OFFICIAL

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PROCEEDINGS

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

OCTOBER, 2016—DECEMBER, 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 November 16, 2016, under constitutional limitation as to age.
[2] Senior Judge effective December 1, 2016.

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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Sexual assault in spousal relationship; assault of elderly person second degree; assault of elderly person third degree; whether trial court erroneously ruled that defendant's full written statement to police was inadmissible as self-serving hearsay; claim that court improperly construed provision of Connecticut Code of Evidence (§ 1-5 (b)) applicable to admission of portions of certain written statements; whether court improperly refused to mark certain confidential records for identification; whether court improperly refused to review certain confidential records in camera.

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Manslaughter first degree; tampering with physical evidence; claim that certain comments by prosecutor during closing argument to jury deprived defendant of due process right to fair trial; whether prosecutor's remarks to jury violated defendant's fifth amendment and statutory (§ 54-84 (a)) rights not to testify; claim that prosecutor misled jury by suggesting that state had to meet probability standard rather than beyond reasonable doubt standard to disprove defendant's claim of self-defense; claim that prosecutor improperly argued to jury facts that were based on assumptions; whether trial court abused discretion by permitting police detective to testify about body language and other indicators of untruthfulness; reviewability of claim that detective's testimony about body language and other indicators of untruthfulness was inherently unreliable and, thus, not proper topic of expert testimony; whether court improperly admitted into evidence certain photographs of victim's corpse; whether court abused discretion by excluding evidence of fatal knife fight that defendant witnessed fourteen years prior to trial; claim that evidence of knife fight was relevant to defendant's subjective belief that he needed to use deadly physical force against victim in self-defense, as permitted by statute (§ 53a-19).

State *v.* Robles 127

Kidnapping first degree; attempt to commit kidnapping first degree; sexual assault fourth degree; whether trial court properly dismissed motion to correct illegal sentence and determined that it lacked subject matter jurisdiction to consider motion when claims raised in motion did not challenge sentence or sentencing proceeding but, rather, challenged validity of defendant's guilty pleas and

subsequent conviction on kidnapping charges; whether motion to correct illegal sentence was proper procedural path for defendant to contest validity of guilty pleas following change to kidnapping laws.

State *v.* Simpson 168

Murder; accessorial liability; whether trial court abused discretion by denying defendant's motion to withdraw guilty plea; whether court abused discretion by failing to conduct evidentiary hearing to determine if defendant understood nature of charge to which he pleaded guilty; claim that court abused discretion by failing to address or to conduct inquiry into defendant's complaints concerning his attorney; claim that court abused discretion by failing to address defendant's request for appointment of new attorney.

State *v.* Walker 794

Murder; conspiracy to commit murder; robbery first degree; conspiracy to commit robbery first degree; claim that there was insufficient evidence to support defendant's conviction of robbery first degree and conspiracy to commit robbery first degree; whether multiple convictions for two conspiracy crimes that arose out of single agreement violated double jeopardy clause; claim that trial court committed plain error by failing to instruct jury on accomplice testimony with respect to certain witness; whether defendant implicitly waived claim of instructional error as to accomplice testimony.

State *v.* Walker (Memorandum Decision) 906

State *v.* Whitnum-Baker 523

Creating public disturbance; whether there was sufficient evidence to support conviction of creating public disturbance; credibility of witnesses.

State *v.* Yates 383

Motion to correct illegal sentence; denial of motion to correct illegal sentence; claim that trial court improperly granted motion to withdraw appearance filed by counsel appointed pursuant to State *v.* Casiano *(282 Conn. 614); whether trial court improperly granted motion to withdraw appearance without requiring appointed counsel to articulate reasoning behind determination that no sound basis existed for defendant's motion to correct illegal sentence; claim that trial court improperly determined that sentence had not been imposed in illegal manner; whether reasoning for appointed counsel's no sound basis determination was readily apparent from record; claim that court improperly considered three unserved arrest warrants at sentencing; whether court effectively sentenced defendant for additional robberies before taking his pleas; whether form of judgment was improper because defendant's motion to correct illegal sentence properly invoked trial court's jurisdiction.*

Vaccaro *v.* Shell Beach Condominium, Inc. 21

Injunction; claim that trial court applied wrong statute of limitations to claim that defendant condominium association and board

of directors violated statute (§ 47-75 (a)) that provides defendants shall comply with Condominium Act of 1976 (§ 47-68a et seq.) and condominium instruments; whether genuine issues of material fact existed as to whether statutes of limitations were tolled by continuing course of conduct doctrine; claim that cause of action pursuant to § 47-75 (a) was equitable and not subject to statute of limitations; whether plaintiff's claim pursuant to § 47-75 (a) was time barred; claim that plaintiff's cause of action was similar to one for adverse possession; whether act or condominium instruments established that defendants owed continuing duty to plaintiff.

Valente *v.* Commissioner of Motor Vehicles (Memorandum Decision) 908

Village Apartments, LLC *v.* Ward 653

Quiet title action; claim that trial court improperly found that plaintiff's easement rights over defendants' property had been extinguished; whether easement rights were extinguished pursuant to statute (§ 47-33h).

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

Westberry *v.* Commissioner of Correction 721

Habeas corpus; claim that second habeas court erroneously concluded that petitioner's due process rights were not violated by alleged use of perjured testimony at his criminal trial; whether petitioner establish that perjured testimony had been used at trial; whether petitioner established that court's credibility determinations were clearly erroneous; whether court reasonably concluded that it could not credit witness' recantation because witness had not testified at second habeas trial; whether court had adequate factual basis for discrediting witness' testimony; claim that court improperly rejected petitioner's claim of actual innocence; whether petitioner demonstrate by clear and convincing evidence that he was actually innocent of murder as required by first prong of standard set forth in Miller *v.* Commissioner of Correction *(242 Conn. 745).*

Williams *v.* Commissioner of Correction 776

Habeas corpus; whether habeas court abused discretion in denying petition for certification to appeal; claim that trial counsel rendered ineffective assistance by failing to take curative measures to remedy certain alleged prosecutorial improprieties; claim that appellate counsel rendered ineffective assistance by failing to raise claim regarding prosecutorial impropriety.

Windham Realty, LLC *v.* Pond View Apartments Ltd. (Memorandum Decision) 906

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DAQUAN HOLMES
(AC 38395)

Lavine, Keller and West, Js.

Syllabus

Convicted, after a jury trial, of the crimes of murder and attempt to commit murder, the defendant appealed. The defendant's conviction stemmed from an incident in which he shot and killed the victim after an altercation outside of a bar. The incident started when the defendant and another man had an argument concerning the defendant's girlfriend. The defendant and four other men got into a car and drove to a residence to retrieve a gun. They then drove to a location where the victim and another person were walking across the street. The defendant got out of the car and shot the victim, mistaking him for the man with whom he had argued. The owner of the bar had called 911 at 2:25 a.m. The bar's surveillance video showed one of the men with the defendant leave the bar at 2:28 a.m. to join the defendant outside. A surveillance video from a Laundromat showed the victim fall to the pavement at 3:32 a.m. At 2:37 a.m., a police officer called dispatch to report that he had heard gunshots and had arrived at the scene. The victim later died, and the defendant was arrested. Following his conviction, the defendant filed a motion for a new trial, which the trial court denied, and the defendant appealed. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion in denying his motion for a new trial because he alleged there was insufficient evidence to support the jury's verdict: contrary to the defendant's assertion that the verdict was based on physically impossible conclusions that he and his cohorts could have left the bar, driven to the residence, and then driven to the scene of the shooting in the allotted time, the jury was free to credit or discredit any of the

time stamps on the surveillance videos, which would have left enough time for the defendant to have shot the victim; moreover, the defendant's assertion that two witnesses were so lacking in credibility that his conviction was a miscarriage of justice was without merit, as the jury was free to make credibility determinations and to believe whatever testimony it found credible.

2. This court found unavailing the defendant's claim that he was deprived of his due process right to a fair trial as a result of certain prosecutorial improprieties during the questioning of a witness on direct and redirect examination, as well as during closing argument: the prosecutor's questions and remarks were not improper, as he had a good faith basis for pursuing the challenged line of questioning each time he returned to it, and his questioning on redirect examination had been specifically invited by a ruling by the court during the trial; furthermore, contrary to the defendant's contention, the prosecutor did not mischaracterize the evidence during his closing argument.

3. This court declined the defendant's request to exercise its supervisory powers to set aside his conviction, as the prosecutor did not deliberately commit any improprieties or defy an order of the trial court as claimed by the defendant.

Argued May 10—officially released October 18, 2016

Procedural History

Substitute information charging the defendant with the crimes of murder and attempt to commit murder, brought to the Superior Court in the judicial district of New London, geographical area number twenty-one, and tried to the jury before *Jongbloed*, *J.*; verdict of guilty; thereafter, the court denied the defendant's motion for a new trial and rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed*.

Cameron R. Dorman, assigned counsel, for the appellant (defendant).

Stephen M. Carney, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

WEST, J. The defendant, Daquan Holmes, appeals from the judgment of conviction, rendered after a jury

trial, of murder in violation of General Statutes § 53a-54a[1] and criminal attempt to commit murder in violation of General Statutes §§ 53a-49[2] and 53a-54a. On appeal, the defendant claims that (1) the trial court abused its discretion in denying his motion for a new trial, (2) the prosecutor engaged in prosecutorial impropriety, and (3) even if his due process rights were not violated, this court should exercise its supervisory powers and set aside his conviction due to deliberate prosecutorial impropriety. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In the early morning hours of May 21, 2011, Maria Fluker was outside of Chacer's bar (bar), located on Franklin Street in Norwich, with her boyfriend, the defendant. A man asked Fluker for a cigarette, which angered the defendant. An argument began involving twenty to thirty people, including the defendant. During the argument, the defendant yelled, "get my gun."

The owner of the bar, Geoffrey Chase, who observed the altercation, heard yelling about guns and knives; he said that he had specifically heard someone say, "I'm going to get my gun." Chase called 911 and reported that there were about twenty people outside his bar yelling about guns and knives. Meanwhile, Roberta Karr, a friend of the defendant, was in her apartment across the street from the bar when she heard the disturbance. In response, she went outside to pull the defendant away from the crowd and into her apartment. The defendant, however, ran back toward the crowd, where

[1] 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 . . . ."

[2] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be . . . ."

he encountered William Long, who had been inside the bar. Karr got into a vehicle driven by Fluker, and they headed toward the defendant. The defendant, his brother, Ronald Holmes, and Long got into the car.

The group drove to Long's residence and Long went inside. When he reemerged, he had a gun. Upon getting back in the car, Long handed the gun to the defendant. The group then drove to the area of Boswell Avenue and Franklin Street, where Joseph Cadet and Johnny Amy were walking across the street. Long and the defendant got out of the car and began yelling. Cadet and Amy continued to walk and informed the two men that they had the wrong guys.

Shots were fired in the direction of Amy and Cadet, and the defendant was seen holding the gun. Amy fell to the pavement, and Cadet ran away from the defendant and Long. When the defendant and Long returned to the car, the defendant was holding the gun. Fluker then drove to Mystic, and while in route, Karr saw Long throw the gun from the car. The group rented a room at a hotel in Mystic, where Crystal Smith, Long's girlfriend, arrived after receiving a phone call from Ronald Holmes.

Scott Dupointe, an officer with the Norwich Police Department, was stationed in the area of the shooting and was parked on Franklin Avenue when he heard six to eight gunshots and immediately drove in the direction of the shots. Upon reaching the intersection of Boswell Avenue and Franklin Street, he found Cadet kneeling over Amy. At 2:37 a.m., Dupointe called dispatch to report that he heard gunshots and had arrived at the scene. After radioing dispatch about the situation, Dupointe drove down Boswell Avenue in search of the car Cadet described as the vehicle in which the defendant and Long had fled the scene. Unable to locate the vehicle, Dupointe returned to the scene.

Amy was transported to the hospital, but he was later pronounced dead. Following an autopsy, the medical examiner determined the cause of death to be a gunshot wound to the head. The scene of the shooting was processed and several defects located in an adjacent building were consistent with gunfire. Several .22 caliber shell casings and a .22 caliber live round were also found in the vicinity. On the basis of a statement made by Karr, the police recovered a Ruger .22 caliber, semiautomatic pistol that was consistent with having fired the bullets recovered at the crime scene. Upon searching Long's residence, police also located a .22 caliber hollow point round that was the same type located at the scene of the shooting. The bullet was consistent with the ammunition typically associated with the recovered pistol. In addition, the police seized a surveillance video from a nearby Laundromat that showed Cadet and Amy walking together, Amy falling to the ground, and Cadet running away and then returning to assist Amy.

A warrant was issued nationwide for the defendant's arrest, and he was arrested in New York on October 19, 2011. He was brought back to Connecticut and charged with murder in violation of § 53a-54a and criminal attempt to commit murder in violation of §§ 53a-49 and 53a-54a. Following a jury trial, the defendant was convicted of both counts. The court subsequently denied the defendant's motion for a new trial and sentenced the defendant to fifty-four years of incarceration. This appeal followed. Additional relevant facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion in denying his motion for a new trial. In his motion for a new trial, the defendant argued that "[t]here was insufficient evidence to support the jury's

finding inasmuch as the defendant demonstrated through scientific evidence and various times of day within the state's evidence that the allegations offered by the state could not have happened." On appeal, the defendant argues that the verdict was based on physically impossible conclusions that he and his cohorts could have left the bar, driven to Long's residence, and then driven to the scene of the shooting in the allotted time.[3] The defendant alternatively acknowledges, however, that he could have been at the scene of the shooting, but only if Karr and Fluker lied about the events that occurred from the time that Long left the bar to the time of the shooting, and he further argues that the facts demonstrate that the testimony of both Karr and Fluker was intentionally untrue, which rendered their testimony unreliable and untrustworthy.

We begin our analysis by setting forth our standard of review and the relevant law. "[T]he proper appellate standard of review when considering the action of a trial court granting or denying a . . . motion for a new trial . . . [is] the abuse of discretion standard. . . . 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. . . . We do not . . . determine whether a conclusion different from the one reached could have been

[3] The state argues that the defendant's claim is unpreserved because he is not challenging the court's denial of his motion based on the overall sufficiency of the state's evidence, but, rather, he is arguing that his motion should have been granted because it was physically impossible for the defendant to have been at the scene at the time of the shooting and that Fluker and Karr were not credible witnesses. We conclude, however, that the defendant sufficiently preserved this claim in his motion for a new trial in which he contended that "[t]here was insufficient evidence to support the jury's finding inasmuch as the defendant demonstrated through scientific evidence and the various times of the day within the state's evidence that the allegations offered by the state could not have happened."

reached. . . . A verdict must stand if it is one that a jury reasonably could have returned and the trial court has accepted." *Bolmer* v. *McKulsky*, 74 Conn. App. 499, 510, 812 A.2d 869, cert. denied, 262 Conn. 954, 818 A.2d 780 (2003).

When evaluating a physical impossibility claim, "[a] verdict should be set aside [w]here testimony is . . . in conflict with indisputable physical facts, the facts demonstrate that testimony is either intentionally or unintentionally untrue, and leave no real question of conflict of evidence for the jury concerning which reasonable minds could reasonably differ. . . . Scientific evidence is relevant to a determination of what is physically impossible." (Citation omitted; internal quotation marks omitted.) *State* v. *Vazquez*, 119 Conn. App. 249, 254, 987 A.2d 1063 (2010).

The defendant set forth the following time line. Chase called 911 at 2:25 a.m. to report the argument occurring outside of the bar. The bar's surveillance video shows Chase making this call at 2:25 a.m. The surveillance video also shows Long exiting the bar at 2:28 a.m. to join the defendant outside. The surveillance video from the Laundromat first shows Cadet and Amy walking away, and then Amy falling to the ground and Cadet running away at approximately 3:32 a.m. At 2:37 a.m. Dupointe called dispatch to report that he heard gunfire.

The defendant contends that the time stamp on the Laundromat surveillance video was exactly one hour off, and asserts that the time on the video should have been 2:32 a.m. The defendant argues that based upon the evidence, "the time elapsed between Long leaving the bar and the earliest time the defendant could have arrived at the scene of the shooting was just under five and a half minutes." The defendant claims that the evidence shows that it would have taken the defendant between nine and thirteen minutes to get to the scene

of the shooting, and therefore, he could not have been at the scene when the victim was shot. The state contends that the defendant offered no evidence to support his claim that the Laundromat video was exactly one hour off, and further asserts that the Laundromat video was less than an hour off. The state bases that argument on the fact that Dupointe called in to dispatch that shots were fired at 2:37 a.m., and contends that it is unlikely that it would have taken Dupointe five minutes to make the call that shots had been fired.

The defendant cannot prevail on this physical impossibility argument. First, the jury was free to credit or discredit any of the time stamps on the surveillance videos, leaving enough time for the defendant to have shot the victim. The 911 call made by Chase corroborated the time stamp on the bar surveillance video. Therefore, the jury, as the fact finder, was free to credit the bar surveillance video time stamp as being in general conformity with the actual time because in the video one can see Chase dialing 911, and the time on the video at that moment is proximate to the time of the call. The defendant offered no evidence in support of the assertion that the Laundromat surveillance video time stamp was exactly one hour off, and the ambulance dispatch report indicated that the dispatch call from Dupointe was received at 2:37 a.m. Thus, given the fact that Dupointe testified that he was just down the road from the scene when he heard the gunshots and that he called in to dispatch upon arriving on scene, the jury was free to infer that the Laundromat video was less than an hour off, and, therefore, that it was not physically impossible for the defendant to have been at the scene when the victim was shot.

The defendant relies on Fluker and Karr's credibility to support his argument that it was physically impossible for him to arrive at the scene of the shooting in the allotted time, however, he alternatively acknowledges

that "he could have been at the scene of the shooting, but only if Karr and Fluker lied about the events that occurred from the time that Long left the bar to the time of the shooting." The defendant seems to also be arguing that the court abused its discretion in denying his motion for a new trial because the state's witnesses were so lacking in credibility that his conviction constituted a miscarriage of justice. We are not persuaded.

This court has established that "[i]n evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . Finally, it is beyond question that the trier of fact . . . the jury, is the arbiter of credibility. This court does not sit as an additional juror to reconsider the evidence or the credibility of the witnesses. . . . Whether [a witness'] testimony [is] believable [is] a question solely for the jury. It is . . . the absolute right and responsibility of the jury to weigh conflicting evidence and to determine the credibility of the witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Vazquez*, supra, 119 Conn. App. 255.

The defendant claims that the facts demonstrate that the testimony of both Karr and Fluker was intentionally untrue, which rendered their testimony completely unreliable and untrustworthy, particularly with respect to the events that occurred from the time Long left the bar up to, and including, the time of the shooting. Although it is true that Karr and Fluker admitted to falsehoods contained in their initial statements to the police, the jury was free to make credibility determinations and to believe whatever testimony it found credible. See id. In denying the defendant's motion for a new trial, the

court indicated that it "[found] that the evidence was sufficient to permit the jury reasonably to find the defendant guilty beyond a reasonable doubt on each of the two counts" and noted that "defense counsel ably argued that there was reasonable doubt based on the scientific evidence as well as the time frame of the events and the jury rejected those arguments." Accordingly, the court did not abuse its discretion in declining to grant the defendant's motion for a new trial.

II

The defendant next claims that his due process rights were violated as a result of improper remarks made by the prosecutor during the questioning of a witness and during closing arguments. The state argues that none of the prosecutor's questions or remarks were improper. We agree with the state and conclude that the prosecutor's questioning of the witness and his remarks during closing argument were proper, and, therefore, did not deprive the defendant of his right to a fair trial.

"In analyzing claims of prosecutorial impropriety, we engage in 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. . . . If we conclude that prosecutorial impropriety has occurred, we then must determine, by applying the six factors enumerated in [*State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)], whether the entire trial was so infected with unfairness so as to deprive the defendant of his due process right to a fair trial. . . . These factors include the extent to which the impropriety was invited by defense conduct, the severity of the impropriety, the frequency of the impropriety, the centrality of the impropriety to the critical issues in the case, the effectiveness of the curative

measures adopted and the strength of the state's case." (Citations omitted; internal quotation marks omitted.) *State* v. *Pascal*, 109 Conn. App. 55, 67, 950 A.2d 566, cert. denied, 289 Conn. 917, 957 A.2d 880 (2008).

"[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 the 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*, 147 Conn. App. 761, 783, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014). Moreover, "[w]hen 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015). "Because [some of] the claimed prosecutorial [improprieties] occurred during closing arguments, we advance the following legal principles. [P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments . . . . In determining whether such [an impropriety] has occurred, the reviewing court must give due deference to the fact that [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. . . . Thus, as the state's advocate, a 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." (Internal quotation marks omitted.) *State* v. *Ross*, 151 Conn. App. 687, 693–94, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271, 272 (2014).

A

The defendant first claims that the prosecutor improperly questioned Smith on direct examination and redirect. Specifically, he argues that "the prosecutor repeatedly attempted to elicit from [Smith] a highly prejudicial extrajudicial statement made by Long, who did not testify, and through improper questioning of the witness effectively made known the substance of that statement to the jury—all in violation of multiple trial court orders . . . ."

The following transpired during Smith's testimony and is relevant to the resolution of the defendant's claim. Smith testified that, after receiving a phone call from Ronald Holmes, she went to a hotel in Mystic. She further testified that Long, Fluker, Karr, Ronald Holmes, and the defendant were in the hotel room. The prosecutor asked about the atmosphere in the room and according to Smith, "[e]verybody looked a little stressed out." The prosecutor then asked what happened next, and Smith replied, "[Long] looked at [the defendant] and said," at which point defense counsel objected, and the prosecutor withdrew his question. The prosecutor then asked Smith, "Mr. Long said something; that's a yes or no," and Smith responded, "[y]es."

Next, the prosecutor asked Smith, "[d]id the defendant say something in response to what Mr. Long said?" Smith responded, "[h]e did." The prosecutor asked her what the defendant said and Smith replied, "[n]iggas disrespect, niggas get spanked." The prosecutor then asked Smith, "[w]hat did Mr. Long say that caused that reaction?" Smith replied, "[h]e said," at which point defense counsel objected. The prosecutor argued that Long's statement would explain the defendant's subsequent statement, but the court ruled that he could ask a question that would not elicit the out-of-court statement made by Long. The prosecutor then asked Smith, "what

caused [the defendant] to say that?" Smith replied, "William Long said," at which point defense counsel again objected. The court sustained the objection.

Later, on direct examination, the prosecutor asked Smith, "what do you know which would cause there to be fear of the police?" and Smith stated, "I know the statement that [the defendant] made." The prosecutor then asked, "[w]as there any other statement that made you think that the police might come?" Smith replied, "[y]es." The prosecutor asked her what statement that was, and Smith responded, "Long made a statement," at which point defense counsel objected, but the court allowed her answer to stand. The prosecutor then asked Smith, "what was it that made there a concern that the police might come?" Smith replied, "[h]e said—Long," at which point defense counsel objected again, and the court heard counsel outside the presence of the jury. Defense counsel argued that the prosecutor's conduct was bordering on bad faith for continuously attempting to get Long's statement into evidence, and the prosecutor argued that Long's statement was necessary to place the defendant's statement into context. The court sustained defense counsel's objection and stated that the prosecutor could ask the witness about the defendant's statement without eliciting Long's hearsay statement. Once the jury returned, the prosecutor asked Smith what the defendant's statement meant, and she responded, "[i]t means if someone disrespects him, then he'll kill them." The prosecutor followed up by asking, "[t]his is a yes or no; did Mr. Long say anything before that statement was made that made you think that?" Smith answered, "[y]es."

On cross-examination, defense counsel asked Smith, "[a]s far as you know, William Long could have shot [the victim] right?" Smith responded, "[a]s far as I know, except for what I," at which point defense counsel interrupted her and continued with another question, to

which the prosecutor objected, saying Smith did not get to finish her answer. The court allowed her to finish her answer, and she stated, "[a]s far as I know, except for what I was told in the [hotel] room." Defense counsel continued questioning her about whether Long could have shot the victim, and Smith continuously was prompted to state what she heard Long say in the hotel room. The prosecutor again objected when defense counsel continued interrupting Smith's answers, arguing that she should be allowed to answer fully, and the court ruled that defense counsel needed to allow her to answer the questions asked. Defense counsel then prefaced that he was asking yes or no questions and asked Smith, "you can't tell us anything about who shot that boy in the street on May 21, right?" The prosecutor objected, and the court ruled that Smith could answer. Smith replied, "I did hear in the hotel room who shot the man in the street."

On redirect examination, the prosecutor asked Smith, "[d]o you know who shot the man in Norwich?" Smith responded, "I was told who shot the man in Norwich." The prosecutor then asked her, "[w]ho told you who shot the man in Norwich?" Smith replied, "William Long." Next, the prosecutor asked Smith, "[w]as [the defendant] present . . . when William Long told you who shot the man in Norwich?" Smith responded, "[y]es." The prosecutor then asked what Long said to her, and defense counsel asserted another hearsay objection, which was sustained.

The defendant contends that the prosecutor made seven attempts to elicit testimony from Smith regarding a highly prejudicial statement made by Long that implicated the defendant. The defendant argues that throughout the attempts, the prosecutor defied two explicit court rulings that ordered the prosecutor to ask questions that did not elicit the statement made by Long. The state maintains that the prosecutor had a good faith

basis for pursuing his line of questioning each time he returned to the subject of Long's statement to the defendant.

The content of Long's statement was not elicited from Smith, nor was it included in the prosecutor's inquiries to Smith. Although the court sustained defense counsel's various hearsay objections during the prosecutor's questioning of Smith, the court never admonished the prosecutor or ordered him to move on to a different subject, which would be expected if the prosecutor's questioning was in fact so egregious as claimed. We agree with the state that simply posing an objectionable question does not amount to an actionable impropriety. See *State* v. *Garcia*, 7 Conn. App. 367, 374, 509 A.2d 31 (1986) ("Often, during the course of a trial, objectionable questions are asked, objections are sustained, and the trial goes on. The due administration of justice would be ill served if every time an objectionable question were asked the case would be subject to a mistrial."). Furthermore, it is important to note that many responses from Smith, harmful to the defense, were elicited by defense counsel on cross-examination. It was during cross-examination of Smith that defense counsel posed the question, "[a]s far as you know, William Long could have shot [the victim], right?" Smith responded by stating, "[a]s far as I know . . . except for what I was told in the [hotel] room." Smith's response was interrupted by defense counsel asking another question, to which the prosecutor objected, arguing that Smith did not have a chance to fully answer, and the court allowed Smith to finish her answer. It was also on cross-examination that Smith indicated that she "did hear in the hotel room who shot the man in the street."

Moreover, the prosecutor's questioning on redirect examination was invited by the court's ruling that Smith would be subject to redirect examination in response to

the prosecutor's objection regarding defense counsel's not allowing her to answer. In addition, defense counsel's suggestions that the defendant's statement in the hotel room was in reference to a card game and that Smith did not know who killed the victim invited the prosecutor to inquire further into those subjects. Significantly, defense counsel did not move to strike Smith's answer after the court allowed her to finish it. Therefore, pursuant to our review of the record, we conclude that the prosecutor's questions were attributable to vigorous advocacy as opposed to impropriety.

B

The defendant also argues that the prosecutor made improper remarks during closing arguments. Specifically, the defendant contends that "the prosecutor mischaracterized evidence in his closing argument to the jury."

"[T]he 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. . . . [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. The state's attorney should not be put in the rhetorical straightjacket of always using the passive voice, or continually emphasizing that he is simply saying I submit to you that this is what the evidence shows, or the like." (Citations omitted; internal quotation marks omitted.) *State* v. *Franklin*, 162 Conn. App. 78, 101, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016).

The defendant argues that the prosecutor made the following improper statements during direct and rebuttal closing arguments, and contends that the statements

were unsupported by the record and mischaracterized the evidence: (1) "The video on the Laundromat says the body fell at 3:32:43; simply not accurate"; (2) "When [the defendant] gets back in the car, [Karr] says that she sees [the defendant] holding the gun"; (3) "[The defendant] is arguing; [Fluker] says the argument is about the fact that an individual, we would suggest the evidence might show that that individual is Cornelius Wingate"; (4) "You can see that on the video, the phone call is made, the hand gestures, and Long does in fact exit the bar just like Fluker says."

The first statement that the defendant challenges regarding the inaccuracy of the Laundromat surveillance video is conceded by the defendant, given that the defendant's claim regarding physical impossibility is premised on the fact that the Laundromat video was exactly one hour off; in other words, that the time on the video was not in fact accurate. The second challenged statement, that Karr said she saw the defendant with the gun after he got back into the car, was a proper representation of Karr's testimony.[4] Although the state agrees with the defendant that at an earlier point in her testimony, when asked whether Long held the gun the entire time in the car, Karr responded, "yea," the state maintains that Karr appeared to be referring to the time

[4] On direct examination of Karr by the prosecutor the following exchange occurred:

"Q. After the man fell and the men are back in the car, did you see [the defendant] with the gun?

"A. In the backseat, yeah. . . .

"Q. Did [the defendant] have the gun when he got back in the car?

"A. I believe so, yeah.

"Q. Is that a yes?

"A. Yes. . . .

"Q. When you saw the body fall, could you, in that immediate time, see one of the men with a gun?

"A. When they got back in the car, yeah, [the defendant] had the gun.

"Q. [The defendant] had the gun when he got back in the car?

"A. Mm-hmm."

period prior to the shooting, during which the group was searching for the individual with whom the defendant had an argument.

The third statement that the defendant challenges regarding the prosecutor's suggestion that Wingate may have been the individual with whom the defendant got into a fight, was also proper, as it raised a possible inference based on the evidence in the record. Wingate testified that he had engaged in an argument outside of the bar, during which he was stabbed. He also identified Long, a man he knew from prison, as one of the individuals he was arguing with, as well as another man and a woman. According to Fluker's testimony, in the hotel room "Long said something about stabbing somebody, cutting them." Additionally, Wingate was wearing a red shirt the night of the shooting, which was seized by the police and introduced into evidence. The victim was wearing a red shirt when he was shot, which also was introduced into evidence. These facts, together with Cadet's testimony that he told the two men that encountered him and the victim in the street that they had the wrong guys, was enough to permit the inference that the shooter mistook the victim for Wingate. Finally, the prosecutor's description of the bar video, specifically his reference to hand gestures, was supported by both the video itself and Fluker's testimony that Long left the bar because "[the defendant's brother] Ron flagged him to come outside." Accordingly, on the basis of our thorough review of the record, we conclude that no prosecutorial impropriety occurred during the prosecutor's closing arguments because his arguments were predicated on evidence produced during the trial.

