written statements.

After the state finished questioning Slavin, the defense cross-examined him. The defense previously had cross-examined each of the witnesses whose police statements Slavin discussed in his testimony.

The court's final charge to the jury at the end of the trial reiterated that the jurors were "the sole judges of the facts," and that they "must determine the credibility of police personnel in the same way and by the same standards as [they] would evaluate the testimony of any other witness." The charge did not specifically reference Slavin's testimony, but instructed the jury generally that, "[y]ou will recall that I have ruled that some testimony and evidence has been allowed for a limited purpose. Any testimony or evidence which I identified as being limited to a purpose you will consider only as it relates to the limits for which it was allowed, and you shall not consider such testimony or evidence in finding any other facts as to any other issue."

Although the defendant frames his objection to this testimony in constitutional terms, invoking the sixth amendment's confrontation clause[24] and the fair trial component of the fourteenth amendment's due process clause,[25] his claim is in reality evidentiary in nature. See

[24] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The sixth amendment right to confrontation is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[25] The defendant argues that this testimony violated his "right to have his jury determine issues of credibility and fact" and that this "state[s] [a claim] of constitutional magnitude." Although he does not specify under what provision of the constitution he asserts this right, we gather from the cases he cites that it is essentially a "fair trial" claim under the due process

State v. *Smith*, 110 Conn. App. 70, 86, 954 A.2d 202 ("[r]obing garden variety claims [of an evidentiary nature] in the majestic garb of constitutional claims does not make such claims constitutional in nature" [internal quotation marks omitted]), cert. denied, 289 Conn. 954, 961 A.2d 422 (2008).

As to the defendant's confrontation clause claim, the United States Supreme Court has stated that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford* v. *Washington*, 541 U.S. 36, 60 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Here, the court "allow[ed] comments [only] with respect to individuals that ha[d] already testified" at trial, on statements that "ha[d] already been presented to the jury . . . ." The defendant had an opportunity to cross-examine those witnesses about their statements and so the confrontation clause was not implicated.[26]

clause of the fourteenth amendment to the United States constitution, which provides in relevant part: "nor shall any State deprive any person of life, liberty or property, without due process of law . . . ."

[26] Although Slavin did testify, in one instance, to the out-of-court statement of a nonwitness, we conclude that the defendant waived any challenge to that testimony. At trial, the state asked Slavin how the police first learned who was involved in the shooting. Slavin began to say that they had received a tip but defense counsel interrupted, objecting "as to what the tip might have been" on the ground that it was hearsay. The state claimed it for its effect on the listener, the court overruled the objection, and Slavin testified that the police "received a tip from a young lady who overheard some people talking on a bus that a party named Rex and Stacks or . . . Dreads were . . . the ones responsible for killing [the victim]." The court then excused the jury and held a sidebar, at which defense counsel asked the court to strike the testimony about "the tip information" but expressly agreed that the state could "ask the question, you heard something, you got a tip, and then as a result of that tip, what did you do. It doesn't have to have what the tip is." The court adopted that position, ruling that Slavin could testify that "the authorities [got] a tip and act[ed] on that" but could not testify that "the tip said (a), (b), or (c)." When the court reiterated that the state could ask about "[t]he fact . . . [that police] got a tip," the state asked, "[b]ut that's where the objection would l[ie] for [defense counsel]," and the court replied: "That's not what I heard. What I heard was, the issue was

As to the defendant's fair trial claim, because we conclude that the court properly admitted the challenged testimony and properly instructed the jury as to its use, the defendant's right to a fair trial was not implicated.

Proceeding then to the defendant's evidentiary claims, the defendant objects to the testimony on two grounds: (1) as improper commentary on the testimony of other witnesses, and (2) as improper hearsay. Neither objection has merit.