III

The defendant also claims that this court should exercise its supervisory powers and set aside his conviction

due to deliberate prosecutorial impropriety. We decline that request.

"[I]n considering claims of prosecutorial [impropriety], we apply a due process analysis and consider whether the defendant was deprived of a fair trial. . . . A different standard is applied, however, when the claim involves deliberate prosecutorial [impropriety] during trial which violates express court rulings . . . . When such an allegation has been made, we must determine whether the challenged argument was unduly offensive to the maintenance of a sound judicial process. . . . If we answer that question in the affirmative, we may invoke our supervisory powers to reverse the defendant's conviction. . . . In determining whether the use of our supervisory powers to reverse a conviction is appropriate, we consider whether the effect of the challenged remark was to undermine the authority of the trial court's ruling . . . . We also consider the degree of prejudice suffered by the defendant as a result of the remark. . . .

"Our Supreme Court . . . has urged a cautionary approach in this regard, noting that [r]eversal of a conviction under our supervisory powers . . . should not be undertaken without balancing all of the interests involved: the extent of prejudice to the defendant; the emotional trauma to the victims or others likely to result from reliving their experiences at a new trial; the practical problems of memory loss and unavailability of witnesses after much time has elapsed; and the availability of other sanctions for such [impropriety]. . . .

"In *State* v. *Ubaldi*, 190 Conn. 559, 462 A.2d 1001, cert. denied, 464 U.S. 916, 104 S. Ct. 280, 78 L. Ed. 2d 259 (1983), our Supreme Court first enunciated the principles relevant to claims of deliberate prosecutorial impropriety in violation of a trial court's ruling. Our Supreme Court held that, where such impropriety has

occurred, an appellate court may exercise its inherent supervisory authority over the administration of justice to defend the integrity of the judicial system. . . . The court blatantly rejected the argument that it could upset a criminal conviction on account of prosecutorial impropriety only where such conduct had deprived the defendant of his constitutional right to a fair trial. . . . Instead, the court recognized that, given the proper circumstances and regardless of whether deliberate impropriety deprived a defendant of a fair trial, the drastic step of upsetting a criminal conviction might be necessary to deter conduct undermining the integrity of the judicial system. . . . Thus, after weighing relevant considerations, the court placed a primacy upon its responsibility for the enforcement of court rules in prosecutorial [impropriety] cases and for preventing assaults on the integrity of the tribunal. . . . The court reasoned that it had an obligation to deter purposeful impropriety and concluded that reversal in cases involving such deliberate conduct may be warranted even where a new trial is not constitutionally mandated. . . . Hence, the touchstone of our analysis in a claim of this nature is not the fairness of the trial but the existence of [impropriety] that deliberately circumvents trial court rulings." (Internal quotation marks omitted.) *State* v. *Reynolds*, 118 Conn. App. 278, 296–98, 983 A.2d 874 (2009), cert. denied, 294 Conn. 933, 987 A.2d 1029 (2010).

The defendant maintains that the prosecutor engaged in impropriety based on his "repeated noncompliance with the trial court's explicit and unambiguous order" and "his flippant response to the trial court when the defendant objected to the repeated attempts to get Long's statement before the jury." We disagree. Although the defendant contends that the court's order was explicit and unambiguous, the only statement of the court that the defendant references in his appellate

brief is the court's statement, "Well, hold on. If you wish to be heard further, maybe this is something that should be done outside of the presence of the jury." The defendant also cites the prosecutor's response to that inquiry in which he stated, "It's the court's pleasure; I don't mind doing it in front of them." The statement by the court on which the defendant relies as an explicit order seems to be phrased as a suggestion or even a question posed to the prosecutor. Furthermore, as previously noted, the court did not expressly forbid the prosecutor from continuing on his line of questioning with respect to Long's statement to the defendant, but, rather, the court sustained various hearsay objections that defense counsel made throughout the prosecutor's examination of the witness. Moreover, as previously discussed, the court did not admonish the prosecutor or reprimand him in any other way. Accordingly, it cannot be said that the prosecutor defied an order of the court. We thus decline to exercise our supervisory powers as there is no basis to do so.

The judgment is affirmed.

In this opinion the other judges concurred.

ENRICO VACCARO *v.* SHELL BEACH CONDOMINIUM, INC., ET AL.
(AC 37811)

Sheldon, Prescott and Bear, Js.

Syllabus

The plaintiff condominium owner sought an injunction and damages from the defendant condominium association and its board of directors, alleging that they had deprived him of the use of a certain garage in violation of the condominium instruments and the Condominium Act of 1976 (§ 47-68a et seq.). The plaintiff purchased his condominium unit in 1999 and was informed that a certain unattached garage would be conveyed with his unit. The condominium declaration forbid conveying title to a condominium unit without conveying all appurtenant interests. In 2009,

the plaintiff received a tax assessment that he believed was substantially higher than prior assessments, and he learned that he was being assessed for the unattached garage and a garage that was attached to his condominium unit's building. The plaintiff contacted the defendants and demanded that they take action to provide him with use of the attached garage pursuant to the condominium instruments and the statute (§ 47-75 [a]) providing that the defendants were obligated to comply with the act, the condominium instruments, and the rules and regulations adopted pursuant thereto. The defendants denied the plaintiff's demand, and the plaintiff commenced the present action alleging that the defendants had deprived him of the use of the attached garage in violation of the condominium instruments and § 47-75 (a). The trial court granted the defendants' motion for summary judgment, concluding that the statutes of limitations had expired on all of the plaintiff's claims and, with respect to the continuing course of conduct doctrine, that the defendants had no ongoing duty to ensure that the plaintiff be assigned the attached garage. On appeal, the plaintiff claimed that the trial court applied the wrong statute of limitations to his claim that the defendants had violated § 47-75 (a), and that genuine issues of material fact existed as to whether the applicable statutes of limitations were tolled by the continuing course of conduct doctrine. *Held*:

1. The trial court properly concluded that the plaintiff's claim pursuant to § 47-75 (a) was time barred: this court found unavailing the plaintiff's claim that his cause of action pursuant to § 47-75 (a) was equitable and not subject to a statute of limitations, as a fair reading of the plaintiff's complaint and prayer for relief suggested that he sought both legal and equitable relief, and, therefore, the running of the applicable limitation period barred both his legal and equitable claims; furthermore, the plaintiff did not claim that the trial court erred in relying on 1999 as the time when the applicable statute of limitations began to run, and, therefore, regardless of whether his claim sounded in contract or tort, his commencement of the action in 2009 was outside the statute of limitations (§ 52-577) for tort claims or the statute of limitations (§ 52-576) for breach of contract claims; moreover, this court rejected the plaintiff's argument that his claim was similar to one for adverse possession, as the plaintiff did not allege or present any evidence that the defendants were in possession of the attached garage, but rather he asserted the breach of a duty, which gave rise to an action sounding in either contract or tort.
2. The trial court properly rendered summary judgment for the defendants, as the plaintiff did not raise a genuine issue of material fact that justified the application of the continuing course of conduct doctrine: neither the condominium act nor the condominium instruments established that the defendants owed a continuing duty to the plaintiff, as they did not define how the defendants were to execute their power to enforce the act or the condominium instruments and, therefore, any duty that the

defendants owed was not an absolute duty to act in all cases; furthermore, the circumstances of this case did not merit the application of the continuing course of conduct doctrine, as all of the plaintiff's injuries arose from either his 1999 acquisition of his condominium or the 1986 conveyance of the attached garage separate from his condominium, and the plaintiff pointed to no separate injuries that arose as a result of the defendants' ongoing failure to enforce his alleged rights.

Argued May 17—officially released October 18, 2016

Procedural History

Action, inter alia, for an injunction requiring the defendants to grant the plaintiff possession and use of a certain condominium garage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of New Haven, where the court, *Wilson, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed.*

Enrico Vaccaro, self-represented, with whom, on the brief, was *Emily A. Gianquinto*, for the appellant (plaintiff).

Sharon Baldwin, for the appellee (named defendant).

Daniel J. Krisch, with whom was *Joshua M. Auxier*, for the appellees (defendant Andrew Hames et al.).

Opinion

BEAR, J. The plaintiff, Enrico Vaccaro, appeals from the summary judgment rendered by the trial court in favor of the defendants, Shell Beach Condominium, Inc. (association), and certain individual members of its board of directors, Andrew Hames, Frank Meolli, Michael Gagliardi, Michelle Augliera, and Raymond Vermette (individually named defendants), on the basis that all of the plaintiff's claims arising from the deprivation of the use of a particular garage were time barred.

The plaintiff argues that the court erred in rendering summary judgment in favor of the defendants, because, inter alia: (1) the trial court applied the wrong statute of limitations to count one of his complaint, which sought to enforce the condominium instruments; and (2) genuine issues of material fact exist as to whether the applicable statutes of limitations were tolled by virtue of the continuing course of conduct doctrine. We affirm the judgment of the court.[1]

Evidence concerning the following facts and procedural history appears in the record. Shell Beach Condominium (condominium) is a condominium complex located in East Haven and organized pursuant to the Condominium Act of 1976 (Condominium Act), General Statutes § 47-68a et seq. It is comprised of forty-seven residential units and fifty-two garages,[2] and includes a number of open-air parking spaces. The association is a nonstock corporation, owned by the unit owners of the condominium; membership in the association occurs immediately upon acquisition of title in a unit. The affairs of the condominium are conducted by a board of directors (board), all of whom are unit owners.

[1] Because we affirm the judgment on the basis that the plaintiff's claims are time barred, we do not consider the plaintiff's arguments that the court improperly determined that other grounds existed for granting the motion for summary judgment as to his claims of trespass and unfair trade practices in violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.

[2] Although a point of contention in the trial court, we do not need to determine conclusively whether the court properly determined that, pursuant to the terms of the condominium declaration, garages are limited common elements and not separate units. Even if we were to conclude that the court properly determined that garages are limited common elements under the declaration, the plaintiff cannot prevail on the remaining aspects of his claim that the defendants owed, and continuously breached, any duty they had as to him. Consequently, we also do not address the plaintiff's arguments that certain actions by the defendants in 2009 tolled the statute of limitations, as the plaintiff explicitly premises these arguments on this court's determination that, contrary to the trial court's memorandum of decision, the garages are separate units.

See General Statutes § 47-80 (c) (1) (bylaws required to contain, inter alia, "[t]he election from among the unit owners of a board of directors"). Each of the individually named defendants was a member of the board when the plaintiff commenced this action.

In 1999, the plaintiff became a unit owner in the condominium when he purchased his individual unit from Salvatore Amendola, who was assisted in the sale by his daughter, Rosalie Porrello. The warranty deed, dated May 26, 1999, and recorded May 27, 1999, purported to convey unit 14 and garage 49.[3] During this transaction, the plaintiff was informed that garage 49 was the garage that would be conveyed with unit 14. Neither Amendola nor Porrello, however, discussed with the plaintiff any use of or ownership in garage 14.[4] Further, although Amendola was a member of the board at the time of the transaction, he was selling a unit that he personally owned.[5] Apart from his conversations with Amendola, the plaintiff did not speak with any member on the board at the time of the conveyance, nor did he speak with any of the individually named defendants, at or before the time of the closing.[6]

The plaintiff did not receive the condominium declaration prior to or during the closing; instead, the association mailed it to him at some point thereafter. Although

[3] Pursuant to the warranty deed, the plaintiff received "all that certain real property . . . known as 2 Old Town Highway, Unit #14, and Garage #49, East Haven, CT . . . ." On the date of this conveyance, however, Porrello, and not Amendola, was the record owner of garage 49.

[4] There is no indication in the record that Amendola or Porrello ever had used or owned garage 14, which, from April 1, 1986, appears to have been owned and used by the owner of unit 19. See footnotes 23 and 25 of this opinion.

[5] Indeed, Amendola was not a party to the underlying action, and the court noted in its memorandum of decision granting summary judgment that "the plaintiff has not alleged any legal relationship or agency between the defendants and Amendola."

[6] In fact, most of the individually named defendants were not unit owners when the plaintiff purchased his unit.

the plaintiff received a copy of the declaration in 1999, he admittedly did not review that document until 2009.

In January, 2009, the plaintiff received a tax assessment that he believed to be substantially higher than prior assessments. He contacted the assessor, and was informed that he was being assessed for both garage 14 and garage 49. After this conversation, the plaintiff examined the condominium instruments[7] and came to believe that he was entitled to the exclusive use of garage 14, not garage 49.[8] The plaintiff contacted the board and demanded that it, on behalf of the association, take action to provide him with use of garage 14 pursuant to the applicable statutory authority and provisions of the condominium instruments. After the board denied the plaintiff's request, the plaintiff commenced this action by summons and a seven count complaint[9] on each of the defendants in July, 2009, in which he alleged, inter alia, that the defendants had deprived him of the use of garage 14 in violation of the condominium instruments and the Condominium Act.

The defendants filed a motion for summary judgment on January 23, 2012, in which they claimed, inter alia, that the statutes of limitations had run on all seven

[7] Pursuant to General Statutes § 47-68a (d), " '[c]ondominium instruments' " include: the declarations, bylaws, survey maps, and plans recorded and filed pursuant to chapter 825 of the General Statutes; any exhibit, schedule, or certification appended to, and recorded or filed with, any declaration, bylaw, survey map, or plan; and any amendment or certification of a declaration, bylaw, survey map, or plan made in accordance with the Condominium Act.

[8] Certain other facts informed the plaintiff's belief that he had an exclusive right to garage 14. Garage 14 is attached to the building in which the plaintiff's unit is located; however, garage 49 is considerably farther away. Additionally, at least some of the garages do not have separate meters for electricity, but, instead, are metered through the like numbered unit to which they are attached.

[9] In this complaint, the plaintiff asserted the following causes of action against the defendants: violation of General Statutes § 47-75 (count one); breach of fiduciary duty (count two); fraudulent misrepresentation (count three); trespass (count four); CUTPA (count five); negligent infliction of

counts of the plaintiff's complaint.[10] After the court allowed additional time for the parties to conduct discovery, and the parties had filed additional briefs, the court heard argument on October 20, 2014. In a memorandum of decision dated February 9, 2015, the court granted the defendants' motion for summary judgment as to all counts, making several determinations relevant to this appeal. First, it determined that, pursuant to the declaration, garages are limited common elements of the condominium,[11] rather than units[12] as the defendants

emotional distress (count six); and "tortuously" breaching the implicit covenant of good faith and fair dealing (count seven).

[10] At the time that the defendants filed their motion for summary judgment, the defendants were represented jointly by the same law firms. Subsequently, on August 31, 2012, counsel for the association withdrew representation as to the individually named defendants, and the association and the individually named defendants are represented separately in this appeal.

[11] Pursuant to § 47-68a (g), a limited common element within the meaning of the Condominium Act "means and includes those common elements designated in the declaration as reserved for the use of a certain unit or units to the exclusion of other units." A common element, in turn, is any part of a condominium that is not a unit. General Statutes § 47-68a (e). Subsections (d) and (h) of the declaration explicitly incorporate these definitions, but then each provide specific examples of what shall be considered a common element and limited common element, respectively, in the condominium.

[12] A "unit" in the Condominium Act is defined by § 47-68a (b) as "a part of the property including one or more rooms or designated spaces located on one or more floors or a part or parts thereof in a building, intended for any type of independent use, and with a direct exit to a public street or highway or to common elements leading to such street or highway." In light of our decision, it is not necessary for us to determine if garage 14 is a unit or a limited common element.

Article 2 (b) of the declaration defines a unit as "a part of the property including one or more rooms or enclosed spaces or recessed balconies and recessed decks located on one or more floors or parts thereof in a building intended for the uses as are more particularly defined in Article 9 of this Declaration, and with a direct exit to a common element leading to a public street or highway. It shall comprise one of the separate and numbered units which are designated in Schedule C attached hereto and made a part hereof, each of which is more particularly described in the Floor Plans of the building referred to in Article 4 hereof, excluding, however, all spaces and improvements lying beneath the undecorated and/or unfinished inner surfaces of the perimeter walls, trim, and floors, and above the undecorated and/or unfinished inner surfaces of the ceilings, and further excluding all spaces and improvements lying beneath the undecorated and/or unfinished

had contended. Second, it also determined that the declaration did not require that particular garages or parking areas be assigned to any particular units, and the defendants therefore had no ongoing duty to ensure that the plaintiff, as title owner of unit 14, be assigned garage 14. Having already concluded that there was no genuine issue of material fact concerning whether the applicable statute of limitations as to each count had run, the court accordingly rendered judgment for the defendants on all counts.[13] The plaintiff filed a motion for reargument and/or reconsideration, which the court denied. This appeal followed.[14]

I

The plaintiff argues that the court erred in rendering summary judgment on the first count of his complaint,

inner surfaces of all interior bearing walls and/or bearing partitions, and partition walls between separate Units and between Units and the Common Elements and Facilities, and further excluding all pipes, ducts, wires, conduits and other facilities running through any interior wall or partition for the furnishing of utility services to other Units or Common Elements. A [U]nit shall include all doors installed within or providing access to a Unit and the heating facility and all window glass installed in any wall or partition in or adjacent to a Unit."

[13] Although disposing of the entire case by determining that there was not a genuine issue of material fact and that the defendants were entitled to judgment as a matter of law with respect to their statutes of limitations defenses, the court also determined that separate grounds existed for granting the motion as to the fraudulent misrepresentation, trespass, CUTPA, and negligent infliction of emotional distress claims. On appeal, the plaintiff does not challenge the court's decision as to his fraudulent misrepresentation and negligent infliction of emotional distress claims.

[14] We address a preliminary matter before considering the merits of the plaintiff's arguments. It is uncontested that the condominium in question was created prior to January 1, 1984, and, therefore, generally is governed by the terms of the Condominium Act and not the Common Interest Ownership Act, General Statutes § 47-200 et seq. (Common Interest Ownership Act). See General Statutes § 47-214. Despite this uncontested fact, certain defined provisions of the Common Interest Ownership Act are applicable to preexisting common interest communities. See General Statutes § 47-216. Because the parties generally have neither raised nor briefed the potential applicability of these provisions, however, we will analyze the issues raised primarily pursuant to the applicable provisions of the Condominium Act.

in which he claimed that the defendants, by their conduct, had violated General Statutes § 47-75 (a),[15] because it improperly relied upon the wrong limitations period in ruling on the timeliness of that claim. In this respect, the plaintiff makes two separate and distinct claims. First, he argues that the court erred in determining that *any* statute of limitations applies to count one because a claim under § 47-75 is equitable in nature. Second, he argues that, even if the court properly determined that the claim pleaded in his first count is subject to a statute of limitations, the court erred in determining that the applicable limitations period is the three year limitations period for tort actions.

The determination of which statute of limitations applies to a given action is a question of law over which our review is plenary. See *Fleet National Bank* v. *Lahm*, 86 Conn. App. 403, 405, 861 A.2d 545 (2004), cert. denied, 273 Conn. 904, 868 A.2d 744 (2005). We address each of the plaintiff's claims in turn.

A

With respect to his first claim, the plaintiff argues that the court improperly determined that count one is subject to any statute of limitations because an action pursuant to § 47-75 is equitable, and equitable proceedings are not subject to statutes of limitations.[16] We disagree.

[15] General Statutes § 47-75 (a) provides: "Each unit owner, and the association of unit owners, shall comply with this chapter, the condominium instruments, and the rules and regulations adopted pursuant thereto. Failure to so comply shall be ground for an action to recover damages or for injunctive relief, or for any other relief to which the party bringing such action may be entitled. Such action may be brought by the association of unit owners against any unit owner or owners or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action. If any such action results in a final judgment or decree in favor of the party instituting such action, such judgment or decree may incorporate a provision for reasonable attorney's fees, as specified in such judgment or decree, to be paid by the party against whom such judgment or decree is entered."

[16] To support his claim that a claim brought pursuant to § 47-75 is equitable in nature, the plaintiff urges us to take cognizance of the "unique amalgam-

The following facts are relevant to the resolution of this claim. In the first count of the complaint, the plaintiff alleges that the defendants, pursuant to both § 47-75 and article 15 of the declaration,[17] are required to comply with and enforce the condominium instruments and the Condominium Act. Pursuant to the declaration, the plaintiff alleges that garages are limited common elements, and that he, as the title owner of unit 14, is entitled to an exclusive easement in garage 14. He further alleges that the declaration forbids any attempt to convey or mortgage the title to a unit without conveying all appurtenant interests or any attempt to sell or transfer an appurtenant interest except as part of the unit to which it is attached, and that the defendants, "in violation of the condominium instruments and the Condominium Act," have "wilfully allowed and/or permitted and/or caused" the interest in garage 14 to be severed from unit 14 and unit 14 to be sold to the plaintiff

ation of property, contract, and tort law" at work in the Condominium Act. Thus, he asserts that an action to enforce the condominium instruments and the Condominium Act is akin to an action to enforce a restrictive covenant, which may be enforced by an injunction, and relies upon both the nature of the relief that he seeks as well as the equivalent provision in the Common Interest Ownership Act to show that a § 47-75 action is equitable. See General Statutes § 47-278 (a) ("A declarant, association, unit owner or any other person subject to this chapter may bring an action to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws. The court may award reasonable attorney's fees and costs.").

[17] The pertinent language of article 15 of the declaration essentially incorporates the text of § 47-75 (a) and broadens its application. Article 15 provides in relevant part: "All present and future Owners, tenants, and occupants of Units and the Association of Unit Owners shall be subject to and shall comply with [the Condominium Act], the provisions of this Declaration, and the Bylaws, attached hereto and as they may be amended from time to time, as well as to such regulations as may be adopted by the Board of Directors of the Association, pursuant thereto. Failure to so comply shall be ground for an action to recover damages or for injunctive relief or for any other relief to which the party bringing such action may be entitled. Such action may be brought by the Association against any Unit Owner or Owners, or, in any proper case, by one or more aggrieved Unit Owners on their own behalf or as a class action."

without the exclusive use of garage 14, and have "wilfully allowed and/or caused and/or permitted and/or continue to permit" another unit owner to use garage 14. (Internal quotation marks omitted.) Further, the plaintiff alleges that the defendants have failed to correct this situation, despite demands by the plaintiff that they "comply with and enforce the condominium instruments, the Condominium Act . . . and the easement in favor of the plaintiff for the exclusive use of" the garage. (Internal quotation marks omitted.) As a result of the defendants' actions, the plaintiff alleges a number of injuries, including that he has been denied the use of garage 14 and has suffered financial harm because, inter alia, he has been assessed for and has paid taxes on that garage, paid for electricity for that garage, and the fair market value of his property has been substantially reduced. Counts two through seven of his complaint rely on most of the same operative facts as count one. In his prayer for relief, he seeks, inter alia, various forms of injunctive relief pursuant to § 47-75 and compensatory damages, but does not attempt to allocate any particular relief to any particular count.

Our case law draws a distinction where statutes of limitations are concerned between purely equitable proceedings and actions where a party can seek both legal and equitable relief. "[I]n an equitable proceeding, a court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within the period of the statute. . . . Although courts in equitable proceedings often look by analogy to the statute of limitations to determine whether, in the interests of justice, a particular action should be heard, they are by no means obliged to adhere to those time limitations." (Citations omitted.) *Dunham* v. *Dunham*, 204 Conn. 303, 326–27, 528 A.2d 1123 (1987), overruled in part on

other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 221, 682 A.2d 106 (1996).

The situation is different, however, where a party asserts a cause of action, pursuant to which it rightfully could seek both legal and equitable relief. "[W]here a party seeks equitable relief pursuant to a cause of action that would also allow that party to seek legal relief, concurrent legal and equitable jurisdiction exists, and the statute of limitations that would be applicable to bar the legal claim also applies to bar the equitable claim." (Internal quotation marks omitted.) *Gager* v. *Sanger*, 95 Conn. App. 632, 641–42, 897 A.2d 704, cert. denied, 280 Conn. 905, 907 A.2d 90 (2006). For instance, in *Dowling* v. *Finley Associates*, *Inc.*, 49 Conn. App. 330, 334–35, 714 A.2d 694 (1998), rev'd on other grounds, 248 Conn. 364, 727 A.2d 1245 (1999), this court held that the plaintiff's claims for equitable relief pursuant to a provision of the Connecticut Uniform Securities Act, General Statutes § 36b-29 (a), were barred by the time limitation set forth in that statute.

A party asserting a claim pursuant to the Condominium Act can seek either legal or equitable relief; see General Statutes § 47-75 (a); and a fair reading of count one of the plaintiff's complaint and the prayer for relief therein suggests that the plaintiff sought both. Further, the plaintiff has pleaded the same essential facts in each of the counts on which he bases his claims for legal and equitable relief. See *Certain Underwriters at Lloyd's*, *London* v. *Cooperman*, 289 Conn. 383, 411, 957 A.2d 836 (2008) (affirming trial court's determination that, where legal claims for statutory theft and conversion were time barred, "the plaintiffs' equitable claims *based on the same facts* also [were] time barred" [emphasis added]). Under these circumstances, the court has concurrent equitable and legal jurisdiction, and the running of the applicable limitation period

would bar both the plaintiff's legal and equitable claims brought pursuant to § 47-75.[18]

B

The plaintiff next argues that, even if the court properly determined that count one alleging a violation of § 47-75 is subject to a statute of limitations, it improperly determined that count one was subject to the three year limitations period set forth in General Statutes § 52-577,[19] which governs torts generally. Noting "the unique nature of condominiums," he asserts that the Condominium Act is concerned with property rights and that the declaration provides that both the relevant statutory provisions and the condominium instruments are covenants that run with the land.[20] Arguing that

[18] Because of this determination, the plaintiff's remaining arguments require little attention. We note that the plaintiff's contention that his action is similar to one to enforce a restrictive covenant would not necessarily exempt his cause of action from being time barred. See General Statutes § 52-575a ("[n]o action or any other type of court proceeding shall be brought to enforce a private restriction recorded in the land records of the municipality in which the property is located or a notation on a filed map pertaining to the use of privately owned land . . . unless such action or proceeding shall be commenced within three years of the time that the person seeking to enforce such restriction had actual or constructive knowledge of such violation").

[19] 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." "[T]he three-year limitation of § 52-577 is applicable to all actions founded upon a tort which do not fall within those causes of action carved out of § 52-577 and enumerated in [General Statutes] § 52-584 or another section." (Internal quotation marks omitted.) *Travelers Indemnity Co.* v. *Rubin*, 209 Conn. 437, 441, 551 A.2d 1220 (1988). "The date of the act or omission complained of is the date when the . . . conduct of the defendant occurs . . . ." (Internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London* v. *Cooperman*, supra, 289 Conn. 408; see also *Farnsworth* v. *O'Doherty*, 85 Conn. App. 145, 150, 856 A.2d 518 (2004) ("[t]he three year limitation period of § 52-577 begins with the date of the act or omission complained of, not the date when the plaintiff first discovers an injury" [internal quotation marks omitted]).

[20] Given this characterization, as well as the clear centrality to the plaintiff's claim of the provisions in the declaration that forbid the severance of interests appurtenant to a unit, we note the failure of the parties to consider the

the appropriate limitations period therefore must be grounded in property law and asserting that his claims are similar to adverse possession claims, the plaintiff contends that the only potentially applicable limitations period is the fifteen year period prescribed for such an action by General Statutes § 52-575 (a).[21]

The individually named defendants and the association disagree with the plaintiff and with each other as to which statute of limitations applies to claims brought pursuant to § 47-75. The individually named defendants assert that, because the plaintiff repeatedly contends that the defendants violated the Condominium Act, count one asserts a claim for a statutory violation and, thus, is subject to § 52-577. In contrast, the association claims that the plaintiff's first cause of action asserts

potential applicability of General Statutes § 52-575a. See footnote 18 of this opinion. Because the parties have limited their arguments to three potential statutes of limitations, however, and have not briefed this issue, we do not consider whether this statute of limitations governs the plaintiff's claim.

[21] General Statutes § 52-575 (a) provides: "No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless within such fifteen-year period, any person or persons claiming ownership of such lands and tenements and the right of entry and possession thereof against any person or persons who are in actual possession of such lands or tenements, gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded as provided in sections 47-39 and 47-40 shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter, provided an action is commenced thereupon within one year next after the recording of such notice. The limitation herein prescribed shall not begin to run against the right of entry of any owner of a remainder or reversionary interest in real estate, which is in the adverse possession of another, until the expiration of the particular estate preceding such remainder or reversionary estate."

a violation of the defendants' duties pursuant to the declaration and, therefore, is governed by General Statutes § 52-576 (a),[22] or, if interpreted as asserting a violation of the Condominium Act, by § 52-577. We conclude that either § 52-576 or § 52-577 would apply to bar this cause of action.

"[W]hen a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon." *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 199, 931 A.2d 916 (2007); see also 51 Am. Jur. 2d 533, Limitation

[22] General Statutes § 52-576 (a) provides in relevant part: "No action . . . on any contract in writing . . . shall be brought but within six years after the right of action accrues . . . ." "[I]n an action for breach of contract . . . the cause of action is complete at the time the breach of contract occurs, that is, when the injury has been inflicted. . . . Although the application of this rule may result in occasional hardship, [i]t is well established that ignorance of the fact that damage has been done does not prevent the running of the statute, except where there is something tantamount to a fraudulent concealment of a cause of action. . . . While the statute of limitations normally begins to run immediately upon the accrual of the cause of action, some difficulty may arise in determining when the cause or right of action is considered as having accrued. . . . The true test for determining the appropriate date when a statute of limitations begins to run is to establish the time when the plaintiff first successfully could have maintained an action. That is, an action cannot be maintained until a right of action is complete and hence, the statute of limitations cannot run before that time. . . . A cause of action does not accrue for the purposes of a statute of limitations until all elements are present, including damages, however trivial. However, the occurrence of an act or omission . . . that causes a direct injury, however slight, may start the statute of limitations running against the right to maintain an action even if the plaintiff is not aware of the injury, and even if all resulting damages have not yet occurred; it is sufficient if nominal damages are recoverable for the breach or for the wrong, and where that is the case, it is unimportant that the actual or substantial damage is not discovered or does not occur until later. The fact that the extent of the damages cannot be determined at the time of the wrongful act does not postpone the running of the statute of limitations." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Rosenfield* v. *I. David Marder & Associates, LLC*, 110 Conn. App. 679, 685–86, 956 A.2d 581 (2008).

of Actions § 129 (2000) ("The nature of the cause of action or of the right sued upon is the test by which to determine which statute of limitations applies and whether the action is barred by the running of the limitation period. Thus, for an action under a state statute that lack[s] an express limitations period, the courts look to analogous causes of action for which express limitations periods are available, either by statute or by case law." [Footnote omitted.]).