First, the defendant argues that "Slavin's testimony in this case . . . placed an improper gloss on the testimony of other witnesses." (Internal quotation marks omitted.) Our Supreme Court has held that "it is improper to ask a witness to comment on another witness' veracity." *State* v. *Singh*, 259 Conn. 693, 706, 793

with respect to the *content* of the conversation from someone outside of the authorities. Am I correct in that?" (Emphasis added.) Defense counsel replied, "Yes." The court then brought the jury back into the courtroom, instructing the jurors that it was striking the testimony they had heard about the tip and that although Slavin would be testifying about what others had said, such testimony was "not to be used for any purpose other than how the police reacted to those responses . . . to give [jurors] the context of the police investigation." The state then elicited the following testimony from Slavin:

"Q. Okay. And now you indicated that at some point in time a tip came into the Waterbury police?

"A. Yes.

"Q. And when was that?

"A. It was on, I believe, January 28th, 2010.

"Q. Okay. And based on that tip, what did you do?

"A. Based on that tip, the—the names that I had to work with, the nicknames—we have a database of nicknames, street names, that we've been compiling—particularly another sergeant and I—since—for almost ten years now. We had those nicknames in this list, and the nicknames came out to be Stacks, which would be [the defendant], and Rex or Dreads, which turned out, we believed, to be Mr. Oliphant—Jabari Oliphant."

Defense counsel did not object to this testimony. Against this background, "[w]e deem this claim waived, and, therefore, we decline to review it." *State* v. *Phillips*, 160 Conn. App. 358, 369, 125 A.3d 280, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015).

A.2d 226 (2002). "[I]t is never permissible . . . to ask a witness to characterize the testimony or statement of another witness . . . ." (Internal quotation marks omitted.) Id., 707; see also id., 708 ("improper to ask question designed to cause one witness to characterize another's testimony as lying"); id. ("question to defendant of whether victim lied in testimony improper because it sought information beyond defendant's competence").

Here, however, Slavin did not comment on the testimony of other witnesses. Although Slavin did testify about the same underlying facts as other witnesses, such as the statements that various witnesses gave to the police, the defendant has cited to no rule that bars two witnesses from testifying about the same underlying facts. Nor are we aware of any.

Moreover, the defendant's argument that Slavin improperly colored the jury's perception of other witnesses' testimony ignores that Slavin's testimony *was not admitted for substantive or credibility purposes*. The court admitted Slavin's testimony for the limited purpose of explaining how the police investigation proceeded, instructed the jurors that his testimony was "not to be used for any [other] purpose," and specifically instructed the jurors that Slavin's testimony should not "in any way . . . affect your individual determination of the credibility of [other] witness[es] as they . . . sat here on the [witness] stand and testified." See *State* v. *L.W.*, 122 Conn. App. 324, 335 n.7, 999 A.2d 5 (court's cautionary instructions relevant to analysis of whether evidence properly admitted), cert. denied, 298 Conn. 919, 4 A.3d 1230 (2010). "We presume that the jury followed the instructions as given." *State* v. *Webster*, 308 Conn. 43, 58 n.11, 60 A.3d 259 (2013). "[I]t is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation

marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010). Accordingly, we conclude that Slavin's testimony was not improper commentary on the testimony of other witnesses.

Second, the defendant argues that "Slavin's testimony about what codefendants and other witnesses told police consisted of first level, double, triple and quadruple hearsay." On the contrary, the court did *not* admit Slavin's testimony for its truth, but only to explain "how the police investigation proceeded." "An out-of-court statement *offered to prove the truth of the matter asserted* is hearsay and is generally inadmissible unless an exception to the general rule applies." (Emphasis added; internal quotation marks omitted.) *State* v. *Rosario*, 99 Conn. App. 92, 108, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007). Evidence offered for another purpose, however, "is admissible not as an exception to the hearsay rule, but because it is not within the rule." *State* v. *Sharpe*, 195 Conn. 651, 661, 491 A.2d 345 (1985). For instance, "the state may . . . present evidence to show the investigative efforts made by the police and the sequence of events as they unfolded, even if that evidence would be inadmissible if offered for a different reason." *State* v. *Vidro*, 71 Conn. App. 89, 95, 800 A.2d 661, cert. denied, 261 Conn. 935, 806 A.2d 1070 (2002). Here, the state did exactly that. Accordingly, the challenged testimony was not improper hearsay.