A number of cases have addressed whether an action sounds in contract or in tort. See, e.g., *Meyers* v. *Livingston*, *Adler*, *Pulda*, *Meiklejohn & Kelly*, *P.C.*, 311 Conn. 282, 290–93, 87 A.3d 534 (2014); *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 200–204; *Gazo* v. *Stamford*, 255 Conn. 245, 262–67, 765 A.2d 505 (2001). "[T]he fundamental difference between tort and contract lies in the nature of the interests protected. . . . The duties of conduct which give rise to [a tort action] are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Furthermore, other courts have held that, when a plaintiff seeks to recover damages for the breach of a statutory duty, such an action sounds in tort." (Citation omitted; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 200. "On the other hand, [c]ontract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of [the] conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract. . . . In short, [a]n action in contract is for the breach of a duty arising out of a contract; an action in tort is for a breach of duty imposed by law." (Citation omitted; internal quotation marks omitted.) Id.

In this case, we are not required to resolve whether count one sounds in contract or in tort. The court in

its memorandum of decision determined that the applicable statute of limitations for each count of the plaintiff's complaint began to run in May, 1999, when the plaintiff purchased unit 14 in a deed dated May 26, 1999, and recorded on May 27, 1999. The plaintiff has not argued on appeal that the court erred in relying on this date. Thus, as it also is uncontested that this action was commenced in July, 2009, count one would be outside the limitations period provided under either §§ 52-576 or 52-577 and, in the absence of an equitable basis for tolling the limitations period, would be barred.

In this light, we now consider the plaintiff's arguments that the most applicable limitations period is not one governing claims sounding in tort or in contract, but rather the time period provided in § 52-575, which defines a claimant's right to title based on adverse possession. "[T]o establish title by adverse possession, the claimant must oust an owner of possession and keep such owner out without interruption for fifteen years by an open, visible and exclusive possession under a claim of right with the intent to use the property as his own and without the consent of the owner. . . . A finding of adverse possession is to be made out by clear and positive proof. . . . The burden of proof is on the party claiming adverse possession." (Internal quotation marks omitted.) *Caminis* v. *Troy*, 300 Conn. 297, 311, 12 A.3d 984 (2011). The courts of this state frequently have referred to the fifteen year period provided in § 52-575 (a) as a statute of limitations. See, e.g., id.; *Pollansky* v. *Pollansky*, 162 Conn. App. 635, 654, 133 A.3d 167 (2016); *Eberhart* v. *Meadow Haven, Inc.*, 111 Conn. App. 636, 645–46, 960 A.2d 1083 (2008). A determination that an adverse possessor meets the requirements of § 52-575 (a) prevents the original title owner from recovering on equitable claims based on title to the property. See *Caminis* v. *Troy*, supra, 299–300 (affirming trial court judgment against plaintiff seeking declaratory and

injunctive relief on alternative ground that claims were "barred because they were brought outside the fifteen year limitations period").

A proper framing of the plaintiff's theory of recovery and of the relationships among the parties reveals compelling reasons to reject the plaintiff's proposal to use the limitations period set forth in our adverse possession statute. In the plaintiff's analogy, he is the rightful owner or possessor of garage 14 by virtue of the condominium instruments; therefore, if the analogy were to hold, he would be suing the defendants as the adverse possessors of the property. He does not allege or present any evidence, however, that the association or the individually named defendants, in their roles as directors of the board of the condominium, are in actual possession, or have been in possession, of garage 14 since the allegedly impermissible severance of that interest from unit 14, and no evidence in the record supports such a finding. Nor does he allege in his complaint or present any evidence showing that the current owner and user of garage 14, who has never been made a party to this action, is using it pursuant to the type of agreement or relationship with the defendants from which it could be inferred that the defendants, through that occupant, have been making the type of adverse and hostile use of the property in derogation of the plaintiff's interest that would constitute adverse possession. Cf. *Richmond* v. *Stahle*, 48 Conn. 22, 23 (1880) (possession by tenant of adversely possessing landlord may be tacked onto landlord's use when determining whether landlord has held property against third parties' possessory interest for statutory period). Instead, the plaintiff's entire theory of recovery against the defendants rests on the assertion that they breached their statutory and contractual duties to him by causing or failing to prevent the severance of garage 14 from unit 14 and by failing thereafter to take any action to

return possession of the garage to him.[23] Actions that assert a breach of a duty sound in contract or tort, depending on the source of the duty alleged. See *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 200.

It is undisputed that the court is required in cases such as this one to determine what is the most analogous statute of limitations, given the "nature of the cause of action or of the right sued upon." Id., 199. The analysis employed by our Supreme Court in *Bellemare* could support the application in this case of either the general tort or written contract statute of limitations. Determining that an action seeking damages for violation of General Statutes § 49-8, the mortgage release statute, sounded in tort, our Supreme Court noted that, despite the presence of a contract, the duty contemplated arose entirely by statute and would exist even without any specific terms in a mortgage contract. Id., 200–201 ("the mortgage contract may be silent with regard to the issuance of a release, may provide for a longer or shorter time period for the issuance of a release, or may be vague or uncertain as to the period for the issuance of a release"). Unlike this case, however, the court in *Bellemare* also noted that "[t]here [was] no allegation in this count of the complaint that a term of the mortgage contract had been breached"; id., 201; and that "the record and case file do not contain a copy of the mortgage contract" at issue there. Id., 201 n.8.[24]

Additionally, accepting the plaintiff's adverse possession argument would result in one of two unfavorable

[23] In a warranty deed dated April 1, 1986, however, the developer, Shell Beach, Inc., purportedly conveyed garage 14 to the purchaser of unit 19, George J. Lepofsky, trustee. The deed provided that "Residential Unit No. 19 of Shell Beach Condominium . . . and Garage Unit Nos. 14 and 15 of Shell Beach Condominium . . . are conveyed . . . ."

[24] We reiterate that we do not determine which of these two statutes of limitations—§§ 52-576 (a) or 52-577—*definitively* applies to count one.

outcomes. First, at a bare minimum, it would require the courts to apply different limitations periods to a single duty, which is something that we generally seek to avoid because it would lead to an unpredictable result. See id., 201–202 (rejecting interpretation of § 49-8 that would, inter alia, result in different limitations periods depending on specific claim brought). Alternatively, it would necessitate that we apply a fifteen year statute of limitations period to *all* claims pursuant to § 47-75 (a), regardless of the type of claim asserted, the source of the right sued upon, or the particular relief requested. "[I]t is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results." (Internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 710, 998 A.2d 1 (2010). Although we note that the plain language of the statute *might* support an argument for the application of two statutes of limitations—one for those coming from the condominium instruments, another for those duties specifically arising from the Condominium Act; see General Statutes § 47-75 (a) (liability results from failure to comply "with [the Condominium Act], the condominium instruments, and the rules and regulations adopted pursuant thereto"); we conclude that the plaintiff has not presented any reason for us to risk either further confusion or a patently absurd result by applying yet a third potential limitations period that finds no explicit support within the section's text.

Finally, although the nature of the relief requested can be indicative of the nature of the right or cause of action at issue; see *Gazo* v. *Stamford*, supra, 255 Conn. 265–66 (action seeking damages for, inter alia, pain and suffering sounded in tort, not contract); it is by no means determinative in every case. See *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 200–204 (relying on numerous factors, including source of

underlying duty, desirability of having one statute of limitations for duty created by statute, and similarity of claim pursuant to § 49-8 to common-law action for slander of title, to determine that § 49-8 claim sounds in tort); see also *Bellemare* v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 600–605, 894 A.2d 335 (2006) (relying on additional factors, such as structure of complaint's allegations, "distinct relief" requested for each count, and legislative history and statutory scheme of § 49-8), aff'd, 284 Conn. 193, 931 A.2d 916 (2007). The nature of the right or cause of action alleged by the plaintiff in count one is not similar in its essence to an adverse possession claim, and we reject the plaintiff's argument that the only appropriate statute of limitations for that cause of action is that set forth in § 52-575.[25] Accordingly, the trial court properly concluded that the first count of the plaintiff's complaint was time barred.

II

The plaintiff next argues that the court improperly rendered summary judgment because it erroneously determined that five counts of his complaint[26] were time barred due to his failure to demonstrate a genuine issue of material fact as to the applicability of the continuing course of conduct doctrine. We disagree.

[25] Even if we were to accept the plaintiff's invitation and apply the limitations period within § 52-575 to count one of the plaintiff's complaint, his claim still would be time barred. The developer assigned the interest in garage 14 separately from unit 14 in 1986, when it included garage 14 in the deed conveying unit 19. See footnote 23 of this opinion. No evidence has been presented that, since 1986, garage 14 was ever used or owned by an owner of unit 14, or that any of the defendants have had a possessory interest in that garage. Further, the deed transferring unit 14 to the plaintiff in 1999 did not make any reference to garage 14. Thus, this action, commenced in 2009, would have occurred twenty-three years after the "wrong" committed in 1986 by the developer, e.g., the definitive act, occurrence, or breach for the purpose of beginning the limitations period within §§ 52-575, 52-576, or 52-577.

[26] See footnote 13 of this opinion.

"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 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. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the [defendant's] motion for summary judgment is plenary. . . . Summary judgment may be granted where the claim[s] [are] barred by the statute of limitations. . . . Summary judgment is appropriate on statute of limitations grounds when the material facts concerning the statute of limitations [are] not in dispute . . . .

"[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*, 312 Conn. 286, 309–10, 94 A.3d 553 (2014).

The plaintiff does not argue that the court erred in relying upon the transfer of the unit from Amendola to the plaintiff in May, 1999, as the relevant point for determining when the various statutes of limitations began to run. Additionally, beyond his arguments concerning the appropriate statute of limitations, if any, governing count one, he does not contest that, without the application of a ground to justify the equitable tolling of the statute of limitations, each of the five remaining counts would be barred as beyond the applicable limitations period. See *Rickel* v. *Komaromi*, 144 Conn. App. 775, 782, 73 A.3d 851 (2013) (trespass claims subject to three year limitations period in § 52-577); *Blinkoff* v. *O & G Industries, Inc.*, 113 Conn. App. 1, 8, 965 A.2d 556 ("General Statutes § 42-110g [f], which governs CUTPA claims, provides: An action under this section may not be brought more than three years after the occurrence of a violation of this chapter" [internal quotation marks omitted]), cert. denied, 291 Conn. 913, 969 A.2d 175 (2009); *Ahern* v. *Kappalumakkel*, 97 Conn. App. 189, 192 n.3, 903 A.2d 266 (2006) ("[b]reach of fiduciary duty is a tort action governed by the three year statute of limitations contained within . . . § 52-577"); *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 610 ("a claim brought pursuant to a contract, alleging a breach of the implied covenant of good faith and fair dealing, sounds in contract . . . [and] is therefore subject to the six year contract statute of limitations as provided in § 52-576");[27] see also part I

[27] We note that the plaintiff alleges that the defendants "tortiously" breached the covenant of good faith and fair dealing in count seven. Although the court does not have to accept the label that a party appends to its cause of action; see, e.g., *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, supra, 311 Conn. 290 ("[O]ne cannot bring an action [under both theories, however] merely by couching a claim that one has breached a standard of care in the language of contract. . . . [T]ort claims cloaked in contractual language are, as a matter of law, not breach of contract claims." [Internal quotation marks omitted.]); we recognize that "the same course of conduct may sound both in tort and in contract . . . and the court should apply the relevant statute of limitations to each claim." (Citation omitted.)

B of this opinion (determining whether §§ 52-577 or 52-576 is applicable statute of limitations to cause of action in count one unnecessary under facts of this case).

Instead, the plaintiff asserts that these limitations periods were tolled by the continuing course of conduct doctrine. "In certain circumstances . . . we have recognized the applicability of the continuing course of conduct doctrine to toll a statute of limitations. Tolling does not enlarge the period in which to sue that is imposed by a statute of limitations, but it operates to suspend or interrupt its running while certain activity takes place. . . . Consistent with that notion, [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." (Citations 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 . . . . Where we have upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act. . . . Therefore, a precondition for the operation of the continuing course of conduct doctrine is that the defendant must have committed an

Hill v. *Williams*, 74 Conn. App. 654, 660, 813 A.2d 130, cert. denied, 263 Conn. 918, 822 A.2d 242 (2003). Nevertheless, even if we were to accept that this count sounds in tort, and not in contract, it would not help the defendant. If § 52-576 is inapplicable, this claim would be governed then by General Statutes §§ 52-577 or 52-584, both of which are subject to a three year repose period.

initial wrong upon the plaintiff. . . . A second requirement for the operation of the continuing course of conduct doctrine is that there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. . . . The doctrine of continuing course of conduct as used to toll a statute of limitations is better suited to claims where the situation keeps evolving after the act complained of is complete . . . .'' (Citations omitted; internal quotation marks omitted.) *Targonski* v. *Clebowicz*, 142 Conn. App. 97, 108–109, 63 A.3d 1001 (2013).

''In sum, [i]n deciding whether the trial court properly granted the defendant's motion for summary judgment, we must determine if there is a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty.'' (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 313. ''[I]f there is no genuine issue of material fact with respect to any one of the three prongs . . . summary judgment is appropriate.'' *Cefaratti* v. *Aranow*, 154 Conn. App. 1, 11, 105 A.3d 265 (2014), rev'd on other grounds, 321 Conn. 593, 141 A.3d 752 (question certified in plaintiff's petition), aff'd, 321 Conn. 637, 138 A.3d 837 (question certified in defendants' petition) (2016).

In support of his claim that the continuing course of conduct doctrine applies, the plaintiff makes the following contentions. First, he asserts that, pursuant to the declaration, garage 14 is assigned as a limited common element to unit 14. Other provisions of the declaration, he contests, forbid the severance of the garage from the unit, and, pursuant to the Condominium Act and the condominium instruments, the defendants had the power and obligation to both prevent this severance and take the necessary actions to correct the con-

tinuance thereof.[28] Thus, although the plaintiff asserted varying theories of recovery in his complaint, some of which do not require the existence of a duty of care,[29] the central underlying ground for each of the plaintiff's arguments concerns the duties owed to the plaintiff "from the [Condominium] Act and the condominium instruments, which place the obligation of enforcing their provisions on the association."[30]

"Duty is a legal conclusion about relationships between individuals, made after the fact . . . . The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 649, 126 A.3d 569 (2015). "A duty . . . may arise from a contract [or] . . . from a statute . . . ." *Coburn* v. *Lenox Homes, Inc.*, 186 Conn. 370, 375, 441 A.2d 620 (1982).

Reviewing the plaintiff's claims requires us to consider and interpret those provisions of the Condomin-

[28] During oral argument before this court, the plaintiff referred to the ongoing duty of the defendants as a "continuing duty of disclosure." The plaintiff did not brief this theory, however, instead asserting that the duty of the defendants was to enforce the condominium instruments and remedy any breaches thereof. "[I]t is well settled that arguments cannot be raised for the first time at oral argument." *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 328 n.20, 71 A.3d 492 (2013).

[29] For instance, "in Connecticut, [t]he essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury." (Internal quotation marks omitted.) *Boyne* v. *Glastonbury*, 110 Conn. App. 591, 601, 955 A.2d 645, cert. denied, 289 Conn. 947, 959 A.2d 1011 (2008).

[30] We note that, although the plaintiff contends that "Connecticut courts have concluded that condominium associations owe duties to unit owners . . . [and] [s]everal courts have expressly concluded that condominium instruments create duties owed to unit owners," he does not attempt to define more specifically, in either analysis or through citation to relevant authority, the particular type of duty that he contends exists in *this* case. (Citations omitted.) Rather, the plaintiff grounds his entire argument as to both the existence and ongoing nature of the defendants' duty strictly on

ium Act and the condominium instruments relevant to the issues raised; we restate the principles that govern this analysis. "[C]onstruing a statute is a question of law." *Somers West Towne Houses, Inc.* v. *LAS Properties Ltd. Partnership*, 108 Conn. App. 426, 432, 949 A.2d 483 (2008). "The principles that govern statutory construction are well established. 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. . . . 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 . . . ." (Internal quotation marks omitted.) *Mickey* v. *Mickey*, 292 Conn. 597, 613–14, 974 A.2d 641 (2009).

Determining the defendants' responsibilities under the condominium instruments on which the plaintiff relies—specifically, the declaration and the bylaws—also requires resolution of questions of law. *Oronoque Shores Condominium Assn. No. 1, Inc.* v. *Smulley*, 114 Conn. App. 233, 237, 968 A.2d 996 ("The interpretation of a condominium's declaration presents a question of

the applicable statutory authority and provisions of the condominium instruments.

law. . . . We also conduct plenary review of corporate articles and bylaws." [Citation omitted; internal quotation marks omitted.]), cert. denied, 292 Conn. 922, 974 A.2d 722 (2009). "Because the [condominium] declaration operates in the nature of a contract, in that it establishes the parties' rights and obligations, we apply the rules of contract construction to the interpretation of [the declaration]." (Internal quotation marks omitted.) *Harbour Pointe, LLC* v. *Harbour Landing Condominium Assn., Inc.*, 300 Conn. 254, 259, 14 A.3d 284 (2011).

"[W]e first attempt to ascertain the parties' intent from the language they used in their contract, looking at the contract as a whole and giving the contract's words their ordinary meaning and one that renders its provisions consistent. . . . Only if the language in the contract is truly capable of more than one reasonable interpretation will we look to evidence beyond the contract language for guidance as to what the parties intended." (Citation omitted.) *C & H Electric, Inc.* v. *Bethel*, 312 Conn. 843, 853, 96 A.3d 477 (2014). "The rules of construction dictate giving effect to all the provisions of a contract, construing it as a whole and reconciling its clauses. . . . Where two clauses which are apparently inconsistent may be reconciled by a reasonable construction, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent and repugnant provisions." (Internal quotation marks omitted.) *Regency Savings Bank* v. *Westmark Partners*, 59 Conn. App. 160, 166, 756 A.2d 299 (2000).

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

if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Harbour Pointe, LLC* v. *Harbour Landing Condominium Assn., Inc.*, supra, 300 Conn. 260–61.

Even if we were to accept the plaintiff's argument that the declaration, at its inception, required the allocation of garage 14 to unit 14, and unit 14 alone, and that the defendants had breached the declaration by causing or permitting the garage to be severed from that unit, the plaintiff still would have to prove that any duty owed by the defendants to the plaintiff was continuing. As previously noted, the plaintiff relies on the applicable provisions of the Condominium Act and the condominium instruments as the sources of that alleged duty of care.

Section 47-75 (a) provides in relevant part: "Each unit owner, and the association of unit owners, shall comply with this chapter, the condominium instruments, and the rules and regulations adopted pursuant thereto. Failure to so comply shall be ground for an action to recover damages or for injunctive relief, or for any other relief to which the party bringing such action may be entitled. Such action may be brought by the association of unit owners against any unit owner or owners or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action. . . ." Article 15 of the declaration contains very similar language to § 47-75. See footnote 17 of this opinion.

Turning to the bylaws, § 4 (b) provides in relevant part: "The Board of Directors shall have the powers and

duties necessary for the administration of the affairs of the Association and shall do all such acts or things except as by law or by the Declaration or by these Bylaws may not be delegated to the Board of Directors by the Unit Owners. . . . The Board of Directors shall have the power to enforce the obligations of the Unit Owners . . . and to do anything and everything else necessary and proper for the sound management of the Association."[31] That section also contains a number of illustrative "powers and duties" of the board.

Examining these provisions, none of them defines *how* the board of directors or association is to execute its power in any enforcement action, or when, if ever, it rightly may choose not to act at all; rather, they merely provide that the defendants "shall have the powers" to enforce the Condominium Act or the condominium instruments.[32] Thus, any duty owed by the association is *not* an absolute duty to act in all cases.[33] Furthermore,

[31] An amendment, executed subsequent to the commencement of this action, modifies the language in § 4 (b) (14) of the bylaws in ways nonmaterial to this analysis.

[32] Indeed, § 47-75 (a) itself suggests that the responsibility to enforce the Condominium Act or the condominium instruments is not exclusively in the association in all cases, as it explicitly allows a unit owner to enforce the condominium instruments and the Condominium Act "in any proper case."

[33] In another context, our Supreme Court has opined as to the proper method for appraising a decision by an association: "When a court is called upon to assess the validity of [an action taken] by a board of directors, it first determines whether the board acted within its scope of authority and, second, whether the [action] reflects reasoned or arbitrary and capricious decision making." (Internal quotation marks omitted.) *Weldy* v. *Northbrook Condominium Assn., Inc.*, 279 Conn. 728, 734, 904 A.2d 188 (2006). Further, various provisions of the Restatement (Third) of Property similarly suggest that the association and the board, although owing duties to unit owners in the exercise of their authority, are not required to take action in all cases. See 2 Restatement (Third), Property, Servitudes § 6.13 (1), p. 233 (2000) ("[i]n addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common-interest community . . . *to act reasonably in the exercise of its discretionary powers including . . . enforcement*" [emphasis added]); see also id., § 6.14, p. 268 ("[t]he directors and officers of an association have a duty to act in good faith, to act in compliance with the law and the governing

we note that these provisions stand in stark contrast to other provisions of the Condominium Act,[34] the declaration,[35] and the bylaws[36] that affirmatively require certain actions be taken or the manner in which those actions are to be taken. Finally, none of these provisions

documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions").

Finally, certain provisions of the Common Interest Ownership Act clarify which actions by an association are mandatory and which are discretionary, and support a clear inference that enforcement, on the whole, is generally subject to the association's and the directors' discretion. See General Statutes § 47-244 (a); see also Public Acts 2009, No. 09-225, § 20 (clarifications making more explicit which duties are discretionary and which are mandatory in § 47-244 [a], applicable as of date of passage, July 8, 2009). Other provisions provide that the board of directors is not required to take any enforcement action if it determines that one of four specified circumstances is met; General Statutes § 47-244 (g); and allows the board to choose to take an enforcement action in one case, but not another, as long as the choice is not arbitrary or capricious. General Statutes § 47-244 (h). These latter provisions, which would generally be applicable to condominiums that were created before 1984; see General Statutes § 47-216 (a); are technically inapplicable in this case, as they became effective after this case had commenced. See Public Acts 2009, No. 09-225, § 21 (added subsections [g] and [h] to § 47-244, effective July 1, 2010). Nevertheless, their existence provides further support for our position, in that they demonstrate legislative affirmance of preexisting common law principles.

[34] For instance, General Statutes § 47-84 (a) provides in relevant part that "damage to or destruction of any building or improvement located on the condominium parcel or serving the condominium shall be promptly repaired and restored by . . . the association, using the proceeds of insurance, if any, on such building or improvement for that purpose . . . ." See also General Statutes § 47-71 (h) and (i) (requiring association to record specified information on annual basis).

[35] Article 25 (e) of the declaration requires the association to provide its books and records to a first mortgagee when the request is received reasonably in advance of the examination and in writing. Article 26 provides that the association "shall at all times keep an adequate reserve fund for the replacement of common elements" and that the fund be maintained through monthly payments rather than special assessments. Prior to an amendment in 1987 that removed the article from the declaration, article 27 required that the association maintain a separate budget for the operation, care, and upkeep of the swimming pool, tennis court, and community building that would have been built on a separate tract.

[36] Section 4 (i) of the bylaws requires that the board must elect certain officers at the annual organization meeting of each new board. Section 5

establishes any requirement that the association redress *prior* breaches of its duty to enforce the Condominium Act or the condominium instruments.

In support of his claim that the defendants had an ongoing responsibility to remedy a past breach of its duties, the plaintiff also relies on § 10 (g) of the bylaws.[37] That subsection provides: "The violation of any rule or regulation adopted by the Association, or the breach of any Bylaw contained herein, or the breach of any provision of the Declaration, shall give the Association the right, in addition to any other rights set forth in these Bylaws:

"i. [T]o enter the Unit in which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Unit Owner, any structure, thing, or condition that may exist therein contrary to the interest and meaning of the provisions hereof and the Association shall not be there by deemed guilty of trespass; or

"ii. [T]o enjoin, abate, or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach." This provision, however, like those previously discussed, gives the board "the right" to take action, but does not dictate the manner in which that right is to be exercised or the circumstances under which the board may refrain from acting. The subsection cannot be read to impose an absolute ongoing duty on the defendants to remedy any and all breaches of

(d) makes it "the duty of the Secretary to mail a notice for each annual or special meeting" to all unit owners and dictates the timing and contents of such notice. Section 10 (f) requires the association to provide various information to any unit owner that requests it in writing and, depending on the information requested, requires that information be delivered either promptly or within fifteen days of the association's receipt of the request.

[37] An amendment, executed subsequent to the commencement of this action, modifies the language in § 10 (g) (iv) of the bylaws in ways nonmaterial to this analysis.

the Condominium Act or condominium instruments, no matter how minor the breach or how distant in the past the violation occurred.

Even more damaging to the plaintiff's argument, however, is that the basic nature of the continuing course of conduct doctrine counsels strongly against the plaintiff's position that whatever duty that the association might have had was ongoing. "[T]he continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are premature because *specific* tortious acts or omissions may be *difficult to identify* and may yet be remedied." (Emphasis added; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 312. This court has similarly observed that "[t]he doctrine . . . is better suited to claims where the situation keeps evolving after the act complained of is complete . . . rather than one where the situation cannot change . . . ." *Sanborn* v. *Greenwald*, 39 Conn. App. 289, 297–98, 664 A.2d 803 (1995).

We also note our Supreme Court's statements in the recent case of *Watts* v. *Chittenden*, 301 Conn. 575, 22 A.3d 1214 (2011). There, "examining the use of the continuing course of conduct doctrine, [our Supreme Court was] mindful of the nature of the doctrine as [then] Chief Judge Richard Posner of the Seventh Circuit Court of Appeals has explained . . . [that] [a] violation is called continuing, signifying that a plaintiff can reach back to its beginning even if that beginning lies outside the statutory limitations period, when it would be unreasonable to require or even permit him to sue separately over every incident of the defendant's unlawful conduct. The injuries about which the plaintiff is complaining in [these] case[s] are the consequence of a numerous and continuous series of events. . . . When a single event gives rise to continuing injuries . . . the plaintiff can bring a single suit based on an estimation of his

total injuries, and that mode of proceeding is much to be preferred to piecemeal litigation despite the possible loss in accuracy. But in [cases in which the continuing course of conduct doctrine is applicable, each incident increases the plaintiff's injury]. Not only would it be unreasonable to require him, as a condition of preserving his right to have [the full limitations period] to sue . . . to bring separate suits [during the limitations period] after each [incident giving rise to the claim]; but it would impose an unreasonable burden on the courts to entertain an indefinite number of suits and apportion damages among them." (Internal quotation marks omitted.) *Fradianni* v. *Protective Life Ins. Co.*, 145 Conn. App. 90, 98–99, 73 A.3d 896, cert. denied, 310 Conn. 934, 79 A.3d 888 (2013). Rather, the doctrine applies to cases "that involv[e] a continuing course of conduct which over a period of years cause[s] injury. Since usually no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm, it seems proper to regard the cumulative effect of the conduct as actionable." (Internal quotation marks omitted.) *Watts* v. *Chittenden*, supra, 592, quoting *Twyman* v. *Twyman*, 790 S.W.2d 819, 821 (Tex. App. 1990), rev'd on other grounds, 855 S.W.2d 619, 620 (Tex. 1993).[38]

In the present case, the original wrong, if any, was completed either upon the 1986 purported conveyance of garage 14 separate from the like numbered unit or,

[38] Indeed, circumstances falling between these two extremes generally will not merit the application of the continuing course of conduct doctrine. See *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 664, 127 A.3d 257 (2015) ("In between the case in which a single event gives rise to continuing injuries and the case in which a continuous series of events gives rise to a cumulative injury is the case in which repeated events give rise to discrete injuries . . . . [In such a case] the damages from each discrete act . . . would be readily calculable without waiting for the entire series of acts to end. There would be no excuse for the delay. And so the violation would not be deemed continuing." [Internal quotation marks omitted.]).

at the absolute latest, upon the 1999 transfer of unit 14 to the plaintiff without garage 14. All of the injuries claimed by the plaintiff arise from either, or both, of those acts or occurrences, and the plaintiff has pointed to no separate injuries that have arisen as a result of any ongoing failure by the defendants to enforce his alleged rights under the documents. These circumstances do not present the type of case that merits the application of the continuing course of conduct doctrine.

Additionally, the plaintiff has not produced any evidence that the defendants have breached any ongoing duty to enforce the condominium instruments. In particular, we note that, although the provisions of the Condominium Act and condominium instruments delineate the defendants' powers to address violations, no evidence or law has been presented by the plaintiff in support of his claims that there are genuine issues of material fact or that summary judgment is incorrect as a matter of law, from which we could conclude that the defendants' failure to do so under the facts of this case is an abuse of their discretion. No evidence or law has been presented concerning the circumstances under which the choice not to enforce a provision of the condominium instruments constitutes a breach of the association's duty. Further, we also note that there is evidence that the deed purporting to convey garage 14 separately from unit 14 was executed in 1986 by the developer; see footnotes 23 and 25 of this opinion; and no evidence has been submitted that the garage and unit, if they were originally required by the declaration to be conjoined, ever *have* been conjoined in the same owner.

In summary, the plaintiff has not raised a genuine issue of material fact in this case that requires or justifies application of the continuous course of conduct

doctrine, and we therefore decline the plaintiff's invitation to apply it.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ESTRELLA J.C.* (AC 37190)

Keller, Mullins and Norcott, Js.