The court properly admitted Slavin's testimony for the limited purpose of explaining how the police investigation proceeded.

III

The defendant's fifth and final claim is that the court improperly penalized him with a longer sentence for electing to go to trial, as revealed by the court's remarks at sentencing.

The following additional facts and procedural history are relevant to this claim. Before being sentenced, the defendant addressed the court to explain that although "I do accept responsibility for my actions [insofar as] . . . I feel that if I was living a better life in 2010, I wouldn't be sitting right here. [Nevertheless] I did not shoot [the victim]. I didn't do it. What I did was see what happened and didn't say anything, when the police questioned me . . . [a]nd I guess that's the reason why I'm sitting here today because . . . I was the first person they questioned in this case, [and] if I [had] told the truth [about] what happened [then] the prosecutor wouldn't be over there saying [I] deserve the maximum, she would have been offering me a deal like she was offering Bugg to lie . . . [at] my probable cause hearing. And I would be free in—in another five years, maybe. . . . But since I didn't say anything this is what I have to—this is what I have to live with. . . . Once again, I'm sorry, for y'all loss, but the facts . . . of the matter, Your Honor, [are that] on these five counts . . . I'm innocent."

After briefly addressing the victim's family, the court addressed the defendant: "Anthony Collymore, your actions on the night of January 18th, 2010, were completely random, totally senseless and just vicious in nature. You shattered [the victim's] family, left them with a loss that will linger with them forever. Your actions clearly demonstrate total indifference to the laws of our society and a complete disregard for others.

"*Furthermore, you are still unwilling to accept full responsibility for your actions.* I cannot get inside your mind to determine your motives that night to commit such a senseless act. You should have known that the decisions that you took that night were going to lead to a tragic end, and they did." (Emphasis added.) The court concluded by noting the defendant's lengthy, violent criminal record.

At the outset, we note that this unpreserved claim by the defendant "is reviewable under the first two prongs of *State* v. *Golding*, [213 Conn. 233, 239, 567 A.2d 823 (1989)] because: (1) the record is adequate for review as the trial court's remarks during sentencing are set forth in the transcripts in their entirety; and (2) the claim is of constitutional magnitude, as demonstrated by the defendant's discussion of relevant authority in his main brief." (Footnote omitted.) *State* v. *Elson*, 311 Conn. 726, 756, 91 A.3d 862 (2014). We thus turn to the third prong of *Golding*, to determine whether "the alleged constitutional violation . . . exists and . . . deprived the [defendant] of a fair trial." (Internal quotation marks omitted.) *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

As to whether a constitutional violation exists, it is "clearly improper" to increase a defendant's sentence "based on [his or her] decision to stand on [his or her] right to put the [g]overnment to its proof rather than plead guilty . . . ." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Elson*, supra, 311 Conn. 758. Nevertheless, a defendant's " 'general lack of remorse' "; id., 761–62; and " 'refusal to accept responsibility' "; id., 783; for crimes of which he was convicted are " 'legitimate sentencing considerations' . . . ." Id., 761. "[R]eview of claims that a trial court lengthened a defendant's sentence as a punishment for exercising his or her constitutional right to a jury trial should be based on the totality of the circumstances. . . . [T]he burden of proof in such cases rests with the defendant." (Internal quotation marks omitted.) Id., 759.

Here, the defendant argues that the court's comment at sentencing that he was "still unwilling to accept full responsibility for [his] actions" proves that the court improperly lengthened his sentence as punishment for electing to go to trial. We disagree. In context, that language was a comment on the defendant's remarks

at sentencing, in which the defendant continued to blame his predicament in large part on his quality of life and on the prosecutor, rather than accept full responsibility for his own actions. In context, the court's remark was proper commentary on the defendant's " 'general lack of remorse' "; *State* v. *Elson*, supra, 311 Conn. 761–62; and " 'refusal to accept responsibility' . . . ."[27] Id., 783; see also *State* v. *West*, 167 Conn. App. 406, 419, 142 A.3d 1250 (2016) (rejecting similar claim).

The judgment is affirmed.