Syllabus

Convicted of three counts of risk of injury to a child after having sexually abused the victim, who was her minor son, the defendant appealed to this court. The defendant claimed, inter alia, that the trial court imposed an illegal sentence after the jury had found her guilty on each of the two counts of the state's information that alleged violations of the risk of injury to a child statute (§ 53a-21 [a] [2]), which provided for a mandatory minimum sentence of five years imprisonment when the victim was under thirteen years of age at the time of the offense. The jury did not make such a finding. The defendant further claimed that the court improperly admitted into evidence a certain video recording of a forensic interview of the victim by M, a clinical social worker. The defendant asserted that the recording was improperly admitted under the rule of evidence (§ 8-3 [5]) governing statements made for the purpose of medical diagnosis and treatment. The defendant claimed that the state did not meet its burden of showing that the interview was conducted to further the victim's medical treatment, and that the admission of the recording violated her right to confrontation. In the interview, the victim discussed with M the incidents that had occurred between himself and the defendant. The interview was observed from a separate room on a television screen by a police detective, another social worker, and a forensic interviewer. Several days later, the victim underwent a medical evaluation by J, a pediatric nurse practitioner. J had not observed M's forensic interview with the victim, but met with M after the interview to learn about the victim's history and family circumstances, and to obtain relevant details for the medical evaluation. Prior to trial, the court granted the state's motion for a hearing to elicit the victim's testimony under oath and out of the defendant's presence through 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 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.

use of a video recording. During that hearing, the state asked the victim about the prior forensic interview with M, and defense counsel cross-examined the victim. Thereafter, the defendant objected at trial to the admission into evidence of the video recording of M's forensic interview with the victim because, inter alia, defense counsel was not present at that interview. The defendant claimed that the sixth amendment confrontation clause prohibited the admission of the recording. *Held*:

1. The trial court did not abuse its discretion by admitting into evidence the video recording of M's forensic interview with the victim because the victim's statements during the interview fell under § 8-3 (5) of the Code of Evidence as statements made for the purpose of medical diagnosis and treatment: the state adequately demonstrated that the statements were reasonably pertinent to obtaining medical treatment, M sufficiently occupied a position within the chain of medical care, and the timing and context of the interview in relation to the victim's other visits to medical professionals supported the conclusion that the interview was not solely conducted in preparation for a legal proceeding; moreover, the defendant's right to confrontation was not violated, as neither § 8-3 (5) nor the common law mandate that statements offered under the medical diagnosis and treatment exception be nontestimonial, and the victim here testified and was cross-examined by the defendant's attorney in a trial setting outside of the defendant's presence.

2. This court found unavailing the defendant's claim that the trial court imposed an illegal sentence when it ordered her to serve a mandatory minimum term of five years imprisonment on each of two counts of having violated § 53a-21 (a) (2):

   a. Although the state alleged that the offenses at issue occurred between 2006 and 2010, the evidence produced at trial established that all of the offenses occurred after July 1, 2007, the effective date of the legislature's amendment (P.A. 07-143, § 4) of § 53a-21 that imposed the five year mandatory minimum sentence requirement.

   b. Contrary to the defendant's claim that the mandatory minimum five year sentence requirement in § 53a-21 (a) (2) constituted a sentence enhancement, and that the trial court lacked the authority to impose that sentence in the absence of a jury determination, beyond a reasonable doubt, that the victim was under thirteen years of age at the time of the offenses at issue, any alleged error by the trial court was harmless beyond a reasonable doubt, as it was undisputed that the defendant's trial occurred when the victim was eleven years old and, thus, the jury could have found beyond a reasonable doubt that all of the instances of the defendant's offensive conduct against the victim occurred while he was under thirteen years of age.

3. The defendant could not prevail on her claim that the trial court abused its discretion when it admitted certain uncharged misconduct evidence that she had asked the victim to steal money from his father, as that evidence was relevant to rehabilitate the credibility of the victim; the

victim was the state's key witness and had testified that he stole in the past, the evidence did not tend to arouse the jury's emotions in light of the nature of the crimes with which the defendant was charged, the prejudicial tendency of the evidence paled in comparison to other evidence that showed that she had threatened to kill the victim's father and stepmother, and the evidence did not consume an inordinate amount of time, but was resolved summarily at the beginning of the trial.

Argued May 17—officially released October 18, 2016

Procedural History

Substitute information charging the defendant with three counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, senior assistant public defender, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Laura DeLeo*, senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Estrella J.C., appeals from the judgment of conviction, rendered following a jury trial, of two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2) and one count of risk of injury to a child in violation of § 53-21 (a) (1). On appeal, the defendant claims that the trial court committed reversible error by (1) admitting into evidence a video recording of a forensic interview between a clinical social worker and the victim, (2) imposing an illegal sentence, and (3) admitting harmful uncharged misconduct evidence. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. The victim was born on October 24, 2000, and the defendant is his biological mother. The defendant met the victim's father, F, approximately one and one-half years before the victim was born. In 2005, the defendant gave birth to the victim's sister, B, whose father is also F. From 2000 to 2005, the defendant and F maintained an "on again, off again" relationship, but they did not live together, and they never married. In 2005, when the victim was five years old, he maintained a permanent residence with the defendant at her home in New Haven. The victim eventually began residing with F at his home in East Haven as well, but he still would spend certain nights and days with the defendant at her New Haven home.

During this time, on more than five occasions, the defendant pulled down the victim's pants and underpants, and touched the victim's penis with her hands or her mouth. The first time that one of these incidents happened was when the victim was between seven and eight years old.

On one such occasion, the victim and the defendant were in the defendant's bedroom. The victim was partially asleep, but he awoke when he felt and saw the defendant "squishing" his penis while she was on top of him. While this occurred, the victim kept one eye open, but he eventually opened both eyes so that the defendant could tell that he was awake. After realizing that the victim was awake, the defendant told the victim that she was checking his penis to see if it was healthy. On another such occasion, the defendant also touched the victim's penis with her mouth.[1] On another one of

[1] The victim testified that, on at least one occasion, the defendant touched his penis with both her mouth and her hands, and that on at least two occasions, the defendant touched his penis with just her hands. In total, the victim testified that on about five or more different occasions, the defendant touched his penis with either her hands, her mouth, or both her hands and her mouth.

these occasions, the victim walked by the defendant's bedroom while she was naked in her bed. The door was open, and she told the victim to come inside. The victim refused to come into the room and he ran to the garage. The defendant then found the victim hiding in the garage. She hit him on his arm and forced him to go back into her bedroom and remove his clothing. The defendant then "squished" the victim's penis with her hands and put her mouth on it as well.

Also during this time period, while the victim was residing with the defendant at her New Haven home, the defendant, on at least two occasions, forced the victim to watch pornographic movies. The defendant also threatened the victim by telling him that she would hit him if he refused to watch the movies.

On at least several other occasions during this time period, while the victim was seven years old, and on another occasion when the victim was eight years old, he and the defendant were alone in the living room at her New Haven home when the defendant forced the victim to touch her breasts for approximately five to ten minutes. The defendant also threatened the victim by telling him that if he refused to touch her breasts, she would "hit him hard."

On at least several other occasions when the victim was eight years old, while the victim and B were sleeping in the defendant's bedroom, the victim awoke to find the defendant having sexual intercourse with her boyfriend, N, in the same bed in which the victim and B were sleeping. Also on this occasion, the defendant and N were watching a pornographic movie while they engaged in sexual intercourse. On another occasion, the victim found several pornographic videos and photographs on the defendant's computer. When the defendant discovered that he had found the materials, she told him that if he told anyone about his discovery,

she would harm F and kill the victim's stepmother, C. Furthermore, on another occasion, while the victim was in the car with the defendant and the victim's aunt, the victim overheard the defendant say that she was going to kill F and C.

On another occasion, when the victim was eight or nine years old, the defendant forced the victim to take a shower with her. During this incident, the defendant forced the victim to touch her breasts, and told him that if he refused, she would hit him.

The victim eventually began living with F and C at F's home in East Haven. The victim's and B's visitations with the defendant at her home terminated in the summer of 2009, but they resumed at some point in late 2009.

After the commencement of these incidents, the victim began having nightmares, and F frequently observed that the victim was "changed" when he returned to F's home after visiting with the defendant. The victim also began misbehaving in school, particularly in the spring of 2010. Specifically, the victim stole items from others at school, and he fought with other students. On one such occasion during this time period, the victim stole an iPod from a teacher, and, after being apprehended, he subsequently was suspended from school and was placed in a disciplinary program.

On one day in April, 2010, the victim came home from school crying. C asked the victim why he was crying and if he had misbehaved at school. In response, the victim told C that the defendant had touched his penis. C comforted the victim and called F, telling him that the victim needed to talk to him about something when he returned home from work. Later that night, F came home from work, and the victim told him that the defendant had touched his penis and threatened him on numerous occasions while he had been residing at her home in New Haven.

Shortly after the victim told F about the defendant's actions toward the victim, F, on that same night, placed telephone calls to the police and the Department of Children and Families (department) to report the incidents that had occurred between the defendant and the victim. When F called the department on that night, however, there was no answer on the telephone, so, on the next day, F went to the Clifford Beers clinic (Clifford Beers) in New Haven and scheduled an appointment for the victim to see a psychologist there on the following day. On the date of the scheduled appointment, the victim went to Clifford Beers with F and C. During this visit, F and C gave permission for several professionals at Clifford Beers to interview and provide therapy to the victim in connection with the incidents that he had reported involving the defendant's actions toward him. Dr. Alyson Brodhagen, a clinical psychologist at Clifford Beers, diagnosed the victim with post-traumatic stress disorder. After this initial meeting, which occurred in April, 2010, the victim continued to participate in therapy consultations with professionals at Clifford Beers until the commencement of the defendant's trial in 2012.

On May 3, 2010, after having visited Clifford Beers, the victim met with Theresa A. Montelli, a licensed clinical social worker employed by Yale-New Haven Hospital as a forensic interviewer for the Yale Child Sexual Abuse Clinic (Yale clinic). During this interview, the victim discussed the incidents that had occurred between the defendant and himself. Specifically, during this interview, the victim pointed out on anatomical diagrams and dolls where the defendant had touched him, and he conveyed some of the details about these incidents to Montelli. This interview was recorded on video, and, while it was occurring, it was observed by a department employee, another forensic interviewer from the Yale clinic, and a New Haven Police Department detective, who observed the interview from a separate room on a closed circuit television screen.

Several days later, on May 7, 2010, the victim met with Janet Murphy, a pediatric nurse practitioner at the Yale clinic, for a medical evaluation.[2] Although Murphy did not observe the forensic interview that Montelli conducted, she met with Montelli after the interview and learned about the victim's history, the circumstances surrounding his relationship with his family, and "the relevant details" for the medical evaluation. Additionally, before conducting the medical evaluation of the victim, Murphy met with C to obtain any further necessary health information about the victim.[3] Murphy then completed a full physical examination of the victim.

In June, 2010, the victim also began meeting with Dr. Ragne Pajo Adams, a psychologist at Clifford Beers, for outpatient therapy sessions. At some point after August, 2010, the victim also saw a psychiatrist, Dr. Thomas Prakash, who diagnosed him with attention deficit hyperactivity disorder, for which he also was treated.

On the basis of the victim's disclosures made during his interview with, inter alia, the professionals working at the Yale clinic, as well as the victim's disclosures to the professionals working at Clifford Beers, Detective William White, Jr., of the New Haven Police Department prepared an arrest warrant for the defendant and she was arrested. The state charged the defendant with two counts of risk of injury to a child in violation of § 53-21 (a) (2), and a third count of risk of injury to a child in violation of § 53-21 (a) (1).[4] After a trial in May, 2012,

[2] Murphy is also the associate medical director for the Yale clinic.

[3] Murphy also testified that, at the time of the medical evaluation, she was aware that the victim had been receiving therapy treatment at Clifford Beers, and that one of the purposes of her inquiry as to relevant health information with respect to the victim was to ensure that the victim was receiving appropriate therapy services.

[4] General Statutes (Supp. 2016) § 53-21 provides in relevant part: "(a) 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

the jury found the defendant guilty on all counts. The court, *B. Fischer*, *J.*, on October 2, 2013, sentenced the defendant, on each of the two counts of risk of injury to a child in violation of § 53-21 (a) (2), to twelve years of imprisonment, execution suspended after the service of eight years, five years of which was a mandatory minimum sentence, followed by ten years of probation. On the third count of risk of injury to a child in violation of § 53-21 (a) (1), the defendant was sentenced to a period of ten years imprisonment, execution suspended after eight years, and five years probation. All sentences were to run concurrently. The total effective sentence was twelve years imprisonment, suspended after the service of eight years, with ten years probation. This appeal followed. Additional facts will be set forth as necessary.

I

We first address the defendant's claim that the court committed reversible error by admitting into evidence, under the medical diagnosis and treatment exception

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, or (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) a class C felony for a violation of subdivision (1) or (3) of this subsection, and (B) a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and 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 in 2007, § 53a-21 (a) was amended by Public Acts 2007, No. 07-143, § 4, which took effect July 1, 2007, and made a violation of subdivision (2) punishable by a term of imprisonment of which five years may not be suspended or reduced by the court when the victim is younger than thirteen years of age.

Although § 53-21 (a) has been amended several times since 2007, those amendments are not relevant to this appeal. For convenience, we refer herein to the revision codified in the 2016 supplement to the General Statutes.

to the hearsay rule, the video recording of the forensic interview between Montelli and the victim. The defendant argues that the state had not met its burden of showing that the essential purpose of the interview was to further the victim's medical treatment. The following additional facts and procedural history are relevant to this claim. Prior to the commencement of the defendant's criminal trial, the state, pursuant to General Statutes § 54-86g and *State* v. *Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988), filed a motion seeking to elicit the victim's trial testimony outside of the presence of the defendant through the use of a video recording. After the court, *Fasano*, *J.*, held a hearing on October 26, 2011, it granted the state's motion in an oral decision issued on October 31, 2011, concluding that "the state ha[d] established a compelling need for the [victim] to testify outside the presence of the defendant . . . by clear and convincing evidence in that the [victim] would be so intimidated or otherwise inhibited by the . . . physical presence of the defendant that the trustworthiness or reliability of the [victim's] testimony would be seriously called into question."

On March 2, 2012, pursuant to the court's ruling on the state's *Jarzbek* motion, the victim testified under oath at Southern Connecticut State University in front of the court, *B. Fischer*, *J.*, two state's attorneys, trial counsel for the defendant, two interpreters, the victim's guardian ad litem, a temporary assistant clerk, and a certified court reporter. In addition to being subject to direct examination by the prosecutor who tried the defendant's criminal case, the victim was subjected to cross-examination by the defendant's trial counsel. The victim's testimony was videotaped and reproduced in a video recording. During the hearing, the state questioned the victim about, inter alia, the forensic interview that he participated in at the Yale clinic with Montelli.

On May 4, 2012, after the conclusion of jury voir dire proceedings and outside the presence of all potential jurors, the state indicated its intent to introduce into evidence the video recording of the victim's forensic interview with Montelli. Defense counsel objected to the state's offer of the video recording of the forensic interview, arguing that it should not be admitted into evidence because (1) defense counsel was not present at the interview and the confrontation clause of the sixth amendment to the United States constitution accordingly would prohibit the introduction of such evidence, and (2) Montelli brought up the subject of the defendant's drinking habits during the interview, which defense counsel argued was highly prejudicial and of little probative value. In response, the state argued that "it [was] the state's intention with respect to the contents contained in the video to establish that the questions and answers were for the purpose of mental treatment." The state also argued that its "response to the video being used versus the witness [Montelli] simply testifying as to the questions and the answers, and the information elicited simply is that [the video is] the best evidence that exists of what actually transpired." Furthermore, the state argued that the video recording of the forensic interview was the best evidence that existed because it was "better than [Montelli] trying to articulate [the victim's] nonverbal response and what [Montelli observed, given that] she would be anticipated to testify that the video . . . is a fair and accurate representation of what actually transpired." Finally, the state argued that the video recording of the forensic interview was relevant and was "not prohibited hearsay by virtue of the fact that the information elicited was for the purpose of treatment."[5]

[5] The state did not dispute the fact that defense counsel was not present at the forensic interview. The court then articulated its understanding of the state's position by stating that it understood the state to be arguing that "a jury in a case such as this gets to see two videos; one where there was a right to confront [the video recording of the victim's testimony at Southern

On May 7, 2012, the first day of the defendant's trial, the court, after allowing both sides to argue further on the issue and clarifying that the defendant's objection included a claim that the medical diagnosis and treatment exception did not permit either the video recording or Montelli's testimony to be admitted,[6] ruled that the video recording of the forensic interview with Montelli and her testimony were both admissible. With respect to the video recording of the forensic interview, the court first referred to the text of § 8-3 of the Connecticut Code of Evidence, which provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (5) A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment."

Thereafter, the court stated in relevant part: "And . . . our case law has expanded it from doctors to other medical professionals, including social workers, who are acting in the chain of medical diagnosis. In the case of [*State* v. *Cruz*, 260 Conn. 1, 792 A.2d 823 (2002)] the victim was interviewed by a social worker at the hospital. The court held that . . . the medical treatment exception to the hearsay rule applies to statements made by a sexual assault victim to a social worker

Connecticut State University] and one where there was not [the video of the forensic interview with Montelli]." The state agreed with the court that this was its position.

[6] The defendant represented to this court at oral argument that she was objecting to the admissibility of both the video recording of the forensic interview and Montelli's testimony concerning the same. We note, however, that on appeal, the defendant has not briefed the issue of the admissibility of Montelli's testimony, although she testified extensively concerning the disclosure made to her by the victim during the forensic interview. Our analysis of the defendant's claim focuses on the admissibility of the video recording of the forensic interview.

who is acting within a chain of medical care as long as those statements are made for the purpose of obtaining medical diagnosis or treatment and are pertinent to the diagnosis or treatments . . . . So, I think . . . [§ 8-3 (5) of the Connecticut Code of Evidence] applies and I will allow the forensic interview as evidence here."

On the next day of trial, the state presented the testimony of Montelli on the witness stand, and during her testimony, the state offered the video recording of the forensic interview, which it then played in front of the jury.

On appeal, the defendant claims that the court erred by admitting the video recording of the forensic interview because it contained hearsay and it was not shown to have been carried out for the purpose of medical treatment. In opposition, the state argues that the court did not abuse its discretion by admitting into evidence the video recording of the forensic interview because the state presented sufficient evidence at trial that the primary purpose of the interview was for medical treatment, which allowed its admission under the medical diagnosis and treatment hearsay exception. Alternatively, the state argues that any error was harmless to the defendant. We agree with the state that the court did not abuse its discretion by admitting into evidence the video recording of the forensic interview.

We begin our analysis of this claim with the appropriate standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of

discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Internal quotation marks omitted.) *State* v. *Griswold*, 160 Conn. App. 528, 536, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).

At the outset of our analysis, we note that the defendant argues that the court, by admitting the video recording of the victim's forensic interview with Montelli, violated her sixth amendment right to confront witnesses against her pursuant to *Crawford* v. *Washington*, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), because the statements made by the victim during that interview were testimonial in nature. With respect to this claim, which is distinct from her evidentiary claim related to the admissibility of the video recording, she relies on *State* v. *Maguire*, 310 Conn. 535, 78 A.3d 828 (2013), and contends that the court erred in admitting the video recording under the medical treatment exception to the hearsay rule without first finding that the forensic interview was not testimonial in nature. The defendant argues that the interrogation conducted by Montelli was intended primarily to further the criminal investigation and preparation for her prosecution, and not to provide medical assistance to the victim. In so arguing, she relies on the principle that "statements taken by government actors who are not members of law enforcement are testimonial if the interview is the functional equivalent of police interrogation with the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." *State* v. *Arroyo*, 284 Conn. 597, 629, 935 A.2d 975 (2007).

The state argues that because the victim was available and was subject to cross-examination at trial, there was no constitutional violation. Moreover, the state claims the defendant's reliance on *Maguire* is misplaced because that case involved similar evidence admitted under the tender years exception to the hearsay rule, rather than the medical treatment exception. Finally, the state asserts that any error was harmless because the statements made during the forensic interview were cumulative of other properly admitted and unchallenged evidence.

Recently, in *State* v. *Griswold*, supra, 160 Conn. App. 550, this court held that there was no error in the admission of video recordings of the forensic interviews of two victims, as well as the summaries of such interviews, under the medical diagnosis and treatment exception. The defendant in that case argued that if the video recordings and summaries were not admissible under the tender years exception as a result of the holding in *Maguire*, then they likewise were inadmissible under the medical diagnosis and treatment exception. We began our analysis in *Griswold* by first clarifying the important point that, because the victims appeared at trial and were subject to cross-examination by the defendant, *Crawford* and its progeny did not directly apply. Id., 550–51. Although the victim in the present case did not testify while he was physically in the presence of the defendant and the jury, he nevertheless testified and was cross-examined by the defendant's attorney in a trial setting pursuant to the court's ruling on the state's *Jarzbek* motion. A minor victim's videotaped testimony pursuant to *Jarzbek* procedures is the "functional equivalent of testimony in court." (Internal quotation marks omitted.) *State* v. *Arroyo*, supra, 284 Conn. 621. Accordingly, because, in the present case, the victim's testimony was elicited under

circumstances which permitted the defendant's attorney to cross-examine him—which he did, in fact, do—a sixth amendment violation does not exist.

Thus, although we concluded in *Griswold* that the victims' statements were testimonial in nature, we did not conclude that they were barred by the sixth amendment's confrontation clause, as *Crawford* would have required if the victims were unavailable to testify at trial and there had been no prior opportunity for cross-examination. Rather, we determined that the video recordings and written summaries did not satisfy one criterion set forth in the tender years exception for admissibility thereunder—a prohibition against statements made in preparation of a legal proceeding.

We then observed, "in contrast to the tender years exception, the medical diagnosis and treatment exception to the hearsay rule contains no language expressly or implicitly importing *Crawford*'s prohibition against testimonial hearsay. The exception provides only that statements 'made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment,' are not excluded by the hearsay rule. Conn. Code Evid. § 8-3 (5). Neither this language, nor any common-law principle that we are aware of, mandates that statements offered under the exception be nontestimonial. Rather, their admissibility turns principally on whether 'the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving those ends.' " (Footnote omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 552.

Therefore, the thrust of the defendant's argument with respect to the court's admission of the videotaped

recording of the forensic interview between the victim and Montelli focuses on the issue of whether the recording properly was admitted under the medical diagnosis and treatment exception to the hearsay rule. Section 8-3 of the Connecticut Code of Evidence, titled "Hearsay Exceptions: Availability of Declarant Immaterial," provides that twelve types of statements "are not excluded by the hearsay rule, even though the declarant is available as a witness." The fifth subsection of this section, titled "Statement for purposes of obtaining medical diagnosis or treatment," provides that the following type of statement is not inadmissible under the hearsay rule: "A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment." Conn. Code Evid. § 8-3 (5). The admissibility of statements offered under the medical diagnosis and treatment exception to the hearsay rule turns on whether "the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving those ends." (Internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 552.

This court, in *State* v. *Griswold*, supra, 160 Conn. App. 528, recently analyzed the medical diagnosis and treatment exception to the hearsay rule. In *Griswold*, minor victims of sexual assault recounted their recent experiences in forensic interviews conducted by members of a "multidisciplinary investigative team" of professionals at the Greater Hartford Children's Advocacy Center (advocacy center). Id., 531. The members of the multidisciplinary investigative team consisted of a clinical child interview supervisor at the advocacy center and a clinical child interview specialist. Id. The victims, already having told their mother about the

defendant's actions toward them, participated in videotaped forensic interviews, during which they again shared their recollections of the defendant's actions with the multidisciplinary investigative team at the advocacy center. Id. Before the defendant's subsequent criminal trial, the state offered as evidence the video recordings of the forensic interviews, and the defendant filed a motion in limine to preclude their admission into evidence on the grounds that they constituted hearsay and were unfairly prejudicial. Id., 532. In response, the state argued that the recordings were admissible under two exceptions to the hearsay rule, the tender years exception[7] and the medical diagnosis and treatment

[7] The tender years exception to the hearsay rule, codified in § 8-10 of the Connecticut Code of Evidence, states the following: "Admissibility in criminal and juvenile proceedings of statement by child under thirteen relating to sexual offense or offense involving physical abuse against child. (a) Notwithstanding any other rule of evidence or provision of law, a statement by a child under thirteen years of age relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by a person or persons who had authority or apparent authority over the child, shall be admissible in a criminal or juvenile proceeding if: (1) The court finds, in a hearing conducted outside the presence of the jury, if any, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness, (2) the statement was not made in preparation for a legal proceeding, (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made and the circumstances surrounding the statement that indicate its trustworthiness, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and (4) either (A) the child testifies and is subject to cross-examination at the proceeding, or (B) the child is unavailable as a witness and (i) there is independent nontestimonial corroborative evidence of the alleged act, and (ii) the statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

"(b) Nothing in this section shall be construed to (1) prevent the admission of any statement under another hearsay exception, (2) allow broader definitions in other hearsay exceptions for statements made by children under thirteen years of age at the time of the statement concerning any alleged act described in subsection (a) of this section than is done for other declarants, or (3) allow the admission pursuant to the residual hearsay exception

exception. Id. The trial court denied the defendant's motion in limine and, in doing so, concluded that the video recordings were admissible under both the tender years, and the medical diagnosis and treatment exceptions to the hearsay rule. Id., 534. On appeal, this court concluded that (1) the trial court improperly admitted the video recordings under the tender years exception because the circumstances surrounding the forensic interviews were such that an objective observer would conclude that their primary purpose was not to provide the victims with medical diagnosis or treatment, but "to [establish] or prov[e] past events potentially relevant to later criminal prosecution"; (internal quotation marks omitted); id., 547; but (2) the trial court properly admitted the video recordings under the medical diagnosis and treatment exception because the victims' statements adduced in the forensic interviews "were reasonably pertinent to obtaining medical diagnosis or treatment"; id., 557; and the professionals participating in the forensic interviews "sufficiently occupied a position within the chain of medical care, to bring the victims' statements within the scope of the medical diagnosis and treatment exception." Id.

In analyzing the defendant's claim with respect to the medical diagnosis and treatment exception, this court stated the following, which we find to be instructive in the present case: "In the context of a forensic interview, [the standard for the admissibility of statements under the medical diagnosis and treatment exception] is substantially less demanding than the one imposed by *Crawford* and incorporated into the tender years exception. Undoubtedly, statements may be reasonably pertinent . . . to obtaining medical diagnosis or treatment even when that was not the *primary purpose* of the inquiry that prompted them, or the principal

of a statement described in subsection (a) of this section." (Internal quotation marks omitted.) Conn. Code Evid. § 8-10.

motivation behind their expression. See *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266 (forensic interview statements admissible under medical diagnosis and treatment exception because the purpose of the interview was, *at least in part*, to determine whether the victim was in need of medical treatment . . .), cert. denied, 291 Conn. 910, 969 A.2d 174 (2009). Consequently, we anticipate that in most circumstances, the task of demonstrating that a statement made during a forensic interview satisfies the medical diagnosis and treatment exception will be less onerous than establishing that it is admissible under the tender years exception.

* * *

"Having concluded that the applicability of the medical diagnosis and treatment exception to the hearsay rule must be determined on its own merits, we set forth the relevant legal principles that guide our resolution of this question. Out-of-court statements made by a patient to a [medical provider] may be admitted into evidence if the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving these ends. . . . The rationale for excluding from the hearsay rule statements made in furtherance of obtaining treatment is that we presume that such statements are inherently reliable because the patient has an incentive to tell the truth in order to obtain a proper medical diagnosis and treatment. . . . The term medical encompasses psychological as well as somatic illnesses and conditions. . . . Statements made by a sexual assault complainant to a social worker may fall within the exception if the social worker is found to have been acting within the chain of medical care. . . . Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, [we] have

permitted this requirement to be satisfied inferentially." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 552–56. Applying these principles, this court noted that the record in that case provided sufficient evidence demonstrating that the victims' statements made in the forensic interviews were reasonably pertinent to their obtaining medical diagnosis and treatment. Id., 557. In this vein, this court took particular note of the fact that the information obtained from the minor victims' statements in the forensic interviews was provided to their medical providers and mental health practitioners. Id. Furthermore, this court focused on the fact that the professionals conducting the forensic interviews, as necessary, made referrals for mental health and medical treatment at the conclusion of each interview. Id. Finally, this court took particular note of the fact that the advocacy center performed physical and mental health examinations on victims of sexual abuse on-site. Id.

In the present case, guided by *Griswold*, we conclude that the court properly admitted into evidence the video recording of the forensic interview between Montelli and the victim because the victim's statements made during the interview fell under the medical diagnosis and treatment exception to the hearsay rule. We reach this conclusion because the state adequately demonstrated that an objective observer could determine that the victim's statements to Montelli during the forensic interview were reasonably pertinent to obtaining medical treatment and that Montelli sufficiently occupied a position within the chain of medical care. See id.; see also *State* v. *Cruz*, supra, 260 Conn. 6 ("[w]e . . . conclude that the medical treatment exception to the hearsay rule applies to statements made by a sexual assault victim to a social worker who is acting within the chain of medical care, as long as those statements are made

for the purpose of obtaining medical diagnosis or treatment and are pertinent to the diagnosis or treatment sought''). Furthermore, given that the medical diagnosis and treatment exception does not require that the primary purpose of the forensic interview and the statements made by the victim therein be for medical treatment, we are satisfied that the victim's statements fell within the exception despite the facts that a police officer and a department social worker were observing the interview, it was recorded, and Montelli's questions largely focused on determining what had happened to the victim in his encounters with the defendant. We also note that the involvement of a police officer in the interview does not automatically preclude a statement from falling within the medical diagnosis and treatment exception. See, e.g., *State* v. *Miller*, 121 Conn. App. 775, 783, 998 A.2d 170 (''[W]e are not persuaded by the defendant's argument that because the victim knew that police officers were present during the interview, the purpose of her interview with [a licensed family therapist] was not for medical treatment. This fact does not undermine the medical treatment purpose of the interview.''), cert. denied, 298 Conn. 902, 3 A.3d 72 (2010).

The record reflects that the timing and context of the forensic interview in relation to the victim's other visits to medical professionals supported the conclusion that the interview was not solely conducted in preparation for a legal proceeding, but rather was reasonably pertinent to obtaining medical treatment. After the victim revealed the details of his encounters with the defendant to F and C, the victim, as a result of those encounters, received a medical diagnosis and began receiving treatment at Clifford Beers in April, 2010. Dr. Adams, a psychologist who treated the victim at Clifford Beers in 2010, testified that Clifford Beers is a ''community mental health center,'' and that when F and C took the victim to Clifford Beers for the first time after he

disclosed the details of the defendant's actions to them, as part of the intake process, the victim was diagnosed with post-traumatic stress disorder after he was examined by Dr. Brodhagen, who is also a psychologist. From April, 2010, to approximately October, 2011, the victim continued visiting Dr. Adams for therapy sessions in order to treat this disorder. The forensic interview between the victim and Montelli took place on May 3, 2010, which was during the time period during which Dr. Adams and other professionals at Clifford Beers were treating the victim for post-traumatic stress disorder. On May 7, 2010, which was several days after the victim participated in the forensic interview with Montelli, he also visited Murphy for a medical evaluation.

Although Murphy testified that she did not observe the video recording of the forensic interview between the victim and Montelli prior to her conducting a medical evaluation of him, she testified that she met with Montelli and discussed the relevant details of the victim's situation as they related to his encounters with the defendant. Murphy also testified that she met with C to obtain any additional necessary information pertaining to the victim's medical history prior to her conducting a medical evaluation of him. Furthermore, Murphy testified that at the commencement of her medical evaluation, she told the victim, as she normally does, that she works with Montelli and that she wanted to make sure that the victim understood that he knew that she was checking his body to make sure that he was in good physical health as a result of his previous encounters with the defendant. Murphy also testified that, as a standard operating procedure, she works closely with social workers, like Montelli, who conduct forensic interviews of victims so that she has all necessary information about the victims' medical histories and the nature of the abuse that they allegedly have

experienced.[8] Finally, Murphy testified that, at the time that she conducted the medical evaluation of the victim, she was aware that Montelli had given the victim therapy referrals, and she was further aware that he had begun receiving mental health treatment at Clifford Beers.

On the basis of our review of the record, we conclude that the victim's statements made during the forensic interview with Montelli were reasonably pertinent to his receiving medical treatment. Although the victim

[8] Murphy also testified as follows with respect to the normal procedure that she follows in conducting medical evaluations of minor victims of sexual abuse: "[T]he way things have evolved and what we have been doing probably for the past ten years, most of the children seen receive an interview and a medical evaluation. So, the initial meeting is with the social worker and the person who is doing the medical evaluation with the accompanying guardian to the child to get a history about the family history and about the concern of why the child is there. After that history is obtained, the forensic interviewer will then meet with the child to do the forensic interview that is observed by myself. I do most of the medical evaluations, so, by myself or whoever is doing the medical by police and [the department]. Then, after the interview is completed is when the child typically is offered a medical evaluation. Sometimes if a medical person isn't available, we don't always do the medical on the same day. Occasionally, it's done on a different day, and then the social worker . . . meets with whoever the child is scheduled with to fill them in on the details of the forensic interview and the history. . . .

"[A]ll children are offered a medical evaluation, and there are several reasons for that. Many of the children who have talked about different things that have happened to them, whether a medical evaluation is indicated or not, sometimes they have worries about their body that they're going to share in the medical evaluation that they may not have shared within the forensic interview or with whoever else they might meet. The other reason is that there's a kind of a process to telling; some kids only tell partial information initially, and sometimes the things they may not have talked about, which may be the more embarrassing things, would necessitate a medical. So, just kind of sitting down and talking with a child about what we want to check, making sure they are okay and learning about what their understandings of things are, what they might be worried about. They may have inaccurate information about some health issue that might be related to whatever happened to them. So, kids are really relieved to have somebody check their body and make sure everything is okay. That has been my experience with as many kids as I have seen."

already had been diagnosed with post-traumatic stress disorder by Clifford Beers professionals in April, 2010, his treatment for this disorder did not conclude, at the earliest, until the commencement of the defendant's criminal trial. Furthermore, as Murphy testified, she met with Montelli to discuss the forensic interview to obtain the history and other relevant details prior to conducting the physical examination of the victim. Thus, the physical examination of the victim was informed by the forensic interview. The evidence showed that both Montelli and Murphy were aware that other medical and mental health professionals were treating the victim and that part of Montelli's purpose in this regard was to elicit information to pass on to these professionals, including Murphy, so that proper treatment could be rendered. Specifically, as Murphy testified, professionals at the Yale clinic worked to ensure that the victim was receiving proper treatment from those other professionals, particularly those working at Clifford Beers.

Accordingly, we conclude that the court properly determined that the victim's statements made during the forensic interview with Montelli fell within the medical diagnosis and treatment exception to the hearsay rule, and that the court did not abuse its discretion in admitting the video recording of the forensic interview into evidence.

II

Next, we address the defendant's claim that the court committed reversible error in imposing an illegal sentence by sentencing the defendant to a mandatory minimum sentence of five years imprisonment on each of the two counts of risk of injury to a child in violation of § 53-21 (a) (2). With respect to this claim, the defendant first argues that the court erred because the information in which the defendant was charged alleged that

the offenses occurred on divers dates between 2006 and 2010, and the mandatory minimum sentencing scheme pertained only to offenses committed after July, 2007. The defendant argues that jury interrogatories should have been submitted to the jury to establish whether it found the defendant guilty on the basis of acts prior to July 1, 2007. Second, the defendant argues that the court erred by imposing an illegal sentence because, in the absence of a jury determination that the offenses occurred when the victim was under thirteen years old, the court did not have the authority to sentence the defendant to a mandatory minimum of five years of imprisonment.

In opposition, the state argues that the court did not impose an illegal sentence because the evidence adduced at trial established that all of the offenses occurred after the July 1, 2007 effective date for the mandatory minimum sentencing scheme. In response to the defendant's second argument, the state argues that it is not reviewable because it was inadequately briefed.[9] We agree with the state that the court did not err in imposing a five year mandatory minimum sentence on each count of risk of injury to a child under § 53-21 (a) (2) because the evidence adduced at trial proved that the offenses committed by the defendant in violation of § 53-21 (a) (2) occurred after July, 2007.

We begin our analysis of this claim with the appropriate standard of review. Our rules of practice provide 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." Practice Book § 43-22. Thus, "[b]oth the trial court and this court,

[9] We conclude that the claim was adequately briefed and, therefore, disagree with the state's argument as to the reviewability of the defendant's second claim.

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). Because the defendant's claim involves a question of law with respect to the applicability of a statute, our review is plenary. See id., 881.

A

We first address the defendant's argument that the court erred by imposing an illegal sentence because the information provided that all of the offenses occurred on diverse dates between 2006 and 2010. We conclude that the court did not err in its imposition of a mandatory minimum sentence of five years imprisonment on each of the two counts of risk of injury to a child in violation of § 53-21 (a) (2).

The following additional procedural history is relevant to this argument. In relevant part, the state charged the following in the first count of the information, accusing the defendant of committing risk of injury to a child: ''on divers dates between and including September, 2006, and March, 2010, in the City of New Haven, the said [defendant] did subject a child under the age of sixteen years, to wit, her son, [the victim, date of birth October 24, 2000], to contact with her intimate parts, to wit, her breast, in a sexual and indecent manner, likely to impair the health or morals of such child in violation of [§] 53-21 (a) (2) . . . .''

In relevant part, the state charged the following in the second count of the information accusing the defendant of committing risk of injury to a child: ''on divers dates between and including September, 2006, and March, 2010, in the City of New Haven, the said [defendant] did have contact with the intimate parts, to wit, the penis, of a child under the age of sixteen years, to wit, her son, [the victim, date of birth October 24, 2000],

in a sexual and indecent manner, likely to impair the health or morals of such child in violation of [§] 53-21 (a) (2) . . . .''

At the October 2, 2013 sentencing hearing, with respect to the defendant's commission of two counts of risk of injury to a child in violation of § 53-21 (a) (2), the court sentenced the defendant to concurrent sentences of twelve years imprisonment, execution suspended after the service of eight years, five years of which were to be a mandatory minimum sentence, followed by ten years of probation.[10] ''Connecticut has recognized two types of circumstances in which the court has jurisdiction to review a claimed illegal sentence. The first of those is when the sentence itself is illegal, namely, when the sentence either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . The other circumstance in which a claimed illegal sentence may be reviewed is that in which the sentence is within relevant statutory limits, but was imposed in a way which violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . .'' (Internal quotation marks omitted.) *State* v. *Fairchild*, 155 Conn. App. 196, 204, 108 A.3d 1162, cert. denied, 316 Conn. 902, 111 A.3d 470 (2015). We confront the first of these circumstances in the present appeal.

Prior to the legislature's amendment of § 53-21 (a) in 2007, the statute provided in relevant part that ''[a]ny

[10] During the sentencing hearing, the court also stated: ''[T]he . . . victim . . . was born on October 24, 2000. Numerous times between the years 2006 and 2009, and that is approximate years, the defendant had sexual contact with the intimate parts of her son, namely, his penis. . . . He was seven, eight, or nine years old when this conduct of the defendant was imposed upon him.''

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 for a violation of subdivision (2) of this subsection." General Statutes (Rev. to 2007) § 53-21 (a). In 2007, however, the legislature, by virtue of its passage of No. 07-143, § 4, of the 2007 Public Acts, amended subsection (a) of § 53-21 to add, in relevant part, the following language: "except that, if the violation is of subdivision (2) of this subsection and 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." The effective date of this statutory amendment was July 1, 2007. Public Acts 2007, No. 07-143, § 4.

"It is axiomatic that it is the date of the crime which controls the possible punishment for the offense." (Internal quotation marks omitted.) *State* v. *Allen*, 12 Conn. App. 403, 406, 530 A.2d 670, cert. denied, 205 Conn. 809, 532 A.2d 76 (1987). It is an undisputed fact that the victim was born on October 24, 2000. The victim's testimony demonstrated that all of the defendant's abusive actions toward him occurred while he was seven years old or older, or on or after October 24, 2007. Specifically, the victim testified at trial that the first time that the defendant abused him by touching his penis occurred when he was between seven and eight years old. The victim then testified that the defendant abused him by touching his penis about five or more times after that. The victim testified that the incident where he witnessed the defendant and N having sexual intercourse with each other while he and B were trying to sleep on the defendant's bed occurred when

he was between eight and nine years old. He also testified that he was "eight to nine" years old on the first occasion where the defendant forced him to touch her breasts. Furthermore, the victim testified that he was between eight and eight and one-half years old when the defendant abused him in the shower. C testified that the victim first disclosed the nature of the defendant's abusive acts toward him in April, 2010. The victim testified that when he first disclosed the nature of the defendant's abusive acts toward him to C, which would have been in April, 2010, he had experienced these acts for "about two years" prior to the date of this disclosure. Finally, the court, at the sentencing hearing, despite stating that the defendant had sexual contact with the intimate parts of the victim on numerous occasions approximately from 2006 to 2009, stated twice that the victim was seven, eight, or nine years old when the offenses occurred.

We conclude that the court did not impose an illegal sentence by imposing the five year mandatory minimum sentence for the judgment of conviction against the defendant with respect to each of her violations of § 53-21 (a) (2) because the evidence adduced at trial adequately proved that the defendant committed all of the offensive acts after July 1, 2007. We reach this conclusion because the testimony elicited at trial established that the earliest occasions on which the victim experienced abusive conduct at the hands of the defendant occurred after October 24, 2007, when he was seven years old. Although the information charged that the defendant committed the offenses "on divers dates between and including September, 2006, and March, 2010,"[11] we note that informations are not evidence. See

[11] With respect to the dates of offenses alleged in an information, we note that "[t]he state has a duty to inform a defendant, within reasonable limits, of the time when the offense charged was alleged to have been committed. The state does not have a duty, however, to disclose information which the state does not have." (Internal quotation marks omitted.) *George M.* v. *Commissioner of Correction*, 101 Conn. App. 52, 59, 920 A.2d 372 (2007),

State v. *Avis*, 209 Conn. 290, 308, 551 A.2d 26 (1988) (court's instruction that indictment is not to be considered as evidence was proper statement of law), cert. denied, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 937 (1989). Given that a court should rely only on evidence adduced at trial in imposing a criminal sentence, the generalized time frame in the information in the present case did not render the court's sentence illegal. See *State* v. *Bazemore*, 107 Conn. App. 441, 461, 945 A.2d 987 (court properly relied on evidence presented at trial in imposing sentence), cert. denied, 287 Conn. 923, 951 A.2d 573 (2008).[12] Accordingly, we reject the defendant's

rev'd on other grounds, 290 Conn. 653, 966 A.2d 179 (2009). Accordingly, the state is permitted to "[allege] a . . . date range during which the [charged] offenses were alleged to have been committed." Id. Furthermore, it is particularly reasonable for the state to allege in an information that the defendant committed offenses within a date range in cases where "the [victim is] of a tender age, there is a continuing nature to the offenses alleged and the capacity of the [victim] to recall specifics precludes the state from alleging events with exactitude." Id.

[12] Even if the evidence had disclosed that some of the acts alleged in this case had occurred prior to the July 1, 2007 amendment to § 53-21 (a) (2), our conclusion that the court did not impose an illegal sentence still would stand. In *State* v. *Ramos*, 176 Conn. 275, 407 A.2d 952 (1978), our Supreme Court noted that "[i]t is a well-established rule in this state that it is not essential in a criminal prosecution that the crime be proved to have been committed on the precise date alleged, it being competent ordinarily for the prosecution to prove the commission of the crime charged at any time prior to the date of the complaint and within the period fixed by the Statute of Limitations." (Internal quotation marks omitted.) Id., 276–77. Furthermore, this court, in *State* v. *Allen*, supra, 12 Conn. App. 403, considered a claim that the trial court improperly applied an amended sentencing statute when the state alleged that some of the criminal acts committed by the defendant, which were in violation of § 53-21, occurred before an amendment to the statutory sentencing scheme took effect. Id., 405. The state alleged in the information that the defendant, "on divers dates 1980 through March 5, 1984 . . . did commit certain acts likely to impair the health or morals of a minor child . . . ." (Internal quotation marks omitted.) Id., 404. After the defendant was found guilty, the court sentenced him pursuant to General Statutes § 53a-35a, which provided, inter alia, that any felony committed on or after July 1, 1981, would require that a definite sentence be imposed for a judgment of conviction for such felony. Id., 406. On appeal, the defendant argued that his sentence was illegal because the state had charged that he had committed offenses both prior to and after July 1, 1981, and, as a result,

first argument and conclude that the court did not err by imposing, in each of the two relevant convictions, the mandatory minimum five year sentence pursuant to the 2007 amendment to § 53-21 (a) (2).

B

Next, we address the defendant's argument that the court erred by imposing an illegal sentence because it did not have the authority to sentence the defendant to the mandatory minimum five year sentence for each of the two convictions under § 53-21 (a) (2) in the absence of a jury determination that the offenses occurred when the victim was younger than thirteen years of age. We conclude that this argument has no merit because any alleged error in this regard is harmless under the facts of this case.

The following additional procedural history is relevant to this argument. In the court's jury instructions, it instructed, inter alia, that the fourth element of the

the court should have sentenced him pursuant to § 53a-35, which required, inter alia, that any sentence imposed for a judgment of conviction for a felony committed prior to July 1, 1981, would be an indeterminate sentence. Id., 405. This court held that although some of the criminal offenses alleged by the state occurred before July 1, 1981, the trial court did not err in imposing its sentence under the amended sentencing statute, § 53a-35a. Id., 407. Furthermore, this court stated in relevant part that "where a sentencing statute which is applicable to a continuing offense is amended during the course of the commission of that offense, and where the offense is not completed until after the effective date of the amended statute, the defendant is subject to the penalties provided by that amended statute. . . . [Section] 53-21 defines a crime which, depending on the facts of the case, may be a continuing offense or may be an offense which is completed upon the happening of a single event. This information was treated by the court and the parties as a continuing offense, beginning in 1980 and not ending until 1984. The court therefore was entitled to sentence the defendant, pursuant to § 53a-35a, for the continuing offense . . . ." (Citations omitted.) Id., 406–407. In the present case, we similarly conclude that the court did not err by imposing a sentence pursuant to § 53-21 (a) (2), as amended in July, 2007, because the evidence adduced at trial established that the offenses committed by the defendant, at the very least, were not completed until after July, 2007.

crime of risk of injury to a child in violation of § 53-21 (a) (1) and (2) required the state to prove beyond a reasonable doubt that at the time of the incident, the minor was under sixteen years of age.

In light of the fact that the sentencing portion of § 53-21 (a) (2) provides that the five year mandatory minimum sentence applies when the victim is under the age of thirteen years at the time of the commission of the crime, the defendant argues that the jury also should have been instructed to make this specific finding with respect to the offenses charged under § 53-21 (a) (2), instead of being instructed to find that the victim was under the age of sixteen years at the time of the commission of those crimes. The defendant's argument is premised on two holdings of the United States Supreme Court, *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Apprendi*, the Supreme Court held, inter alia, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, supra, 490. In *Alleyne*, the court reaffirmed its *Apprendi* holding and clarified that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne* v. *United States*, supra, 103. Thus, the defendant argues, given that the sentencing portion of § 53-21 (a) (2) enhances punishment for the offense by imposing a mandatory minimum five year sentence when the victim is under thirteen years of age, this fact should have been found beyond a reasonable doubt by the jury.

We agree with the state inasmuch as it argues that any error in this regard is harmless. In *Washington* v. *Recuenco*, 548 U.S. 212, 221–22, 126 S. Ct. 2546, 165 L.

Ed. 2d 466 (2006), the Supreme Court held, inter alia, that the failure to submit a sentencing factor to the jury is subject to harmless error analysis. See *State* v. *Fagan*, 280 Conn. 69, 101 n.23, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). It is undisputed that the victim was born on October 24, 2000. Given that the defendant's trial occurred on several days in May, 2012, when the victim was eleven years old, we conclude that the jury could have found beyond a reasonable doubt that all of the instances of the defendant's offensive conduct against the victim occurred while the victim was under thirteen years of age. As a result, we reject the defendant's argument and conclude that any alleged error of the court in not instructing the jury to find beyond a reasonable doubt that the victim was under thirteen years of age when the defendant violated § 53-21 (a) (2) was harmless beyond a reasonable doubt.

III

Finally, we address the defendant's claim that the court committed reversible error by admitting unduly prejudicial uncharged misconduct evidence against the defendant. The following additional facts and procedural history are relevant to this claim. On March 2, 2012, the victim testified during direct examination by the state as follows:

"[The Prosecutor]: . . . Sometimes at home, do you still get into trouble for things?

"[The Victim]: Yes.

"[The Prosecutor]: For acting out?

"[The Victim]: Yes.

"[The Prosecutor]: Okay. Do you sometimes tell lies about things you do?

"[The Victim]: Yes, I do.

"[The Prosecutor]: You do. And have you ever taken things that aren't yours?

"[The Victim]: Yes.

"[The Prosecutor]: Okay. Did you take an iPod?

"[The Victim]: Yes.

"[The Prosecutor]: Tell me about that . . . do you know why you take something?

"[The Victim]: I, like, I just have, like, a feeling that every time I, like, see something, I have to take it.

"[The Prosecutor]: Okay. Do you know if it's right or it's wrong to take something?

"[The Victim]: It's wrong.

"[The Prosecutor]: And if somebody asks you about something you did, are there ever times that you don't fess up, you don't say what really happened?

"[The Victim]: Yes.

"[The Prosecutor]: And what makes you not tell the truth then?

"[The Victim]: Because I don't want to get in trouble.

"[The Prosecutor]: Okay. Today, when we come here, it's, obviously, a really important place where we have to tell the truth, do you understand that?

"[The Victim]: Yes.

"[The Prosecutor]: Okay. And when I asked you questions today, you know how important it is that you tell the truth of how you remember things?

"[The Victim]: Yes, I do.

"[The Prosecutor]: Have you told the truth?

"[The Victim]: Yes, I do—I have."

While the victim was being cross-examined, he testified as follows:

"[Defense Counsel]: Now, recently, you've talked to your therapist?

"[The Victim]: Yes.

"[Defense Counsel]: And you've had little problems of saying the truth?

"[The Victim]: Yes.

"[Defense Counsel]: And you keep saying, you know, different things to different people?

"[The Victim]: Yes.

"[Defense Counsel]: And so, you tend to lie a lot?

"[The Victim]: Yes.

"[Defense Counsel]: But you are not lying today?

"[The Victim]: I'm not lying today.

"[Defense Counsel]: You didn't lie prior to all these incidents happening?

"[The Victim]: No.

"[Defense Counsel]: [C] didn't tell you to lie?

"[The Victim]: No, she did not.

"[Defense Counsel]: [C] didn't promise you anything?

"[The Victim]: She promised she would keep me safe.

"[Defense Counsel]: Okay. And you also had a little problem with stealing?

"[The Victim]: Yes.

"[Defense Counsel]: And you've been stealing quite a bit?

"[The Victim]: Yes."

On May 7, 2012, the state notified the defendant and the court that it intended to introduce evidence of other crimes, wrongs, or acts of the defendant through, inter alia, the testimony of the victim's half-sister, M, whose biological mother was also the defendant, with respect to her overhearing the defendant ask the victim to steal money from his biological father, F, and to bring it to the defendant so that she could use it to purchase items for the victim. The state argued that this evidence was relevant because it was "a matter of impeachment" for the victim, given that he had testified that he occasionally tells lies and steals. The court did not rule on the issue on that date, but the videotaped testimony of the victim, in which he testified that he lies and steals at times, subsequently was played before the jury.

On May 8, 2012, the defendant filed a written objection to the state's notice of intent and an accompanying memorandum of law, in which she objected to the state's introduction of the uncharged misconduct evidence on the grounds that its probative value was outweighed by its unfairly prejudicial effect, and that it subjected her to unfair surprise. On this same date, the court ruled that the evidence presented through M's testimony was admissible, as follows:

"There was filed yesterday by motions . . . a notice of intent to introduce evidence. This is the state's motion of other crimes, wrongs or acts, specifically to allege relevant facts. The first one is, quote, the defendant is alleged to have requested that the [victim] steal money from [F] to bring to the defendant, who, thereafter, indicated she would purchase him things with it.

"The court has already and the jury has already heard [that the victim] has admitted under oath to stealing. The court would allow the defendant to make comments, and the defendant's statements are admissible. Relevant statements are admissible. This issue of what,

if anything, was stolen or her involvement in the stealing of any funds concerning [the victim] goes to weight and not admissibility, so I would allow that." On the same date, M testified that, on one occasion, she overheard the defendant ask the victim to take quarters from F so that she could buy the victim a laptop.[13] M also testified that she recalled that the victim frequently would come home with quarters.

On appeal, the defendant argues that the court erred by admitting this uncharged misconduct evidence because it was not relevant or material to the crimes with which the defendant had been charged. The defendant also argues that not only was this uncharged misconduct evidence irrelevant, but its prejudicial effect outweighed its probative value with respect to any material issue in the case. Furthermore, the defendant argues that because the state was the first party to impeach the victim, it did not need to introduce the uncharged misconduct evidence and any attempt at doing so was not only unnecessary, but unduly harmful to the defendant. We disagree with the defendant's arguments.

We begin our analysis with the appropriate standard of review for this claim. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Reynolds*, 152 Conn. App. 318, 335, 97 A.3d 999, cert. denied, 314 Conn. 934, 102 A.3d 85 (2014).

With respect to the defendant's claim that the court erred by admitting the uncharged misconduct evidence because it was irrelevant, we agree with the state that such a claim is not reviewable. "[T]he standard for the

[13] Although the defendant objected to M's testimony on hearsay grounds, the court properly ruled that the defendant's statement was admissible as an admission of a party. See Conn. Code Evid. § 8-3 (1).

preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"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. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Pagan*, 158 Conn. App. 620, 632–33, 119 A.3d 1259, cert. denied, 319 Conn. 909, 123 A.3d 438 (2015). In the defendant's objection to the state's notice of intent to introduce evidence that the defendant enticed the victim to steal from F, she only objected on the grounds that the probative value of such evidence was outweighed by the danger of unfair prejudice and unfair surprise. At trial, during M's testimony, the defendant only objected to the evidence on the grounds that such evidence was hearsay and was elicited in an improper form.[14] Because the only one of these grounds stated at trial that the defendant raises on appeal is that the uncharged misconduct evidence's probative value was outweighed by its tendency

[14] We reject the defendant's argument, made in her reply brief, that, by virtue of her objection to the admissibility of the evidence on unfair prejudice grounds, she implicitly objected to the relevance of the evidence because the exceptions set forth in § 4-5 of the Connecticut Code of Evidence require that the evidence be relevant.

to cause unfair prejudice, this is the only ground on which we shall review the defendant's claim.

The defendant argues that the prejudicial effect of this uncharged misconduct evidence unduly outweighed its probative value because, although it was introduced to rehabilitate the credibility of the victim insofar as he had testified that he sometimes lies and steals, it unnecessarily tarnished the character of the defendant, given that she is the victim's mother, and any evidence suggesting that she would entice her son to commit a crime would arouse the emotions of the jury against her. Furthermore, the defendant argues that the unfairly prejudicial effect is amplified by the fact that this evidence does not fit into any recognized exception to the admissibility of uncharged misconduct evidence as set forth in § 4-5 of the Connecticut Code of Evidence.

Section 4-5 of the Connecticut Code of Evidence, titled "Evidence of Other Crimes, Wrongs or Acts Generally Inadmissible," provides in relevant part: "(a) . . . Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

"(b) . . . Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and

(3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

"(c) . . . Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

"(d) . . . In cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person's conduct."

The official commentary to § 4-5 (c) states in relevant part: "Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered, and that its probative value outweighs its prejudicial effect. . . . *The purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive.* Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors." (Emphasis added.) Conn. Code Evid. § 4-5 (c), commentary.

In the present case, the court determined that the challenged uncharged misconduct evidence showing that the defendant told the victim to steal money from

F was relevant to the issue of the victim's credibility,[15]

[15] As previously mentioned, the defendant disputes this conclusion on appeal, yet she did not properly preserve her objection on this ground because at trial and in her written objection to the state's notice of intent to introduce evidence of other crimes, wrongs, or acts, she only objected to the admission of this evidence on different grounds, none of which challenged the relevance of this evidence as it pertained to the victim's credibility. Nevertheless, we conclude that the court properly determined that this uncharged misconduct evidence was admissible as relevant to the rehabilitation of the victim's credibility.

The commentary for § 4-5 (c) of the Connecticut Code of Evidence does not limit the purposes for which a court can admit uncharged misconduct evidence to those enumerated in that subsection of the Code. Therefore, the court was permitted to admit the uncharged misconduct evidence at issue in the present appeal to the extent that it bore on the victim's credibility, which the court determined to be a material issue in the state's case. Furthermore, we note that "[t]he state is allowed to rehabilitate a witness whose credibility has been impeached . . . by allowing that witness to explain the circumstances underlying the [the incident that was used to impeach] . . . and may rebut such evidence *by other evidence*." (Citation omitted; emphasis added.) *State* v. *Sauris*, 227 Conn. 389, 412, 631 A.2d 238 (1993), overruled in part on other grounds by *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 309, 852 A.2d 703 (2004). Such other evidence may also include the testimony of a witness such as M who is called to testify about the circumstances surrounding an event which opposing counsel used to cast doubt on the credibility of another witness. The admissibility of this evidence is not abolished simply because this type of evidence also can be characterized as uncharged misconduct evidence with respect to the defendant.

Rehabilitation also can be accomplished by testimony about the impeached witness' character for veracity: "If a witness's veracity has been attacked by proof of a reputation for untruthfulness, it can be supported by proof of the witness's reputation for truthfulness. *Smirnoff* v. *McNerney*, 112 Conn. 421, 423, 152 A. 399 (1930) [('The plaintiff introduced evidence of the conviction of [the defendant] some years before of the crime of forgery in order to attack his credibility as a witness. In rebuttal the defendant offered, and the court admitted, evidence of his reputation in the community for truth and veracity. Such evidence is not restricted, as the plaintiff claims, solely to the purpose of rebutting evidence of the same kind admitted to attack the credibility of a witness, but is admissible to support that credibility when it is attacked as here by proof of a prior conviction of crime.')]. A reputation for truth is also admissible to support a witness who has been impeached by a conviction of a crime. Id. By similar reasoning, a truthful reputation should also be admissible to rebut impeachment by misconduct evidence a lack of veracity. Id." C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 6.39.2, p. 437.

and that its probative effect was not outweighed by the danger of unfair prejudice or surprise brought about by its admission. The victim was the state's key witness at trial and, in essence, the state's case hinged on the victim's credibility. Given that during direct and cross-examination, the victim testified that he lied and stole at times, his credibility was called into question. "Issues of credibility typically are determinative in child sexual abuse prosecutions. This is so because in sex crime cases generally, and in child molestation cases in particular, the offense often is committed surreptitiously, in the absence of any neutral witnesses." (Internal quotation marks omitted.) *State* v. *James W.*, 87 Conn. App. 494, 514, 866 A.2d 719, cert. denied, 273 Conn. 925, 871 A.2d 1032 (2005). The uncharged misconduct evidence at issue explained, only as to one specific incidence of stealing, why the victim had stolen in the past, and, given that stealing is evidence of dishonesty which can be used to impeach a witness' credibility; see *State* v. *Swain*, 101 Conn. App. 253, 267, 921 A.2d 712, cert. denied, 283 Conn. 909, 928 A.2d 539 (2007); such explanation was a proper means of rehabilitating the credibility of the victim.

Aside from the defendant's unpreserved argument as to the relevancy of the uncharged misconduct evidence at issue, she argues that its probative value was outweighed by its prejudicial effect. Section 4-3 of the Connecticut Code of Evidence, titled "Exclusion of Evidence on Grounds of Prejudice, Confusion or Waste of Time," provides that "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." "[T]he determination of whether the prejudicial impact of evidence outweighs its probative value is left to the sound discretion of the trial

court judge and is subject to reversal only where an abuse of discretion is manifest or injustice appears to have been done. . . . [Our Supreme Court] has previously enumerated situations in which the potential prejudicial effect of relevant evidence would counsel its exclusion. Evidence should be excluded as unduly prejudicial: (1) where it may unnecessarily arouse the jury's emotions, hostility or sympathy; (2) where it may create distracting side issues; (3) where the evidence and counterproof will consume an inordinate amount of time; and (4) where one party is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Dorlette*, 146 Conn. App. 687, 691, 79 A.3d 132 (2013), cert. denied, 311 Conn. 906, 83 A.3d 607 (2014). Furthermore, with respect to a trial court's ruling on a prejudicial-probative balancing test, "[w]e will indulge in every reasonable presumption in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Figueroa*, 235 Conn. 145, 162, 665 A.2d 63 (1995).