In this opinion the other judges concurred.

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[27] On several of his claims, the defendant also asks this court to invoke its supervisory powers to reverse the judgment of the trial court and remand the case for a new trial. We decline to do so. "The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010). This is not such a case.

Finally, the defendant asks this court "to review the sealed exhibit [submitted to the court at trial, containing the personnel files of several detectives who testified] and [to] grant appropriate relief." (Citation omitted.) The state does not dispute the propriety of such review, but argues that "unless the sealed exhibit contains information . . . so compelling that it could have impacted the outcome at trial," the court did not abuse its discretion in denying the defendant's request for those files. At trial, the court agreed to review the files to determine whether any information in them should be disclosed to the defendant. It appears that no such information was disclosed. We have reviewed the sealed files ourselves and conclude that the court did not abuse its discretion in denying the defendant's request.

Note

Appellate Court Memorandum Decisions begin at page 901. Page numbers 899 to 900 are intentionally omitted.

Reporter of Judicial Decisions

MEMORANDUM DECISIONS

LAHCEN LATRACHE *v.* YALE UNIVERSITY
(AC 37742)

Sheldon, Keller and Foti, Js.

Argued September 12—officially released October 4, 2016

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Nazzaro*, *J.*

Per Curiam. The judgment is affirmed.

JESSIE LEE COGER *v.* COMMISSIONER OF CORRECTION
(AC 38607)

Lavine, Prescott and Bishop, Js.

Argued September 13—officially released October 4, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver*, *J.*

Per Curiam. The appeal is dismissed.

IN RE PROBATE APPEAL OF FRANK N. PELUSO, EXECUTOR (ESTATE OF FRANCES M. RENDAHL) ET AL.
(AC 38168)

Alvord, Prescott and Harper, Js.

Argued September 13—officially released October 4, 2016

Named plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Povodator*, *J.*

Per Curiam. The judgment is affirmed.

GARY COOKE *v.* COMMISSIONER
OF CORRECTION
(AC 38072)

Beach, Sheldon and Gruendel, Js.

Argued September 15—officially released October 4, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Cobb*, *J.*

Per Curiam. The appeal is dismissed.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
v. SARAH BECKER ET AL.
(AC 38184)

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

Argued September 16—officially released October 4, 2016

Defendants' appeal from the Superior Court in the judicial district of Litchfield, *Pickard*, *J.*; *Marano*, *J.*

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

KEITH E. ANDERSEN *v.* COMMISSIONER
OF CORRECTION
(AC 37631)

Beach, Sheldon and Lavery, Js.

Argued September 19—officially released October 11, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver*, *J.*

Per Curiam. The judgment is affirmed.

SOLOMON WHITE *v.* COMMISSIONER
OF CORRECTION
(AC 37320)

Lavine, Alvord and West, Js.

Argued September 21—officially released October 11, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Sferrazza*, *J.*

Per Curiam. The appeal is dismissed.

JONATHAN MITCHELL *v.* COMMISSIONER
OF CORRECTION
(AC 38073)

Sheldon, Prescott and Mullins, Js.

Argued September 22—officially released October 11, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger*, *J.*

Per Curiam. The appeal is dismissed.

STEPHEN J. BRUNO *v.* LISA BRUNO
(AC 37472)

Lavine, Sheldon and Mullins, Js.

Submitted on briefs September 23—officially released October 11, 2016

Defendant's appeal from the Superior Court in the judicial district of Danbury, *Winslow*, *J.*

Per Curiam. The judgment is affirmed.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE *v.* LAQUISHA R. WORTHY ET AL.
(AC 37791)

Beach, Prescott and Mullins, Js.

Submitted on briefs September 22—officially released October 11, 2016

Defendants' appeal from the Superior Court in the judicial district of Hartford, Housing Session, *Woods*, *J.*

Per Curiam. The judgment is affirmed.

DEXTER MURRAY *v.* COMMISSIONER OF CORRECTION
(AC 38393)

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

Argued September 22—officially released October 11, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Sferrazza*, *J.*

Per Curiam. The appeal is dismissed.