We conclude that the court properly determined that the probative value of M's testimony that she once overheard the defendant urging the victim to steal quarters from F was not outweighed by its prejudicial effect. This uncharged misconduct evidence did not tend to arouse the emotions of the jury, especially in light of the nature of the crimes with which the defendant had been charged, crimes that involved her sexual abuse of her son. The prejudicial tendency of this uncharged misconduct evidence also pales in comparison to evidence that was adduced at trial showing that the defendant had threatened to kill F and C. Thus, we conclude that the jury's emotions were not unduly aroused by the admission of evidence that she encouraged her son, the victim, to steal. The evidence also did not create a distracting side issue because it pertained to the credibility of the state's key witness, which was the essence

of the state's case. Furthermore, the evidence and counterproof of it was not consumed by an inordinate amount of time, but rather was resolved quite summarily at the beginning of two days of the trial.

Last, we are not persuaded by the defendant's argument that she was unfairly surprised by the evidence. On May 7, 2010, at the request of defense counsel, the court afforded defense counsel an opportunity to meet with M prior to her testimony on the afternoon of May 8, 2010. The record suggests that this meeting between M and defense counsel occurred and that no further objection that was based on the lack of timely notice was raised by the defendant. Accordingly, the court did not abuse its discretion in admitting the uncharged misconduct evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DELROY MCPHERSON (AC 37872)

Alvord, Mullins and Sullivan, Js.

Syllabus

The defendant, who had been convicted, on guilty pleas, of two counts of the crime of larceny in the sixth degree, appealed to this court from the judgment of the trial court dismissing, for lack of subject matter jurisdiction, his motion to correct an illegal sentence. In his motion, the defendant claimed that his criminal trial attorney had provided ineffective assistance by failing to advise him properly regarding the immigration consequences of his guilty pleas. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence for lack of subject matter jurisdiction; for that court to have jurisdiction over the motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the proceedings leading to the conviction, had to be the subject of the attack, and the defendant's motion here attacked the validity of the guilty pleas, via a

claim of ineffective assistance of counsel, and did not challenge the legality of the sentencing proceeding or the sentence itself.

Argued September 15—officially released October 18, 2016

Procedural History

Information, in the first case, charging the defendant with the crime of larceny in the sixth degree, and information, in the second case, charging the defendant with the crimes of robbery in the third degree, larceny in the sixth degree, possession of a controlled substance and use of drug paraphernalia, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, where the defendant was presented to the court, *Prescott*, *J.*, on pleas of guilty; judgments of guilty of two counts of larceny in the sixth degree; thereafter, the court, *Baldini*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Justin R. Clark, for the appellant (defendant).

Toni M. Smith-Rosario, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Adam B. Scott*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Delroy McPherson, appeals from the judgment of the trial court dismissing, for lack of subject matter jurisdiction, his motion to correct an illegal sentence. On appeal, the defendant claims that the court erred in dismissing his motion, in which he alleged that his criminal trial attorney had provided ineffective assistance of counsel by failing to advise him properly regarding the immigration consequences of entering guilty pleas to two separate counts of larceny in the sixth degree in violation of General

Statutes § 53a-125b. We conclude that the court properly dismissed the defendant's motion for lack of subject matter jurisdiction.

This case is controlled by *State* v. *Casiano*, 122 Conn. App. 61, 68, 998 A.2d 792 (holding that court did not have jurisdiction over motion to correct illegal sentence when defendant challenged validity of his guilty plea on ground that trial counsel gave erroneous advice prior to entry of such plea), cert. denied, 298 Conn. 931, 5 A.3d 491 (2010). In *Casiano*, we explained: "In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the [proceedings] leading to the conviction, must be the subject of the attack. . . . The defendant's claim does not attack the validity of the sentence. Instead, it pertains to . . . alleged flaws in the court's acceptance of the plea. As such, it does not fit within any of the four categories of claims recognized under Practice Book § 43-22." (Citation omitted; internal quotation marks omitted.) Id.; see also *State* v. *Monge*, 165 Conn. App. 36, 43, 138 A.3d 450 (discussing *Casiano*), cert. denied, 321 Conn. 924, 138 A.3d 284 (2016); Practice Book § 43-22 ("[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 court properly dismissed the defendant's motion to correct an illegal sentence because the defendant sought to attack the validity of his guilty pleas, via a claim of ineffective assistance of trial counsel, rather than attacking the legality of the sentencing proceeding or the sentence itself.

The judgment is affirmed.

JAN JODLOWSKI *v.* STANLEY WORKS
(AC 38261)

Lavine, Keller and Flynn, Js.

Syllabus

The plaintiff, who previously had sustained certain compensable injuries during his employment with the defendant, appealed to this court from the decision of the Workers' Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner to dismiss in part his request for certain medical treatment. The plaintiff claimed that the commissioner improperly denied his request for lumbar fusion surgery, and improperly declined to order that he undergo a medical examination pursuant to the applicable statute (§ 31-294f [a]) to resolve certain conflicting medical opinions as to the need for lumbar fusion surgery. The plaintiff claimed that he had sustained his burden of proof as to his need for the treatment on the basis of the opinions of certain physicians who had treated him. The board concluded that § 31-294f (a) did not require the commissioner to order a medical examination of the plaintiff. The board further concluded that the plaintiff's claims constituted a dispute between his medical experts and those of the defendant as to the optimal manner in which to treat the plaintiff, and the board deferred to the commissioner's finding that the opinions of the defendant's experts were more persuasive. *Held* that the board properly affirmed the commissioner's finding and dismissal with respect to the plaintiff's requests for certain medical treatment of his lumbar spine, as the board was bound to accept the commissioner's decision that the medical opinions of the defendant's experts were more persuasive than those of the plaintiff's experts; moreover, contrary to the plaintiff's claim, § 31-294f does not require the commissioner sua sponte to order a medical examination to resolve conflicting medical evidence, but, rather, directs that an individual seeking workers' compensation benefits submit to an examination at the request of the employer or at the direction of the commissioner.

Argued September 14—officially released October 18, 2016

Procedural History

Appeal from the decision by the Workers' Compensation Commissioner for the Sixth District dismissing in part the plaintiff's claim for certain medical treatment, brought to the Workers' Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Jan Jodlowski, self-represented, the appellant (plaintiff).

Erik S. Bartlett, for the appellee (defendant).

Opinion

LAVINE, J. The self-represented plaintiff, Jan Jodlowski, appeals from the decision of the Workers' Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner (commissioner), who denied the plaintiff's request for additional treatment. On appeal, the plaintiff claims that it was improper for the commissioner (1) to deny his request for lumbar fusion surgery, (2) to fail to consider the conflicting opinions of medical experts, and (3) to decline to order a commissioner's medical examination, pursuant to General Statutes § 31-294f (a). We affirm the decision of the board.

Pursuant to a formal hearing held on July 23, 2014, the commissioner found the following facts in his finding and dismissal dated December 15, 2014. The plaintiff sustained compensable injuries to his neck, back, shoulder, leg and hand during the course of his employment with the defendant, Stanley Black and Decker.[1] In his finding and award dated January 7, 2011, the commissioner found that the plaintiff had sustained injuries to his right knee and left shoulder, but denied the plaintiff's claim for a psychiatric injury and total disability benefits. In addition, the commissioner found that the plaintiff's pain management treatment with Jonathan Kost, medical director of the pain treatment center at Hartford Hospital, was reasonable and necessary and

[1] The record does not disclose the relation between Stanley Works, as the case is captioned, and Stanley Black and Decker. We presume the discrepancy is the result of a scrivener's error. The plaintiff was injured on November 8, 2004, when an upright tool box tipped over and came in contact with his torso and slid down his chest, abdomen, and legs. The plaintiff strained himself when setting the tool box upright.

ordered the defendant to authorize treatment with Kost. The plaintiff treated with Kost from October, 2006, until the formal hearing. Kost's medical records indicate that the plaintiff continued to complain of pain in multiple parts of his body.

On December 14, 2012, to address the plaintiff's continued complaints of pain, Kost discussed with the plaintiff possible treatment options, including a spinal cord stimulator[2] and a surgical consult. Kost referred the plaintiff to Andrew Wakefield, a neurosurgeon, for a neurosurgical consult, which was conducted on September 19, 2013. Wakefield and his physician assistant, Sean T. Brennan, noted in a report that the plaintiff was not a surgical candidate and that he was unable to find any objective evidence to explain the level of the plaintiff's complaints.

Kost recommended that the plaintiff undergo an electromyography nerve conduction test to determine whether he was a candidate for a spinal cord stimulator. The test was conducted on February 20, 2014; the results of the test were normal.

At the request of the defendant, the plaintiff was examined by Jerrold Kaplan, a physiatrist. Kaplan opined that the plaintiff's pain management was not curative, and he did not recommend a spinal cord stimulator for the plaintiff. He instead recommended that the plaintiff undergo the comprehensive pain management program at the Rosomoff Center in Florida. On April 18, 2014, Kost agreed with Kaplan that the plaintiff was not a candidate for a spinal cord stimulator and that

[2] Spinal cord stimulation delivers mild electrical impulses to the spinal cord that interrupt pain signals to the brain, replacing them with a tingling sensation. See University of California San Francisco Medical Center, Spinal Cord Treatments, Spinal Cord Stimulation, available at https://www.ucsfhealth.org/treatments/spinal cord stimulation/ (last visited October 4, 2016).

the plaintiff should undergo treatment at the Rosomoff Center.

The plaintiff referred himself to Joseph Aferzon, a neurosurgeon, who examined him on April 30, 2014. Aferzon opined that the plaintiff should undergo a discogram[3] and spinal fusion[4] at the L5-S1, and possibly L4-5, level. On June 16, 2014, Kost recommended that the plaintiff delay treatment at Rosomoff Center pending a discogram and spinal fusion.[5]

At the formal hearing, the plaintiff contended that, on the basis of the opinions and recommendations of Kost and Aferzon, he had sustained his burden of proof regarding his need for medical treatment, including ongoing pain management, a discogram, and lumbar fusion. The defendant argued, on the basis of the opinions of Wakefield and Kaplan, that the plaintiff had failed to sustain his burden of proof that he is entitled to ongoing medical treatment, including pain management, a discogram, and lumbar fusion.

The commissioner found on the basis of the evidence produced that Wakefield's and Kaplan's opinions were more persuasive than those of Kost and Aferzon regarding the plaintiff's need for a spinal stimulator and lumbar spine surgery. He also found Kaplan's recommendation that the plaintiff undergo treatment at the

[3] A discogram is a test used to evaluate back pain. The test may help a physician determine if an abnormal disk in the spine is causing back pain. Mayo Clinic, Tests and Procedures, Discogram, available at http://www.mayoclinic.org/tests-procedures/discogram/basics/definition/prc-20013848 (last visited October 4, 2016).

[4] Spinal fusion is surgery that permanently connects two or more vertebrae in the spine, eliminating motion between them. Mayo Clinic, Tests and Procedures, Spinal Fusion, available at http://www.mayoclinic.org/tests-procedures/spinal-fusion/home/ovc-20155554 (last visited October 4, 2016).

[5] Although it is not in the record before the board, the defendant indicates in its brief that the plaintiff has undergone a lumbar spinal fusion during the pendency of the present litigation. The plaintiff does not dispute the defendant's representation.

Rosomoff Center to be more persuasive than Kost's proposed treatment plan. Moreover, the commissioner found that although Kost's pain management treatment might or might not be curative, it enabled the plaintiff to function and was reasonable and necessary. Therefore, the commissioner denied the plaintiff's request for a spinal cord stimulator and for lumbar fusion surgery, and dismissed those claims. The commissioner authorized the plaintiff's claim that he undergo treatment at the Rosomoff Center. The commissioner ordered the defendant to be responsible for all reasonable and necessary costs associated with the plaintiff's need for ongoing pain management with Kost.

Thereafter, the plaintiff filed a petition for review by the board. In his appeal, the plaintiff stated that he saw other physicians to whom he was referred by his primary care physician due to what he claimed were inconsistent "results" among the opinions of Wakefield, Kaplan, and Kost.[6]

The board issued its opinion on August 12, 2015. It was not persuaded by the plaintiff's arguments that the commissioner's decision was legally erroneous. The board concluded, essentially, that the plaintiff's claims constituted a dispute between physicians as to the optimal manner in which to treat the plaintiff's complaints of pain, i.e., the plaintiff and the defendant each presented differing treatment alternatives to the commissioner. The commissioner found the opinions of the defendant's experts to be more persuasive. As an appellate panel, the board stated that it was not permitted to

[6] On appeal to the board, the plaintiff sought to submit as additional evidence regarding the results of a magnetic resonance image and the medical notes supporting lumbar surgery that were authored by Aferzon and Jeffrey Bash, an orthopedic surgeon. The defendant objected to the admission of the additional evidence pursuant to *Diaz* v. *Pineda*, 117 Conn. App. 619, 980 A.2d 347 (2009). The board sustained the defendant's objection. On appeal here, the plaintiff does not claim that the board improperly denied his request to present additional evidence.

second-guess the commissioner. In addition, the board disagreed with the plaintiff that the commissioner was obligated to order a commissioner's examination of the plaintiff under § 31-294f. The board, therefore, affirmed the commissioner's finding and dismissal.

The plaintiff appealed to this court, claiming that the decision of the board should be reversed because the commissioner did not grant his request for a spinal cord stimulator and lumbar fusion surgery. He also claims that it was error for the commissioner not to order a commissioner's examination to resolve the dispute between the conflicting medical opinions as to the need for lumbar fusion surgery.

Before addressing the plaintiff's claims, we set forth the applicable standard of review. "A party aggrieved by a commissioner's decision to grant or deny an award may appeal to the board pursuant to General Statutes § 31-301. . . . The appropriate standard applicable to the board when reviewing a decision of a commissioner is well established. [T]he review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is oblig[ated] to hear the appeal on the record and not retry the facts. . . .

"Similarly, on appeal to this court, [o]ur role is to determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them . . . . [Therefore, we ask] whether the commissioner's conclusion can be sustained by the underlying facts." (Citations omitted; internal quotation marks omitted.) *Estate of Haburey* v. *Winchester*, 150 Conn. App. 699, 713, 92 A.3d 265, cert. denied, 312 Conn. 922, 94 A.3d 1201 (2014).

"The [commissioner] alone is charged with the duty of initially selecting the inference [that] seems most reasonable and his choice, if otherwise sustainable, may

not be disturbed by a reviewing court." (Internal quotation marks omitted.) Id., 714.

It is well within the authority of the commissioner "to choose which evidence he found persuasive and which evidence he found unpersuasive, and adjudicate the claim accordingly. As the fact finder, the commissioner may reject or accept evidence . . . . It is not the province of this court to second-guess the commissioner's factual determinations. [T]he trier of fact—the commissioner—was free to determine the weight to be afforded to [the] evidence. . . . This court, like the board, is precluded from substituting its judgment for that of the commissioner with respect to factual determinations." (Citations omitted; internal quotation marks omitted.) Id., 717.

We thoroughly have reviewed the record and the decisions of the commissioner and the board. We agree with the board that it was bound to accept the commissioner's decision as to the medical evidence he found more persuasive. The medical opinions provided by Wakefield and Kaplan are probative evidence that lumbar fusion surgery was not recommended for the plaintiff. We therefore conclude that the board properly affirmed the commissioner's finding and dismissal with respect to treatment of the plaintiff's lumbar spine.

We also agree with the board that § 31-294f[7] does not mandate that the commissioner order a commissioner's

[7] General Statutes § 31-294f (a) provides: "An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. At any examination requested by the employer or directed by the commissioner under this section, the injured employee shall be allowed to have in attendance any reputable practicing physician or surgeon that the employee obtains and pays for himself. The employee

examination when conflicting medical evidence is presented to the commissioner. The plaintiff's claim requires us to construe the statute. Statutory construction raises questions of law over which we exercise plenary review. *Cruz* v. *Montanez*, 294 Conn. 357, 367, 984 A.2d 705 (2009). "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).

"[A] court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 431–32, 927 A.2d 843 (2007).

shall submit to all other physical examinations as required by this chapter. The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal."

The salient language of § 31-294f (a) is found in its first sentence: "An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. . . ." The statute, therefore, directs an individual seeking workers' compensation benefits to submit to an examination at the request of the employer or at the direction of the commissioner. The statute further defines the circumstances under which such an examination is to take place and the consequences of a claimant's failure to comply. See footnote 7 of this opinion. The statute does not require the commissioner sua sponte to order a commissioner's examination to resolve conflicting evidence, although there is nothing in the statute to prohibit the commissioner from doing so. Because the commissioner in the present case was under no statutory duty to order a commissioner's examination, the plaintiff's claim to the contrary fails.

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

In this opinion the other judges concurred.

IN RE ADELINA A.*
(AC 38947)

DiPentima, C. J., and Alvord and Pellegrino, 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

* 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.

petitioner, the Commissioner of Children and Families, had filed a petition to terminate the respondent's parental rights after the child had been adjudicated neglected. Thereafter, the respondent's brother, V, and sister-in-law, S, expressed their interest in becoming licensed foster parents for the minor child. The Department of Children and Families chose not to disrupt the child's current foster placement, as V and S had not maintained any relationship with the child since she had been removed from the respondent's custody, and the child had bonded with the foster family. The department encouraged V and S to be a family support resource for the child, but neither of them filed a motion to intervene in the termination proceeding. At the trial on the termination petition, although the respondent stated her preference that the child be placed with V and S, she did not present any evidence concerning the viability of granting V and S permanent guardianship of the child as an alternative to terminating her parental rights. The trial court granted the petition to terminate the respondent's parental rights, noting that the petition was the only matter before the court, V and S had not filed a motion to revoke or transfer guardianship, and it was unknown whether they would have been approved for a foster care license. On appeal, the respondent claimed that the trial court violated her substantive due process rights under the federal constitution by failing to consider whether there was a less restrictive permanency plan available to safeguard the child's well-being than termination of parental rights, and by failing to require the petitioner to prove by clear and convincing evidence that there was no less restrictive permanency plan than termination of parental rights. *Held* that the record was inadequate to review the respondent's unpreserved constitutional claim under *State* v. *Golding* (213 Conn. 233), as there was no evidence presented at trial concerning the viability of the alternative permanency plan involving V and S: at trial, the respondent never proposed guardianship with V and S as an alternative permanency plan, nor did she, V, or S file an application for permanent guardianship, and because it was unknown whether V and S would have been approved for a foster care license, this court would not order a new trial to elicit additional evidence to determine whether the constitutional violated existed; furthermore, the record was insufficient as to whether a constitutional violation had occurred because it was unclear whether the trial court concluded that the petitioner had proven that termination of parental rights was the only option available to satisfy the best interests of the child, and this court would not attempt to supplement or reconstruct the record, or make factual determinations, in order to decide the respondent's claim.

Argued September 7—officially released October 11, 2016**

** October 11, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights as to their minor child, brought to the Superior Court in the judicial district of Litchfield, Juvenile Matters at Torrington, and transferred to the judicial district of Middlesex, Child Protection Session at Middletown; thereafter, the matter was tried to the court, *Olear*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

David J. Reich, for the appellant (respondent mother).

Tammy Nguyen-O'Dowd, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, *Gregory T. D'Auria*, solicitor general, and *Benjamin Zivyon* and *Michael Besso*, assistant attorneys general, for the appellee (petitioner).

Opinion

ALVORD, J. The respondent mother, Kristina D., appeals from the judgment of the trial court terminating her parental rights with respect to her daughter, Adelina A., pursuant to General Statutes § 17a-112 (j).[1] On appeal, the respondent claims that the trial court violated her substantive due process rights, as guaranteed by the fourteenth amendment to the United States constitution, by failing to (1) consider whether there was a less restrictive permanency plan available to "safeguard" her daughter than termination of her parental

[1] The trial court also rendered judgment terminating the parental rights of the respondent father with the father's consent. Because the respondent father is not a party to this appeal, respondent in this opinion refers to Kristina D.

rights[2] and (2) require the petitioner, the Commissioner of Children and Families, to "prove, by clear and convincing evidence, that there was no less restrictive" permanency plan than termination of parental rights. We determine that the record to support the respondent's constitutional claim is inadequate for review. Accordingly, we affirm the judgment of the trial court.

I

The following facts are undisputed or were found by the court by clear and convincing evidence. On July 27, 2013, at the age of six months, Adelina was placed by the agreement of the family and the Department of Children and Families (department) with her paternal grandfather and his fiancée, Monica,[3] after Adelina's parents were arrested for using heroin in her presence. On September 19, 2013, the petitioner filed a neglect petition after the respondent and Adelina's father refused to cooperate with substance abuse evaluations. On December 5, 2013, the petitioner sought, and was granted, an order of temporary custody after the paternal grandfather was determined to be using heroin and abusing prescription drugs. On December 10, 2013, the paternal grandfather and Monica filed motions to intervene, but the motions were denied without prejudice.

On March 24, 2014, Adelina was adjudicated neglected. That same day, the paternal grandfather and Monica renewed their motions to intervene, but, on March 31, 2014, the court denied the paternal grandfather's motion with prejudice because of his drug abuse

[2] In her brief to this court, the respondent alternatingly claimed that substantive due process requires the trial court (a) "to *consider and place* a child in the least restrictive placement that will safeguard the child" and (b) to "*consider* the least restrictive placement." (Emphasis added.) In her reply brief and at oral argument before this court, the respondent clarified that her position is that the trial court must *consider*, but is not required to place the child in, the least restrictive permanency location.

[3] Monica is also related to Adelina, as she is the cousin of Adelina's paternal grandmother.

and denied Monica's motion without prejudice because she resided with him. On April 1, 2014, Adelina was committed to the custody of the petitioner. Monica and one of the respondent's cousins continued to make efforts to intervene and become placement resources for Adelina, but by the fall of 2014, both relatives had indicated that they no longer wanted to be placement resources. At that time, the respondent and Adelina's father did not identify any additional relatives for placement, and Adelina continued to live with her legal risk foster family.[4] On January 28, 2015, the petitioner filed a petition to terminate the respondent's parental rights.

In the summer of 2015, the respondent's half brother, Victor, and his wife, Samantha, expressed their interest in becoming licensed foster parents for Adelina to the department. The respondent also indicated in her pretrial memorandum, dated July 6, 2015, that she would consider consenting to the termination of her parental rights if "a meaningful agreement for an open adoption can be reached or in the event that her brother, [Victor], is granted custody of Adelina and is ultimately able to adopt her." The department elected not to disrupt Adelina's current foster placement and not to pursue licensing Victor and Samantha. The department reasoned that because Victor and Samantha had not maintained any relationship with Adelina since her removal from her parents when she was six months old[5] and

[4] The December 24, 2014 social study for the termination of parental rights, which was entered into evidence, addressed the possibility of the respondent's half brother, Victor, being a placement resource. The report stated that "Mother reported [Victor] is unable to take on responsibility of caring for Adelina at this time. He has not contacted the Department to inquire about [Adelina] since she has been in foster care."

[5] Samantha testified at the termination hearing that she and Victor have a very distant relationship with the respondent, and they are "100 percent distanced . . . from the [respondent's] family because [Victor] knows that the more that you are around them, the more you, kind of, get sucked into that lifestyle, and he's just—has a zero tolerance policy for it, and we've, kind of, tried to keep our distance." Nevertheless, Victor and Samantha had seen Adelina occasionally prior to her removal from the respondent's care,

Adelina had bonded with her current foster family, with whom she had resided since November, 2014, it was not in her best interests to have her placement altered again. The department encouraged Victor and Samantha to be a family support resource for Adelina, and they have visited with Adelina on a monthly basis. However, Victor and Samantha never filed a motion to intervene in this matter, and the respondent never filed a motion to transfer guardianship to them.

On January 5 and 6, 2016, a trial was held to determine whether the court would grant the petition to terminate the respondent's parental rights.[6] The respondent did not present any evidence concerning the viability of granting permanent guardianship to Victor and Samantha as an alternative to terminating her parental rights.[7] However, during the trial, there was testimony from various individuals concerning Adelina's relationship with Victor and Samantha and the fact that Victor and Samantha had previously expressed interest in being placement resources for Adelina. Samantha also testified that she and Victor were still interested in being resources for Adelina.

The respondent stated her preference for Adelina to be placed with Victor and Samantha during the trial as

and Victor saw her very briefly when he picked her up after the respondent was arrested in July 2013. Victor and Samantha did not have contact with her for a prolonged period after that. Samantha testified that she and Victor believed that Adelina remained in the care of Monica up until the summer of 2015.

[6] The trial concerned the termination of only the respondent's parental rights. On October 14, 2015, Adelina's father had executed a written consent to the termination of his parental rights, which the court accepted after canvassing him.

[7] The respondent did attempt to present evidence about the viability of placing Adelina with Victor and Samantha, but the court repeatedly sustained relevancy objections to this line of questioning because the only pending matter was a petition to terminate parental rights. The respondent does not challenge the court's evidentiary rulings on appeal.

well. During her testimony, the respondent acknowledged that "[Adelina] would be best off with a family member, preferably my brother and his wife, Samantha . . . ." During closing argument, the respondent's counsel also argued that, although the respondent was "not independently prepared to parent," termination was "not necessary because the evidence shows that she has family supports of her own that allow the child to, in fact, have stability and permanence within her own biological family."

On January 22, 2016, the court granted the petition to terminate the respondent's parental rights after finding that inter alia, a statutory ground for termination existed pursuant to § 17a-112 (j) (3) (B) and that termination was in the best interests of Adelina. In a footnote in its written memorandum of decision, the court addressed the respondent's stated preference that Adelina be placed with Victor and Samantha. The court first noted that "[t]he only matter before the court is the [termination of parental rights] petition. No motion to revoke or transfer guardianship was filed and remained pending. As has been intimated throughout this memorandum, the evidence was clear that [the respondent] acknowledges she is not [in] a position to have Adelina reunified with her at any time soon."

The court went on to acknowledge that the respondent's "desire is for Adelina to be placed with relatives." The court reviewed the unsuccessful efforts to place Adelina with the paternal grandfather, with Monica, and with the respondent's cousin. It also discussed how the respondent "belatedly suggested placement of the child with Victor and Samantha" and why the department decided not to disrupt Adelina's foster placement. The court concluded: "It is unknown and irrelevant if Victor and Samantha would have been approved for a foster

care license due to [Victor's] past history.[8] The issue of placement of the child is not before the court. '*Where* [a child] should reside and *with whom*, however, are not questions that relate to whether it is in [the child's] best interests to terminate [her] relationship with [her] parents.' . . . *In re Denzel A.*, 53 Conn. App. 827, 834, 733 A.2d 298 (1999)." (Emphasis in original; footnote added.)

This appeal followed.

II

On appeal, the respondent claims that the trial court violated her substantive due process rights, as guaranteed by the fourteenth amendment to the United States constitution, by failing (1) to consider whether there is a less restrictive permanency plan available to safeguard Adelina's well-being than termination of parental rights and (2) to require the petitioner to "prove, by clear and convincing evidence, that there was no less restrictive" permanency plan than termination of parental rights. The petitioner responds that the record is inadequate to review the underlying constitutional claim. We agree that the record is inadequate for review.

Because the respondent did not preserve her due process claim at trial,[9] she seeks review pursuant to

[8] Victor was placed in residential treatment through juvenile parole in 1998 and was convicted of assault in the second degree in 2005. The addendum to the social study in support of the petition for termination of parental rights, which was admitted into evidence, also alluded to "substance abuse and mental health histories" in Victor and Samantha's household, but the trial court did not make any findings concerning that history in its memorandum of decision.

[9] The respondent contends that she preserved this constitutional issue for appeal by arguing at trial that termination was unnecessary because members of her own family could provide Adelina with stability and permanence and by stating her preference that Adelina be placed with Victor and Samantha. However, "[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." Practice Book § 60-5. The respondent never argued at trial that substantive due process, as guaranteed by the fourteenth amendment to the United States constitution, requires (1) the trial court to consider whether there is

State v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). "Under *Golding*, a [party] 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 [party] 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 [party's] claim will fail. The appellate tribunal is free, therefore, to respond to the [party'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).

"An appellant [that] has not preserved her claim before the trial court must overcome hurdles that are not imposed when the issue was properly presented to that court." *In re Azareon Y.*, 309 Conn. 626, 635, 72 A.3d 1074 (2013). As our Supreme Court "repeatedly has underscored . . . '*Golding* is a *narrow exception* to the general rule that an appellate court will not entertain a claim that has not been raised in the trial court.' " (Emphasis in original.) Id. The court will review an unpreserved constitutional claim on appeal "only if the trial court record is adequate for appellate review." (Internal quotation marks omitted.) Id. "To determine whether the record is adequate to ascertain whether a constitutional violation occurred, we must consider the

a less restrictive permanency plan available to safeguard a child's well-being than termination of parental rights and (2) the petitioner to prove, by clear and convincing evidence, that there is no less restrictive permanency plan other than termination of parental rights. By failing to raise this constitutional issue distinctly at trial, the respondent failed to preserve it for appeal.

respondent's alleged claim of impropriety and whether it requires any factual predicates." Id., 636.

The starting point of the respondent's argument is the proposition that due process requires a trial court to undertake a least restrictive means analysis during the adjudicative phase of a termination hearing.[10] In her briefs and at oral argument before this court, however, the respondent repeatedly used the phrases "least restrictive placement," "least restrictive permanency plan," and "least restrictive alternative" interchangeably. The respondent never defined these similar but distinct phrases. The usage was confusing; thus, we are first compelled to clarify, here.

In juvenile proceedings, there is a distinct difference between a "placement" and a "permanency plan." "Placement" refers to the temporary status of a child until such time that the court can approve a permanency plan for implementation. A placement can take a variety of forms. For example, a child can be voluntarily placed in the temporary legal and physical custody of a relative or nonrelative, or a child can be involuntarily placed in the legal custody of the petitioner, followed by a placement of the child in the physical custody of a relative or nonrelative foster parent. General Statutes § 46b-129 (d) and (j) (4). A respondent parent, relatives, and former guardians can contest a child's placement at various stages in the proceedings. For example, a respondent parent or a former legal guardian can try to change the child's placement by filing a motion to

[10] See *In re Joseph M.*, 158 Conn. App. 849, 859, 120 A.3d 1271 (2015) ("[A] hearing on a petition to terminate parental rights consists 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. . . . 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 [parent's] parental rights is not in the best interests of the child." [Internal quotation marks omitted.]).

reinstate guardianship. General Statutes § 46b-129 (n) (establishing procedure for filing motion to reinstate guardianship in parent or former legal guardian). Similarly, relatives can seek to become the child's temporary custodian[11] or guardian[12] by filing a motion to intervene in the matter. See General Statutes § 46b-129 (d) (1) (A) and (B) (establishing right to file motion to intervene for purposes of seeking temporary custody); General Statutes § 46b-129 (d) (4) (establishing right to file motion to intervene for purposes of seeking guardianship).

A "permanency plan" is the proposal for what the long-term, permanent solution for the placement of the child should be. General Statutes §§ 17a-111b (c) and 46b-129 (k). Our statutory scheme provides five permanency options: (1) reunification with a parent; (2) long-term foster care; (3) permanent guardianship;[13] (4) transfer of either guardianship or permanent guardianship; or (5) termination followed by adoption.[14] General Statutes §§ 17a-111b (c) and 46b-129 (k) (2).

[11] "Any person or organization awarded the temporary custody of a minor under section 45a-607, shall have the following rights and duties regarding the minor: (1) The obligation of care and control; (2) the authority to make decisions regarding routine medical treatment or school counseling and emergency medical, psychological, psychiatric or surgical treatment; and (3) other rights and duties which the court of probate having jurisdiction may approve." General Statutes § 45a-608.

[12] A "guardian" is a person who has the authority and obligations of "guardianship," such as "[t]he obligation of care and control" and "the authority to make major decisions affecting the minor's education and welfare . . . ." (Internal quotation marks omitted.) General Statutes § 45a-604 (5) and (6).

[13] " 'Permanent guardianship' means a guardianship . . . that is intended to endure until the minor reaches the age of majority without termination of the parental rights of the minor's parents . . . ." General Statutes § 45a-604 (8).

[14] The Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997), and parallel state law, has established a clear preference for termination followed by adoption when reunification with a parent is not a viable permanency plan. For example, ASFA requires the petitioner to engage concurrent permanency planning from the inception of the case. 42 U.S.C. § 671 (a) (15) (F) (2012); see also General Statutes § 17a-110a.

If during the course of the juvenile proceedings the child is placed in the care and custody of the petitioner, as occurred in this case, the petitioner must file a motion for review of a permanency plan within nine months of that placement. General Statutes § 46b-129 (k) (1) (A). When the petitioner files a motion to review a permanency plan, the respondent parents and qualifying relatives may file a motion in opposition to the proposed plan. General Statutes § 46b-129 (k) (1) (A). If the permanency plan is opposed, the court must hold an evidentiary hearing, at which "[t]he commissioner shall have the burden of proving that the proposed permanency plan is in the best interests of the child or youth." General Statutes § 46b-129 (k) (1) (A). After the hearing, "the court shall approve a permanency plan that is in the best interests of the child . . . and takes into consideration the child's . . . need for permanency." General Statutes § 46b-129 (k) (2).

Concurrent permanency planning requires the petitioner "to identify permanent placements and prospective adoptive parents"; General Statutes § 17a-110a (b); while the department continues to make reasonable efforts to reunite the child with the parents. General Statutes § 17a-111b (outlining department's duties concerning reunification of child with his or her parent). This enables the court to commence permanent placement or adoption proceedings immediately after termination of parental rights is granted. General Statutes § 17a-110a (b). ASFA also requires the petitioner to file a petition for termination of parental rights if the child has been under the responsibility of the state for fifteen of the last twenty-two months, subject to limited exceptions. 42 U.S.C. § 675 (5) (E) (2012); see 45 C.F.R. § 1356.21 (i); see also General Statutes § 17a-111a (a). Finally, state law requires a court to find by clear and convincing evidence that adoption is not possible or appropriate prior to issuing an order for permanent legal guardianship. General Statutes § 46b-129 (j) (6) (B).

These statutory mandates implicitly recognize that children develop attachments to the caregivers while in foster care, and they reflect the legislature's desire to shift the focus of juvenile proceedings from parental rights to the child's right to safety, stability, and permanency. See, e.g., General Statutes § 17a-110a (a) ("[i]n order to achieve early permanency for children, decrease children's length of stay in foster care, reduce the number of moves children experience in foster care and reduce the amount of time between termination of parental rights and adoption, the [petitioner] shall establish a program for concurrent permanency planning").

If the trial court approves a permanency plan of termination followed by adoption, the petitioner "shall file a petition for termination of parental rights not later than sixty days after such approval if such petition has not previously been filed . . . ." General Statutes § 46b-129 (k) (6) (A).

With this statutory framework in mind, the most precise phrase for the policy advocated by the respondent in her brief and at oral argument before this court is "least restrictive permanency plan." This selection reflects that the respondent's argument appears to be based on a synthesis of the following propositions. Due to the recognized fundamental right of parents in the care, custody, and control of their children, strict scrutiny must be applied to termination of parental rights proceedings. Strict scrutiny requires the state to advance a compelling state interest by employing the least restrictive means available.[15] Consistent with that

[15] The respondent's argument of course assumes that the strength of her fundamental rights with respect to her child is undiminished by the time of a termination hearing. "The constitutionally protected interest of parents to raise their children without interference undeniably warrants deference . . . [but] [t]here are . . . limitations on . . . parental rights. Some of these limitations arise out of an appreciation of the state's long recognized interests as parens patriae. . . . Furthermore, it is unquestionable that in the face of allegations that parents are unfit, the state may intrude upon a family's integrity." (Citations omitted; internal quotation marks omitted.) *In re Jeisean M.*, 270 Conn. 382, 395–96, 852 A.2d 643 (2004), quoting *Roth* v. *Weston*, 259 Conn. 202, 224, 789 A.2d 431 (2002). That is why our Supreme Court has held that "it is clear that a requirement of an allegation such as abuse, neglect or abandonment would provide proper safeguards to prevent families from defending against unwarranted intrusions and would be tailored narrowly to protecting the interest at stake." (Internal quotation marks omitted.) *In re Jeisean M.*, supra, 396, quoting *Roth* v. *Weston*, supra, 224. Notably, the respondent in this case was not only accused of being an unfit parent, but she was twice adjudicated unfit. Prior to the termination hearing, the court found that Adelina was neglected and, therefore, committed her to the care of the petitioner. At the termination hearing, the court found by clear and convincing evidence that the respondent "is in no position to provide the care and attention that Adelina requires."

standard, the respondent argues that once a court determines that reunification with a respondent parent is not a viable permanency plan, it must consider whether any other permanency plan short of termination of parental rights exists that will protect the state's compelling interest in the child's best interests.[16]

It flows from the posited logic of the respondent's argument that "unless there is some valid alternative to termination, it cannot violate substantive due process to terminate parental rights. Therefore, the record must reflect whether there is a valid alternative permanency plan to termination and adoption" that adequately would safeguard the child's best interests.[17] (Footnote omitted.) *In re Azareon Y.*, supra, 309 Conn. 637, 639.

In this case, the respondent argues that granting temporary or permanent guardianship to Victor and Samantha was a less restrictive permanency plan than termination followed by adoption. Therefore, she argues that due process required the court to consider this alternative to termination followed by adoption and the petitioner to prove by clear and convincing evidence that this Victor-Samantha permanency plan was not in the best interests of Adelina. She further argues that the record is adequate to review this claim because, unlike in *In re Azareon Y.*, she did "identif[y] [this] least restrictive placement and the court did not consider that placement."

[16] Presumably, the least restrictive alternative will be either long-term foster care or permanent guardianship with an individual that will permit the parent to interact with the child when she desires to do so. The respondent does not address procedurally or substantively how the court can consider one of these less restrictive permanency plans if an alternative permanency plan or a petition for guardianship is never filed, as occurred in this case.

[17] The respondent relied extensively on the respondent's appellate brief in *In re Azareon Y.*, and therefore, the nature of their due process claims is virtually identical.

The respondent is correct that one of the deficiencies in the record in *In re Azareon Y.* was the fact that the respondent mother never represented that the relative that actually had custody of the children, the children's aunt, was amenable to either long-term foster care or permanent guardianship,[18] nor did she propose such an option to the trial court. *In re Azareon Y.*, supra, 309 Conn. 637 n.7. However, the precise reason that our Supreme Court held that the record was inadequate for review in *In re Azareon Y.* was that "there [was] an inadequate basis in the record for the trial court to determine whether there [were] *available alternatives* to termination that adequately would safeguard the children's best interests." (Emphasis added.) Id., 638–39.

There are two problems associated with the record in this case. First, there was no evidence presented at trial concerning the viability of the Victor-Samantha permanency plan. The respondent never proposed guardianship with Victor and Samantha as an alternative permanency plan,[19] nor did she, Victor, or Samantha ever file an application for permanent guardianship. While at trial Samantha testified that she and Victor would be willing to be resources for Adelina,[20] as the trial court noted in its memorandum of decision, "[i]t is unknown . . . if Victor and Samantha would have been approved for a foster care license due to his past history." See footnote 8 of this opinion. "Thus, in order

[18] Although, the record apparently did reflect that "[t]he aunt did indicate that she was amenable to an open adoption, an arrangement that would provide the respondent with visitation, but at the aunt's discretion." *In re Azareon Y.*, supra, 309 Conn. 637 n.15.

[19] In her opposition to the petitioner's permanency plan and in her proposed orders, the respondent maintained that reunification was still a viable permanency plan. It was only in closing argument that the respondent argued that termination was unnecessary because she had family resources she could rely on to help her appropriately care for Adelina until she could successfully rehabilitate herself.

[20] Victor did not testify at the termination hearing.

to make the requisite finding [of whether there is a valid alternative permanency plan to termination], the evidence would have to be opened. In cases of unpreserved constitutional claims, [our Supreme Court] consistently has refused to order a new trial when it would be necessary to elicit additional evidence to determine whether the constitutional violation exists." *In re Azareon Y.*, supra, 309 Conn. 639.

Second, it is unclear whether the trial court concluded that the petitioner had proven by clear and convincing evidence that termination was the only option available to satisfy the best interests of Adelina. The trial court concluded that "termination of the parental rights of mother and father as to Adelina is in the best interests of such child." As the respondent conceded at the trial and on appeal to this court, reunification was not a viable permanency plan. The dearth of evidence as to whether Victor and Samantha would have committed to, and been approved for, long-term foster care or permanent guardianship would not have precluded the trial court from reasonably concluding that termination followed by adoption was the *only* permanency plan in the best interests of Adelina.[21] "Under *State* v. *Golding* . . . '[i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make

[21] It is noteworthy that, at the time of the termination hearing, Adelina had resided with nonrelative foster care providers for more than one year. A court cannot issue an order for permanent legal guardianship unless the court finds by clear and convincing evidence that a statutory ground for termination of parental rights exists, adoption is not possible or appropriate, and "[*t*]*he child . . . has resided with the proposed permanent legal guardian for at least a year . . . .*" (Emphasis added.) General Statutes § 46b-129 (j) (6) (A) and (D). Therefore, approving a permanency plan of permanent guardianship with Victor and Samantha would have deprived Adelina of a stable and permanent placement for at least another year. For a toddler, this is a significant period of time.

factual determinations, in order to decide the [respondent's] claim.' " *In re Azareon Y.*, supra, 309 Conn. 642.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROLANDO ROBLES (AC 37881)

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

Syllabus

The defendant, who had been convicted, on pleas of guilty pursuant to the *Alford* doctrine, of kidnapping in the first degree, attempt to commit kidnapping in the first degree and sexual assault in the fourth degree, appealed to this court from the judgment of the trial court dismissing, for lack of jurisdiction, his motion to correct an illegal sentence. In his motion, the defendant claimed that in light of our Supreme Court's new interpretation of our kidnapping statutes in *State* v. *Salamon* (287 Conn. 509), which was decided after his conviction, he should not have been convicted of the kidnapping charges. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence and determined that it lacked subject matter jurisdiction to consider the claims raised therein, a motion to correct an illegal sentence not being the proper procedural path for the defendant to contest the validity of his guilty pleas following the change to our kidnapping laws; for a trial court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentence or sentencing proceeding itself must be the subject of the attack, and the claims in the defendant's motion here, instead, challenged the validity of his guilty pleas and subsequent conviction of the kidnapping charges, which did not fall within any of the four categories of claims for which the trial court would have jurisdiction to modify a sentence after it has been commenced.

Argued September 7—officially released October 25, 2016

Procedural History

Two informations charging the defendant, in the first case, with the crimes of kidnapping in the first degree and sexual assault in the fourth degree, and, in the

second case, with the crime of attempt to commit kidnapping in the first degree, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Miano*, *J.*, on pleas of guilty; judgments of guilty in accordance with the pleas; thereafter, the court, *Alexander*, *J.*, denied the defendant's motion to correct an illegal sentence; subsequently, the court, *Alexander*, *J.*, dismissed the defendant's motion to correct an illegal sentence and petition for a writ of error coram nobis, and the defendant appealed to this court. *Affirmed*.

Rolando Robles, self-represented, the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The self-represented defendant, Rolando Robles, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. The defendant was convicted, following his guilty pleas made pursuant to the *Alford* doctrine,[1] of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), attempt to commit kidnapping in the first degree in violation of General Statutes §§ 53a-49 and 53a-92 (a) (2) (A) and sexual assault in the fourth

[1] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 167 Conn. App. 233, 234 n.1, 143 A.3d 630 (2016); *Misenti* v. *Commissioner of Correction*, 165 Conn. App. 548, 551–52 n.2, 140 A.3d 222, cert. denied, 322 Conn. 902, 138 A.3d 932 (2016).

degree in violation of General Statutes § 53a-73a (a) (2). On appeal, the defendant, raising a number of constitutional and nonconstitutional issues, claims that the trial court improperly concluded that it lacked subject matter jurisdiction to consider his motion to correct an illegal sentence. The defendant's appellate claims, however, challenge the validity of his conviction rather than his sentence or the sentencing proceeding. We conclude, therefore, that the court properly determined that it lacked subject matter jurisdiction. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our discussion. On August 29, 2007, the defendant appeared before the court, *Miano*, *J.*, to enter guilty pleas to the charges pending against him. The defendant intended to plead guilty pursuant to the *Alford* doctrine. The prosecutor recited the factual bases underlying the charges against the defendant.[2] During the plea canvass, a question arose regarding

[2] Specifically, the prosecutor stated: "[T]hat's an incident that happened on December 15, 2005, and it was in the area of Sigourney Street and Russ Street. The complainant, the victim, was a seventeen year old female. She was on her way to school at Hartford Public High School when this defendant came up from behind her. He grabbed her and had sexual contact placing his hand on her buttocks area and genital area and that was over her clothing. She was able to push him away.

"He followed her. A short distance later and pulled her by the jacket. He attempted to pull her back behind the apartment building, and these were her words, she was able to break free. Her jacket did rip. And she was able to gain freedom. A later identification was made after she filed this complaint and told family members. One family member had seen him. And she ultimately positively identified the defendant as the person who had done this to her.

"The next incident . . . that happened five days later on December 20, 2005, in the morning hours, 8:40 in the a.m., near the intersection of Capitol Avenue and Laurel Street. This [incident] involved a sixteen year old female. She was walking to school. She observed the defendant following her. He did catch up with her in that area of Capitol Avenue and Laurel Street. He grabbed her from behind and attempted to pull her or drag her into a fenced area. She also fought back and freed herself after a short scuffle with him."

whether the defendant wanted to plead guilty pursuant to the *Alford* doctrine or enter a "straight guilty plea to all three of the charges . . . ." After further discussion, the court accepted the guilty pleas pursuant to the *Alford* doctrine. On October 17, 2007, Judge Miano sentenced the defendant to fifteen years incarceration, execution suspended after time served,[3] and twenty years probation.

On July 22, 2011, the defendant filed a motion to correct an illegal sentence. That motion was denied on November 10, 2011. On September 3, 2014, the defendant filed another motion to vacate or correct an illegal sentence or, in the alternative, for a writ of error coram nobis.[4] The defendant requested that the court vacate or correct the plea disposition and his sentence pursuant to Practice Book § 43-22,[5] or, in the alternative, issue a writ of error coram nobis. He argued that as a result of the new interpretation of our kidnapping statutes as set forth in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008),[6] the state and the court had committed

[3] The court noted that the defendant had served approximately twenty-two months of incarceration.

[4] "A writ of error coram nobis is an ancient common-law remedy which authorized the trial judge, within three years, to vacate the judgment of the same court if the party aggrieved by the judgment could present facts, not appearing in the record, which, if true, would show that such judgment was void or voidable. . . . The facts must be unknown at the time of the trial without fault of the party seeking relief. . . . A writ of error coram nobis lies only in the unusual situation [in which] no adequate remedy is provided by law." (Citations omitted; internal quotation marks omitted.) *State* v. *Das*, 291 Conn. 356, 370–71, 968 A.2d 367 (2009).

[5] 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."

[6] In *Salamon*, our Supreme Court concluded that in order for a defendant to commit a kidnapping in conjunction with another crime, he or she must intend to prevent the victim's liberation for a longer period of time or to a greater degree than what is necessary to commit the other crime. *State* v. *Salamon*, supra, 287 Conn. 542.

"numerous constitutional errors" resulting in his sentences[7] being void or subject to correction. On November 20, 2014, the state filed a response to the defendant's motion arguing, inter alia, that the court lacked jurisdiction to consider the defendant's claims.

On March 19, 2015, the court, *Alexander*, *J.*, issued a memorandum of decision dismissing the defendant's motion. With respect to the Practice Book § 43-22 claim, the court noted that the defendant's arguments essentially challenged the validity of his conviction, and therefore it lacked subject matter jurisdiction. As to the petition for a writ of error coram nobis, the court observed that it lacked subject matter jurisdiction because the petition had been filed untimely.[8]

On appeal, the defendant presents a variety of claims, including that the dismissal of his motion to correct an illegal sentence deprived him of his federal and state constitutional rights to due process, that his conviction for kidnapping constituted plain error and that the court abused its discretion and misapplied Practice Book § 43-22. The state counters that the court properly dismissed the defendant's motion because it challenged his convictions and not his sentence or the sentencing proceeding. We agree with the state.

At the outset, we note that the defendant's claims pertain to the subject matter jurisdiction of the trial court, and therefore present a question of law subject to the plenary standard of review. *State* v. *Koslik*, 116 Conn. App. 693, 697, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009); see also *State* v. *Bozelko*, 154 Conn. App. 750, 759, 108 A.3d 262 (2015); *State* v. *Abraham*, 152 Conn. App. 709, 716, 99 A.3d 1258 (2014).

[7] In his brief filed in support of his motion, the defendant noted that he had been "re-sentenced" for violating his probation on two separate occasions.

[8] The defendant did not brief any claims on appeal challenging the dismissal of the petition for a writ of coram nobis.

"The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act." (Citation omitted; internal quotation marks omitted.) *State* v. *Monge*, 165 Conn. App. 36, 41–42, 138 A.3d 450, cert. denied, 321 Conn. 924, 138 A.3d 284 (2016); see also *State* v. *Cruz*, 155 Conn. App. 644, 648–49, 110 A.3d 527 (2015).

"[Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . . [T]o invoke successfully the court's jurisdiction with respect to a claim of an illegal sentence, the focus cannot be on what occurred during the underlying conviction." (Citations omitted; internal quotation marks omitted.) *State* v. *St. Louis*, 146 Conn. App. 461, 466, 76 A.3d 753, cert. denied, 310 Conn. 961, 82 A.3d 628 (2013); see also *State* v. *Francis*, 322 Conn. 247, 259–60, 140 A.3d 927 (2016).

"Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . [I]f a defendant's claim falls within one of these four categories the trial court has jurisdiction to modify a sentence after it has commenced. . . . If the claim is not within one of these categories, then the court must dismiss the claim for a lack of jurisdiction and not consider its merits." (Citation omitted; internal quotation marks omitted.) *State* v. *St. Louis*, supra, 146 Conn. App. 466–67; see also *State* v. *Williams-Bey*, 167 Conn. App. 744, 760–61, 164 A.3d 9 (2016).

As previously noted, the defendant has presented this court with several different claims. Distilled to their essence, however, they share a common denominator; that is, the defendant should not have been convicted of the crimes of kidnapping in the first degree and attempt to commit kidnapping in the first degree under our Supreme Court's decision in *State* v. *Salamon*, supra, 287 Conn. 509. The defendant's appellate claims challenge the validity of his plea, and subsequent conviction, on the kidnapping charges and, therefore, do not fall with the four categories set forth previously. Put another way, the defendant's sentence or sentencing proceeding is not the subject of his attack, and therefore the trial court lacked jurisdiction over his motion to correct an illegal sentence. See *State* v. *Casiano*, 122 Conn. App. 61, 68, 998 A.2d 792, cert. denied, 298 Conn. 931, 5 A.3d 491 (2010); see also *State* v. *Henderson*, 130

Conn. App. 435, 443, 24 A.3d 35 (2011) ("[i]t is clear that [i]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack" [internal quotation marks omitted]), appeals dismissed, 308 Conn. 702, 66 A.3d 847 (2013) (certification improvidently granted).

Our decision in *State* v. *Brescia*, 122 Conn. App. 601, 606, 999 A.2d 848 (2010), informs both our analysis and conclusion in the present case. In *Brescia*, the defendant claimed that he erroneously had pleaded guilty to the crime of conspiracy to commit forgery in the first degree when the evidence supported only a charge of conspiracy to commit forgery in the second degree. Id., 602. The defendant subsequently filed a motion to correct an illegal sentence, claiming that he had been sentenced for "the wrong crime." (Internal quotation marks omitted.) Id., 604. We affirmed the decision of the trial court to dismiss the motion to correct for lack of subject matter jurisdiction. Id., 604–607. Specifically, we stated: "[T]he subject of the defendant's attack in the present case is the underlying conviction, not the sentencing proceeding. He does not allege that the sentence he received exceeded the prescribed statutory maximum for the crime to which he pleaded guilty. He simply asserts . . . that he was convicted of the wrong crime. . . . Under Connecticut law, that collateral attack on his conviction does not fall within the purview of Practice Book § 43-22." (Citation omitted; internal quotation marks omitted.) Id., 606–607.[9]

[9] We note that *State* v. *Brescia*, supra, 122 Conn. App. 607, is distinguishable from the present case because in that case, the state agreed that the defendant's conviction for forgery in the first degree was improper. "To its credit, the state recognizes that the defendant's conviction for conspiracy to commit forgery in the first degree cannot stand. It concedes that the defendant erroneously was charged with conspiracy to commit forgery in the first degree, rather than in the second degree. The state further acknowledges that the defendant's inability to prevail upon the claims raised herein is not

In the present case, all of the defendant's appellate claims originate from his contention that his guilty pleas to the kidnapping charges are invalid as a result of *Salamon* and its progeny. Similar to the facts of *Brescia*, the defendant attacks his conviction, and not his sentence or sentencing proceeding, and the trial court, therefore, properly concluded that it lacked jurisdiction. Simply stated, a motion to correct an illegal sentence is not the proper procedural path for the defendant in this case to contest the validity of his guilty pleas following the change to our kidnapping laws.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN JOSEPH LEPESKA
(AC 37637)

Lavine, Alvord and Bear, Js.

Syllabus

Convicted of, inter alia, stalking in the second degree as a result of having engaged in a month-long course of obsessive behavior toward the victim, his former girlfriend, which included calling her dozens of times a day and threatening to kill her, the defendant appealed to this court. He claimed, inter alia, that the evidence was insufficient to support his

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an indication that the mistake which occurred in this case is of no consequence and cannot be challenged, noting the defendant's pending habeas corpus proceeding in the Superior Court. In addition, the state submits that permission to file an untimely appeal from the judgment of conviction is warranted under the circumstances. Doubtless, this appeal is not the final chapter in this story." (Footnote omitted; internal quotation marks omitted.) Id., 607–608. In the present case, the state does not agree with the defendant that his conviction was improper. Our analysis in *Brescia* does provide an example of how a collateral attack of a conviction is not within the limited scope of a motion to correct an illegal sentence filed pursuant to Practice Book § 43-22.

[10] We note that the defendant has challenged the validity of his conviction in a separate case that presently is pending before this court. See *Commissioner of Correction* v. *Robles*, AC 37686.

conviction because his conduct constituted an attempt to reconcile with the victim such that no reasonable jury could have concluded that her fear of him was objectively reasonable within the meaning of the statute (§ 53a-181d [b] [1]) that proscribes stalking in the second degree. Prior to the conduct that gave rise to the stalking charge, the defendant and the victim were involved in a domestic violence incident after which the victim was arrested and ordered by the police to have no contact with the defendant. Thereafter, the defendant engaged in the conduct at issue even though he knew that the no contact order was in place, and the victim had told him that she did not want to speak with him and had ignored his prior attempts to contact her. The victim also testified that on three occasions the defendant attempted to approach her in person to discuss their relationship, and that she felt terrified for her life during those incidents. *Held*:

1. The evidence was sufficient to establish beyond a reasonable doubt that the defendant's entire course of conduct caused the victim reasonably to fear for her physical safety, as required for a conviction of stalking in the second degree under § 53a-181d (b) (1); the testimony at trial provided an adequate basis for the jury to find that the victim's fear was objectively reasonable and that the defendant's conduct infiltrated her personal and professional life, as the victim testified that she felt terrified for her life when the defendant attempted to approach her in person three times to discuss their relationship, that the defendant called her dozens of times a day when he knew that a no contact order was in place, threatened to kill her and stalked her at a courthouse, and repeatedly called her friends and family in an attempt to talk to her, and although the victim ignored the defendant's prior attempts to contact her and told him that she did not want to speak with him, he left a voice mail for the victim's supervisor at work in which he accused the victim of taking bribes and sharing company secrets, and threatened to report it to the corporate office if she did not reconcile with him.
2. The trial court did not abuse its discretion when it excluded certain testimony that the defendant sought to elicit from two police officers about domestic incidents that he and the victim had been involved in prior to the conduct that led to the stalking charge; contrary to the defendant's claim that the exclusion of the proffered testimony violated his constitutional right to present a defense because it would have shown the victim's bias and motive to testify falsely, and that her fear of him was not objectively reasonable, the proffered testimony had no bearing on whether the defendant's conduct caused the victim reasonably to fear for her life, the proffered testimony constituted improper impeachment through extrinsic evidence on collateral matters, and it was insufficient to show any bias, prejudice or interest on the part of the victim that would cause her to testify falsely.

Argued September 21—officially released October 25, 2016

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of stalking in the second degree, and, in the second part, with being a persistent offender, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the first part of the information was tried to the jury before *Crawford*, *J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; verdict of guilty; subsequently, the defendant was presented to the court on a plea of nolo contendere to the second part of the information; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to this court. *Affirmed.*

Peter G. Billings, with whom, on the brief, was *Sean P. Barrett*, for the appellant (defendant).

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant argues, "[a]ll of the conduct set forth by the state amounts to an attempt to reconcile by a man who did not know that his relationship was over." We disagree.

The defendant, John Joseph Lepeska, appeals from the judgment of conviction, rendered after a jury trial, of stalking in the second degree in violation of General Statutes § 53a-181d (b) (1).[1] On appeal, the defendant claims that (1) there was insufficient evidence to prove

[1] The defendant was also charged by way of a part B information with being a persistent offender pursuant to General Statutes § 53a-40d. Following the jury's verdict of guilty of stalking in the second degree, the defendant was presented to the court on a plea of nolo contendere to the part B information.

that the victim's[2] fear for her physical safety was objectively reasonable and (2) the trial court improperly excluded the testimony of two defense witnesses. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The defendant and the victim met in 1978. In December, 2011, they reconnected and began dating. Shortly thereafter, in February, 2012, they began living together at the victim's residence. During their relationship, there were incidents of domestic violence.[3]

On August 3, 2013, at approximately 3:30 a.m., the victim was arrested after a domestic violence incident between her and the defendant.[4] The victim was released later that day at approximately 7 a.m.; a condition of her release was that she could not have contact with the defendant.[5] An officer drove the victim from the police station to her house so that she could pick up her vehicle. The victim proceeded to the residence of her friend, Joseph Gorman, because she had a mobile home parked on his property.

While driving to Gorman's house, the victim noticed the defendant driving up behind her in his van at a high rate of speed. As a result, she "froze" and stopped her

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

[3] On one occasion, the defendant told the victim that "if [she] ever attempted to leave or if [she] . . . ever called the police on him that he'd kill [her]." The victim also testified that she considered applying for a protective order at that time, but someone recommended that she not do so because a protective order would not result in the defendant being removed from her house. The victim was also concerned about how the defendant might react to her serving him with a protective order.

[4] In October, 2013, the charges against the victim were dismissed.

[5] Throughout the trial, witnesses incorrectly referred to the condition of release as a "protective order" or a "restraining order." For consistency and accuracy, we refer to this condition as a "no contact order."

vehicle. The defendant, who appeared very agitated, jumped out of his van, started shaking his fist, and screamed that the victim "better not be going to Joey's house because if [she] was . . . he was going to do something . . . ." As the defendant began to walk toward her, the victim realized that she should not have stopped her vehicle, and she drove away from the defendant and called 911. The defendant did not follow her. The victim met with state police troopers alongside the road to report the incident, and then she proceeded to Gorman's house.

That same day, at approximately 1 p.m., the victim, her daughter, and another friend went to a Verizon store. While at the Verizon store, the victim noticed the defendant driving back and forth, sounding his horn, and waving at her.[6] The victim estimated that he drove back and forth approximately four or five times, sounding the horn and waving at her each time. The victim did not report this incident to the police at that time.

That evening, the victim returned to her mobile home on Gorman's property. While the victim and Gorman were sitting in his garage, the defendant drove up in his van. When the victim heard a vehicle approaching, she asked Gorman to see if it was the defendant. When she saw the defendant approaching her, she ran back into her mobile home, locked the doors, and called 911 because she was "petrified," "terrified that [the defendant] would harm [her]." The victim did not speak with the defendant that evening. Instead, Gorman approached the defendant and told him that he was not welcome on the property and needed to leave. The defendant then left Gorman's property. When the officers arrived, the victim provided them with an account of the incident.

[6] The victim had not had contact with the defendant since the incident alongside the road. She believed that the defendant might have learned where she was because the friend she was with tagged her in a Facebook post, which indicated their location at the Verizon store.

On August 5, 2013, the victim went to the courthouse with her daughter for a court hearing relating to her August 3 arrest. Upon arrival, they went to speak with a family services officer. While they were waiting, the defendant repeatedly called the cell phone of the victim's daughter, insisting that she relay messages to the victim or put the victim on the phone. The victim refused to speak with the defendant. Shortly thereafter, the defendant arrived at the courthouse, sat down in a chair across from the victim, and began motioning for the victim to go down the hallway with him. When the victim refused to go with him, the defendant moved next to her and began to talk to her about reconciling. When the family services officer came out into the hallway, she reminded them that they were not permitted to interact with each other as a condition of the victim's release. The victim then waited for her court appearance down the hall with her daughter. The defendant remained at the courthouse as well. When court resumed, the defendant sat across the courtroom from the victim.

During the luncheon recess, the victim and her daughter went to put more money in their parking meter after the defendant called the victim's daughter to tell her that the meter was running out. The defendant again called the victim's daughter to ask her and the victim to drive to a gas station down the street so that they could talk. Shortly thereafter, the defendant approached them at the vehicle while they were sitting inside of it. He began yelling through the passenger's side window, where the victim's daughter was sitting. The defendant wanted the victim to go to the gas station with him so that they could reconcile, and he told her that if they did reconcile, he would tell the judge that he did not want the no contact order in place anymore. The victim refused to go with the defendant, and, instead, she and her daughter got out of her vehicle

and proceeded down the street, away from the defendant. The defendant chased the victim, yelling at her in an attempt to get her to talk to him and reconcile. The victim and her daughter attempted to get away from the defendant by crossing several streets and going into a café for lunch.

The victim and her daughter eventually returned to the courthouse. While there, the victim's daughter called her father, the victim's former husband, to pick her up from the courthouse because it was getting to be late in the afternoon. While the victim's daughter met with the victim's former husband outside the courthouse, the victim initially stayed inside the courthouse. When the victim exited the courthouse, the defendant again tried to confront her, and she attempted to evade him by going to different locations around the courthouse. When the defendant continued to run after her, the victim went to her former husband's vehicle.

At that point, the victim's former husband told their daughter to call 911 because the defendant's behavior was "ridiculous, there's a protective [condition] in place, [and] he shouldn't be trying to go after her."[7] The victim's former husband advised the victim to go back inside the courthouse because it would be safe for her in there. The victim then ran back into the courthouse, and the defendant followed her up to the courthouse doors. Once inside the building, the victim told the marshals what had happened, and they told her to speak

[7] The victim's daughter testified that at this point, although she did not feel personally threatened, "[she] felt more threatened for [her] mother . . . [she] felt bad for [her] mother that she had to go through this." The victim's daughter and former husband remained at the courthouse for approximately an additional thirty minutes to one hour so that they could talk to an officer in person, "to have something on record that we called and what the call was for." They called dispatch again while waiting to get an approximation of when an officer would arrive, but they were told it was an extremely busy day. Eventually an officer arrived at the courthouse to speak with them, but by that later time, they had already left.

with a family services counselor. Unable to meet with a family services counselor before court resumed, the victim returned to the courtroom and reported the defendant's conduct to the court when her case was called.

After her appearance in court, the victim left the courthouse. Later that day, the victim began receiving phone calls from a blocked phone number. Initially, the victim answered the phone, but when she recognized the defendant's voice, she stopped answering the calls. The defendant's persistent calls continued throughout the night.

The next morning, on August 6, 2013, the victim discovered that she had voice mails from the defendant, who was, again, begging her to reconcile. The victim called the police department to report the calls, and she was instructed to go to the nearest police station to fill out a report of the incident, which she did. After making the report, the victim went to work. When she arrived at work, the victim's supervisor informed the victim that she had received a voice mail from the defendant stating that the victim would not be at work that day because she had been arrested and was in court. The defendant further stated in the voice mail that "he personally had witnessed [the victim] taking a cash bribe of at least two thousand dollars from a supplier. That [the victim] had done so in exchange for [her] having been awarded some work to that supplier. He also stated that [she] had shared company secrets with him. And that if [her] boss did not tell [the victim] to call him and reconcile with him and turn his . . . fuckin' phone back on,[8] that he was going to call Sikorsky Corporate United Technologies and report the

[8] The victim testified that the defendant's cell phone was connected to her son's cell phone account and that her son had turned off service to the defendant's cell phone because of his recent conduct.

same." (Footnote added.) The victim called the police department to report the incident, but the defendant was not arrested because of that report.

The next day, August 7, 2013, the victim was scheduled to play pool at a local pool club as a member of her weekly pool league. The defendant was also a member of the pool league. Prior to the victim's arrival, the defendant approached one of the victim's teammates, Jan King, and asked her to call the victim. The defendant, who appeared "frustrated," told King to tell the victim to call him or else "he was going to make [her] life so miserable that [she] would have no choice but to call him." King then called the victim to tell her what had happened, but King emphasized that the victim should not contact the defendant and that she should continue to keep her distance from him because of the no contact order.

From August 8, 2013 until the defendant's arrest in October 9, 2013, the victim continued to receive blocked calls on her cell phone.[9] Sometimes she would receive dozens of calls from the defendant within a short period of time.[10] On August 9, 2013, in addition to receiving phone calls from a blocked number, the victim found flowers on her vehicle in the morning.

A few days later, on the victim's birthday, she did not awake to find any missed phone calls. She believed that she was finally getting a "reprieve" from the defendant, but later she saw that someone had painted "happy birthday XO" in bright white paint across the street outside of the property where she was now staying with her father. At approximately 7 a.m., she began

[9] The victim testified that her friends and family also received "harass[ing]" phone calls from the defendant.

[10] For example, on August 8, 2013, the victim recalled receiving two phone calls at lunch. On August 10, 2013, she woke to find dozens of missed calls made between 5:30 and 6:30 a.m. On August 11, 2013, she was awoken by approximately twenty to thirty calls between 5:30 a.m. and 6:30 a.m.

receiving more phone calls from a blocked number. She received approximately forty-three calls that day. The victim notified the police about what happened that day, and the police contacted the defendant, but did not arrest him. Because of the defendant's conduct on her birthday, the victim decided to leave the spotlights on at night, and her father began leaving his gun safe unlocked.

On August 15, 2013, the defendant continued to attempt to contact the victim, now through Facebook's message system. The victim received numerous Facebook messages from the defendant.

On August 28, 2013, the victim applied for a protective order against the defendant. That same day, she was scheduled to play in her weekly pool league. Prior to the match, the victim's pool team decided to change the location of the match with the hope that the defendant would not show up and the victim would be able to play. Nevertheless, the defendant showed up at the new location. Upon arriving at the pool hall, the defendant approached one of the victim's teammates, James Bradley, and told him to call the victim and tell her that she could not play because of the no contact order. When Bradley stepped outside to call her, the "irate" defendant came "storming out of the bar, screaming and yelling obscenities and everything." The victim recalled hearing through the phone the defendant screaming something to the effect of "tell her I'll fucking kill her, how dare she serve a restraining order paperwork on me . . . ." Bradley told the defendant to back off, hung up the phone, and went back inside the bar. Ultimately, the pool team elected to forfeit the last two games of the night so that they would not have to continue to play pool with the defendant, which rendered them ineligible for the regional tournament in Las Vegas, Nevada.

On September 6, 2013, the victim's daughter made a comment on Facebook that she and her mother were planning to go to a local festival the following day. That night, the victim's daughter received a phone call from the defendant, who told her, "I'm coming there after your mother, I'm going to fuck her up."[11] Because the victim and her daughter were not at the festival that day, they were not worried about running into the defendant and hoped that he would continue to think that the victim was at the festival.

On September 16, 2013, the victim approached the Office of the State's Attorney about the defendant's conduct, and she met with four officers to provide a statement about the defendant's conduct. The detectives assigned to investigate the case subsequently contacted the defendant about the victim's allegations. When one of the detectives met with the defendant, the defendant informed him "that this is a free country and that he didn't feel that a judge could issue a protective order to stop him from seeing the person that he loved. That there was recently a restraining order placed that he was having a hard time not violating."

On September 2, 2014, a jury trial commenced on a one count long form information charging the defendant with stalking in the second degree, in violation of § 53a-181d (b) (1), for his conduct between August 3, 2013 and September 8, 2013. On September 5, 2014, the jury found the defendant guilty of the charged crime. That same day, the defendant pleaded nolo contendere to a part B information charging him with being a persistent offender pursuant to General Statutes § 53a-40d. This appeal followed.

[11] The victim testified that she was with her daughter when she received this call and that because of the way her daughter was holding her cell phone she could overhear what the defendant was saying as well.

I

The defendant's first claim on appeal is that there was insufficient evidence for the jury to find him guilty of stalking in the second degree. In his view, "[a]ll of the conduct set forth by the state amounts to an attempt to reconcile by a man who did not know that his relationship was over"; therefore, no reasonable jury could have concluded that the victim's fear of the defendant during the time in question was objectively reasonable. We disagree.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt . . . . [A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the

defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015).

To obtain a conviction under § 53a-181d (b) (1), the state must prove beyond a reasonable doubt that the defendant "knowingly engage[d] in a course of conduct directed at a specific person that would cause a reasonable person to fear for such person's physical safety or the physical safety of a third person . . . ." "The standard to be applied in determining the reasonableness of the victim's fear in the context of the crime of stalking is a subjective-objective one . . . . As to the subjective test, the situation and the facts must be evaluated from the perspective of the victim, i.e., did she in fact fear for her physical safety? . . . If so, that fear must be objectively reasonable, i.e., a reasonable person under the existing circumstances would fear for his or her physical safety." (Internal quotation marks omitted.) *State* v. *Arthurs*, 121 Conn. App. 520, 526–27, 997 A.2d 568, cert. denied, 310 Conn. 957, 82 A.3d 626 (2013).

The defendant challenges only the objective reasonableness of the victim's fear. In this case, the recited testimony clearly provided an adequate basis for the jury to find that the victim's fear was objectively reasonable. Between August 3, 2013 and September 8, 2013, the defendant engaged in obsessive behaviors, such as calling the victim dozens of times a day, including during the night, and sending her numerous Facebook messages. He engaged in this conduct even though he knew that a no contact order was in place, even though the victim told him that she did not wish to speak with

him, and even though he knew that the victim had ignored his prior attempts to contact her. On three occasions, he attempted to approach the victim in person to discuss their relationship, and the victim testified that each time, she promptly made an effort to get away from the defendant. The victim further testified that during those incidents in which the defendant was physically present, she felt "terrified for [her] life."

The defendant's obsessive, stalking conduct infiltrated the victim's personal and professional life as well. The defendant repeatedly called the victim's friends and family in an attempt to talk to her. On August 6, 2013, the victim's supervisor received a voice mail in which the defendant accused the victim of taking bribes and sharing company secrets and threatened to report this conduct to the corporate office if the victim did not call him and reconcile with him. The following day, the defendant told King that "he was going to make [the victim's] life so miserable that [she] would have no choice but to call him." On August 28, 2013, the defendant screamed that he was going to kill the victim for seeking a protective order. Finally, on September 6, 2013, the defendant told the victim's daughter that "I'm coming there [to the festival] after your mother, I'm going to fuck her up."

When other individuals observed the defendant's conduct, they did not merely shrug off the behavior as that of a man attempting to patch things up with his girlfriend. On August 3, 2013, when the defendant attempted to talk to the victim at Gorman's house, Gorman told the defendant he was not welcome on the property and had to leave. When the defendant continued to stalk the victim at the courthouse on August 5, 2013, the victim's former husband and daughter called 911 to report the defendant's behavior and waited approximately one hour for an officer to respond so that they could file a complaint. The following week,

the defendant's conduct on the victim's birthday caused the victim's father, with whom she was staying, to leave his gun safe unlocked.

"The stalking statute was enacted to address the situation where the criminal does not physically take an act against the person or does not verbally make a direct an[d] immediate threat of harm, but merely stalks the victim. . . . The statute can be violated without a defendant's uttering a syllable, writing a word, or making a gesture. . . . [D]efendants' obsessive behaviors, even in the absence of threats of physical violence, [can] reasonably [cause] their victims to fear for their physical safety." (Citation omitted; internal quotation marks omitted.) *State* v. *Russell*, 101 Conn. App. 298, 320–21, 922 A.2d 191, cert. denied, 284 Conn. 910, 931 A.2d 934 (2007).

In sum, the evidence presented at trial, viewed in the light most favorable to sustaining the jury's verdict, was sufficient to establish beyond a reasonable doubt that the defendant's entire course of conduct caused the victim to reasonably fear for her physical safety. Accordingly, the defendant's first claim fails.

II

The defendant next claims that (1) the trial court abused its discretion by excluding the testimony of two defense witnesses and that (2) the exclusion of this testimony violated his right to present a defense as guaranteed by the sixth amendment to the United States constitution. We disagree.

The sixth amendment to the United States constitution guarantees "the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may

decide where the truth lies." (Internal quotation marks omitted.) *State* v. *Cerreta*, 260 Conn. 251, 260–61, 796 A.2d 1176 (2002). The defendant's right to present a defense, however, "does not compel the admission of any and all evidence offered in support thereof. . . . The trial court retains the discretion to rule on the admissibility, under the traditional rules of evidence, regarding the defense offered." (Citations omitted; internal quotation marks omitted.) *State* v. *DeJesus*, 260 Conn. 466, 481, 797 A.2d 1101 (2002).

"[W]e 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 [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.) Id. "If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail." *State* v. *Davis*, 298 Conn. 1, 11, 1 A.3d 76 (2010).

After the state rested its case-in-chief, the defendant indicated that he wished to call two officers to testify about prior domestic incidents involving the defendant and the victim. The state objected on the grounds that the testimony was irrelevant and related to collateral matters. The court, after offers of proof, sustained the state's objections. We will address the testimony of each officer in turn.

A

The defendant first sought to present evidence about a domestic incident that occurred on August 2, 2013, the day before the defendant's stalking commenced. Following a disagreement that occurred over lunch, the defendant drove away with the victim's purse, and the

victim and the defendant exchanged text messages about how he should return her purse. The victim subsequently went to the police station claiming that the defendant was sending her threatening text messages. Officer Alexia Castro reviewed the text messages sent by the defendant and determined that they were not threatening in nature.

At trial, the defendant cross-examined the victim concerning this incident and the fact that the defendant was not arrested because of her allegation.[12] During

[12] The following colloquy occurred between defense counsel and the victim:

"[Defense Counsel]: Do you recall talking to Officer Castro on August 2nd?

"[The Victim]: I recall talking to an officer at the Naugatuck Police Department; I don't recall the name of the person.

"[Defense Counsel]: Was it a female officer?

"[The Victim]: I believe so.

"[Defense Counsel]: And your claim is that you didn't tell that officer that [the defendant] was sending you threatening messages?

"[The Victim]: [The defendant] made threatening phone calls—

"[Defense Counsel]: My question, ma'am, was whether or not you recall telling that officer that [the defendant] was sending you threatening messages following his departure from where you were having lunch on August 2, 2013?

"[The Victim]: Threatening messages? No.

"[Defense Counsel]: You didn't tell her that?

"[The Victim]: No.

"[Defense Counsel]: If I may approach the witness, Your Honor?

"[The Court]: You may. . . .

"[Defense Counsel]: Ma'am, that's Officer Castro's report of that incident. And about the third paragraph—is your testimony here that Officer Castro has incorrectly reported what you said to her?

"[The Victim]: I'm sorry, could you repeat that? . . .

"[Defense Counsel]: Did you have an opportunity to read that report?

"[The Victim]: I read part of it. . . . I don't see anything in here where it says that I told her that he was sending me threatening text messages. There's nothing that says that. It says I said he threatened me, which he did, but not in text messages. . . .

"[Defense Counsel]: And, ma'am, just so we're clear, do you have any trouble reading the English language?

"[The Victim]: No.

"[Defense Counsel]: Did you tell Officer Castro on that August 2nd date that you were in fear for your life?

"[The Victim]: I did.

cross-examination, the victim disagreed with defense counsel that the basis for her complaint was text messages rather than threatening phone calls. After the state rested its case-in-chief, the defendant indicated that he wished to call Castro to testify further about this incident. The court permitted the defendant to present Castro's testimony outside the presence of the jury. Castro testified that she recalled the victim coming into the police station to make a complaint about threatening text messages, that she reviewed the text messages and determined that they were nonthreatening, and that she called the defendant to get his version of events. The court sustained the state's objection, holding that the proffered testimony was irrelevant, related to a collateral matter, and was insufficient to establish bias, prejudice, or interest on the part of the victim to testify falsely.

On appeal, the defendant argues, as he did before the trial court, that Castro's testimony was admissible to show the victim's bias and motive as well as to show that the victim's fear of the defendant was not objectively reasonable. The state responds that Castro's testimony was irrelevant and related to a collateral matter. We agree with the state.

"[I]t has long been the rule in Connecticut that extrinsic evidence may not be used to contradict the testimony of a witness with regard to a particular act of misconduct. . . . [I]f the witness stands his ground and denies the alleged misconduct, the examiner must take his answer not that he may not further cross-examine

"[Defense Counsel]: Why were you in fear for your life?

"[The Victim]: Because [the defendant] had told me in the past that if I ever attempted to leave or if I had ever called the police on him that he'd kill me.

"[Defense Counsel]: Was [the defendant] arrested as a result of that incident?

"[The Victim]: No."

to extract an admission, but in the sense that he may not call other witnesses to provide the discrediting acts." (Internal quotation marks omitted.) *State* v. *Jose G.*, 290 Conn. 331, 345, 963 A.2d 42 (2009). "Extrinsic evidence may be admitted, however, if the subject matter of the testimony is not collateral, that is, if it is relevant to a material issue in the case apart from its tendency to contradict the witness. . . . Evidence tending to show the motive, bias or interest of an important witness is never collateral or irrelevant. It may be . . . the very key to an intelligent appraisal of the testimony of the [witness]." (Internal quotation marks omitted.) Id., 345 n.11; see also Conn. Code Evid. § 6-5, commentary.

"The determination of whether a matter is relevant or collateral . . . generally rests within the sound discretion of the trial court." *State* v. *Colton*, 227 Conn. 231, 248, 630 A.2d 577 (1993), on appeal after remand, 234 Conn. 683, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996). "The [trial] court [is] in the best position to determine whether the proffered testimony pertained to a collateral matter or whether it was relevant. The [trial] court's evidentiary rulings are given great deference precisely because the [trial] court [is] in the best position to hear and to assess the witnesses' testimony in the context of the entire trial." *State* v. *Reyes*, 81 Conn. App. 612, 620, 841 A.2d 237 (2004).

One of the issues at trial was whether the defendant's conduct between August 3, 2013 and September 8, 2013 would cause a reasonable person to fear for her physical safety. The proffered testimony about an allegation made by the victim on August 2, 2013 had no bearing on that issue. The only potential value of Castro's testimony was its ability to contradict the victim's testimony that her complaint was based on the defendant's having made threatening phone calls rather than having sent

threatening text messages. Thus, the evidence constituted improper impeachment through extrinsic evidence on a collateral matter. Moreover, the testimony was insufficient to show any bias, prejudice, or interest on the part of the victim that might cause her to testify falsely.

Consequently, we conclude that there was no abuse of discretion in the court's disallowing the testimony, and, therefore, the defendant's constitutional claim necessarily fails as well. See *State* v. *Davis*, supra, 298 Conn. 11.

B

The defendant also sought to present evidence of a second incident that occurred in February 2013 in which the victim and the defendant raised competing domestic violence claims against one another. The victim asserted that the defendant had thrown a work boot at her, which hit her hand, while the defendant asserted that the victim had thrown coffee at him. The investigating officer, Charles Schofield, decided to arrest the victim for disorderly conduct because there was physical evidence at the home of coffee being thrown, i.e., a coffee-soaked couch and T-shirt.

At trial, the defendant cross-examined the victim about the fact that she was arrested because of that incident.[13] The court permitted the defendant to summarize Detective Schofield's proposed testimony, outside

[13] The following colloquy occurred between defense counsel and the victim:

"[Defense Counsel]: There was an incident from February of 2013, wasn't there?

"[The Victim]: Yes.

"[Defense Counsel]: And that incident you claimed that [the defendant] threw a boot at you, correct?

"[The Victim]: He did.

"[Defense Counsel]: The police were called, right?

"[The Victim]: Yup.

"[Defense Counsel]: And they confirmed that you, in fact, had thrown coffee at him; isn't that right?

the presence of the jury. In essence, the defendant offered that, if permitted to testify, Schofield would testify about his recollection of the coffee-throwing incident. His testimony would provide more detail about the incident, but not contradict the victim's testimony about it.

The defendant argued that Schofield's testimony demonstrated the victim's bias toward or motive against the defendant as well as her willingness "to make a report to the police that doesn't necessarily pan out." Upon inquiry from the court, however, the defendant acknowledged that the victim was questioned about the coffee-throwing incident during cross-examination and that the victim "admitted she was arrested as a consequence of that incident." The court specifically inquired as to whether any of the information that the defendant was seeking to elicit from Schofield was not already before the jury. The defendant responded that the specific allegation that the victim had thrown coffee at the defendant during the incident was not before the jury[14] as well as the fact that Schofield found evidence of coffee being thrown. When the state further argued that the evidence was irrelevant and addressed a collateral matter, the defendant responded that the specific details of the incident were relevant because they demonstrated "the nature of the relationship between [him and the victim]" and assisted the jury in evaluating

"[The Victim]: No, sir.

"[Defense Counsel]: They didn't confirm that?

"[The Victim]: No, sir.

"[Defense Counsel]: You were arrested for that incident though, were you not?

"[The Victim]: For throwing coffee at him?

"[Defense Counsel]: Were you arrested for a domestic incident with [the defendant] in February of 2013?

"[The Victim]: Yes, sir."

[14] Defense counsel, however, was mistaken in his response to the court as he did question the victim about the fact that she was arrested for throwing coffee at the defendant in February 2013. See footnote 13 of this opinion.

whether the victim's fear was reasonable. The trial court ultimately sustained the state's objection, ruling that the evidence was irrelevant and collateral to the issues at trial.

On appeal, the defendant again argues that Schofield's testimony was admissible to show the victim's bias and motive and to show that the victim's fear of the defendant was not objectively reasonable. The state again responds that Schofield's testimony was irrelevant and related to a collateral matter. We agree with the state.

Schofield's proffered testimony about an incident that occurred in February 2013 had no bearing on the issue of whether the defendant's course of conduct between August 3, 2013 and September 8, 2013 caused the victim to have an objectively reasonable fear for her physical safety. The testimony was also insufficient to show any motive, bias, or interest on the part of the victim that might cause her to testify falsely. Consequently, we conclude that there was no abuse of discretion in the court's disallowing the testimony, and, therefore, the defendant's constitutional claim necessarily fails as well. See *State* v. *Davis*, supra, 298 Conn. 11.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICHARD CAMPBELL
(AC 38763)

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

Syllabus

Convicted, following a trial to the court, of the crimes of attempt to commit murder and risk of injury to a child, the defendant appealed. The defendant's conviction stemmed from his alleged conduct in striking the

victim in the head repeatedly with a hammer in the presence of her child and his threats to kill her child. The defendant claimed that the trial court improperly rejected his affirmative defense that he lacked substantial capacity, as a result of mental disease or defect, to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. Specifically, he claimed that the court improperly disregarded undisputed testimony from two eyewitnesses, H and A, and improperly rejected the conclusion of his expert witness, M, that the defendant lacked substantial capacity to conform his conduct within the law. *Held* that the defendant failed to meet his burden of establishing that the trial court's rejection of the affirmative defense of mental disease or defect was not reasonably supported by the evidence: that court reasonably could have concluded that H possessed a bias because of her sibling like relationship with the defendant and that H's testimony, which primarily concerned the defendant's past hospitalizations, was not determinative of his mental state at the time of the incident, the court was not required to mention H's testimony because, as the trier of fact, it could disbelieve any or all of the evidence on insanity, and the court did not disregard A's testimony, but used its discretion, as the fact finder, to resolve conflicting evidence; moreover, the court properly considered, sifted and weighed the evidence in finding that M's testimony was inconsistent with his prior reports and that his conclusions were unreliable, the court reasonably and thoroughly articulated its reasoning and was under no obligation to accept M's testimony, and the court's decision was based on a reasonable assessment of the evidence presented, which suggested that the defendant did not lack substantial capacity to conform his conduct within the requirements of the law.

Argued September 12—officially released November 1, 2016

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit murder and risk of injury to a child, brought to the Superior Court in the judicial district of New Britain, where the defendant waived his right to a jury trial; thereafter, the case was tried to the court, *D'Addabbo*, *J.*; judgment of guilty, from which the defendant appealed. *Affirmed.*

Glenn W. Falk, assigned counsel, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, was *Brian Preleski*, state's attorney, for the appellee (state).

DiPENTIMA, C. J. The defendant, Richard Campbell, appeals from the judgment of conviction, rendered after a court trial, of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2)[1] and 53a-54a (a),[2] and risk of injury to a child in violation of General Statutes § 53-21 (a) (1).[3] On appeal, the defendant claims that the court's rejection of the affirmative defense of mental disease or defect, otherwise known as the insanity defense, was not reasonably supported by the evidence.[4] We affirm the judgment of the court.

Approximately one month after the trial, the court orally rendered its factual findings and legal conclusions in open court. The defendant was a forty-four year old male and a lifelong friend of T.C.[5] On or about July 27, 2013, T.C. invited several friends to her home

[1] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[2] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another, he causes the death of such person . . . ."

[3] 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 . . . ."

[4] The affirmative defense of mental disease or defect is codified under General Statutes § 53a-13 (a) and provides in relevant part: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."

[5] 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.

to celebrate her birthday. The party began in the early afternoon, and the defendant was present. The defendant left the party sometime in the afternoon, and T.C. was unaware of his whereabouts.

The defendant eventually returned the same day and, although T.C. testified that the defendant appeared "a little tipsy," he appeared to be in control of his actions. Upon the defendant's return, T.C. suggested that the defendant take a nap in an upstairs bedroom, and he did so. After the guests departed, the defendant came downstairs and asked whether he could stay the night.[6] T.C. agreed and allowed the defendant to use her child's bedroom.[7] After this conversation, the defendant, T.C., and her child retired to their respective bedrooms.[8]

In the early morning of July 28, 2013, T.C. was awoken by several blows to her head. The defendant struck T.C. repeatedly over the head with a hammer and told her he was going to kill her.[9] During this encounter, T.C.'s six year old child was in the bed next to her. T.C. demanded that the defendant stop, but he did not. She eventually escaped from the room and asked her child to call 911. The defendant then told the child, "if you call 911, I will kill you too."[10] During T.C.'s initial escape, she reached the stairs but was pushed down them by the defendant. Injured and at the bottom of the stairs, T.C. attempted to reach the front door, but the defendant threw her on the couch. The defendant straddled

[6] Evidence was presented to the court that suggested the defendant had requested to live in T.C.'s home the week prior to the crime, but was told he could not.

[7] The child spent the night in T.C.'s bedroom.

[8] The court found that during the night, the defendant "made a passing remark about . . . sleeping in [T.C.'s] bed with her which [T.C.] responded—no you're not."

[9] T.C. believed that the hammer the defendant used was one she regularly kept inside a closet; it was missing after the incident.

[10] The record is unclear regarding the child's whereabouts during the defendant's pursuit of T.C.

T.C. and again repeatedly struck her with the hammer. She eventually broke free, exited her home through the back door, and ran to her neighbor's house. An ambulance was called and responded to her neighbor's house, and T.C. was taken to the hospital.

New Britain Police Officers Gregory Harkins and Brian Shea were dispatched to T.C.'s street. En route, the officers observed the defendant in the street wearing only boxer shorts and moccasins with what appeared to be blood covering his body. The officers "smelt an odor of alcoholic beverage emanating from his person" and, when questioned, the defendant indicated that he had consumed three beers.

The officers called for an ambulance, and the defendant was transported to the Hospital of Central Connecticut (hospital) for observation. Christopher Yergen, a physician, assessed and treated the defendant, and noted in his records the defendant's recollection of what happened earlier that morning. After further observation and assessment, the defendant was released the following day from the hospital to the custody of the New Britain Police Department.

The defendant then was interviewed by Detective Michael Steele following a voluntary waiver of his *Miranda* rights. The defendant at that time stated that he recalled standing over the victim's bed then blacking out, seeing the victim bleeding and crying, and admitted that he struck her with a hammer but could not recall why he did it. The defendant also recalled having "words" with the victim and believed that he was "physically hitting her but not mentally."

The defendant subsequently was charged with the attempted murder of T.C. and risk of injury to her child. The defendant elected to be tried by the court and raised the affirmative defense of mental disease or defect. At the conclusion of trial, the court found the defendant

guilty, on both counts, beyond a reasonable doubt and that "the defendant has not sustained his burden of proof [by a] preponderance of the evidence for this [affirmative] defense . . . that he had a mental disease or defect . . . [and] as a result he lack[ed] a substantial capacity . . . to control his conduct within the requirements of [the] law." The court rendered judgment accordingly and sentenced the defendant to twenty-three years of incarceration followed by seven years of special parole. This appeal followed.

On appeal, the defendant claims that the court's rejection of the affirmative defense of mental disease or defect was not reasonably supported by the evidence. He argues that the court improperly disregarded undisputed witness testimony and rejected an expert witness' conclusion that the defendant lacked substantial capacity to conform his conduct within the law. We disagree.

As an initial matter, we set forth our standard of review. "The evaluation of . . . evidence on the issue of legal insanity is [within] the province of the finder of fact . . . . We have repeatedly stated that our review of the conclusions of the trier of fact . . . is limited. . . . This court will construe the evidence in the light most favorable to sustaining the trial court's [judgment] and will affirm the conclusion of the trier of fact if it is reasonably supported by the evidence and the logical inferences drawn therefrom. . . . The probative force of direct and circumstantial evidence is the same. . . . The credibility of expert witnesses and the weight to be given to their testimony and to that of lay witnesses on the issue of sanity is determined by the trier of fact." (Internal quotation marks omitted.) *State* v. *Medina*, 228 Conn. 281, 309, 636 A.2d 351 (1994).

The affirmative defense of mental disease or defect is codified in General Statutes § 53a-13 (a) and provides that "[i]n any prosecution for an offense, it shall be an

affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."[11] "Whereas an *affirmative defense* requires the defendant to establish his claim by a preponderance of the evidence, a properly raised *defense* places the burden on the state to disprove the defendant's claim beyond a reasonable doubt." (Emphasis in original.) *State* v. *Revels*, 313 Conn. 762, 778, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

The following additional facts are relevant to this issue. During the state's case-in-chief, Harkins testified that when he and Shea arrived on the scene, the defendant was "rambling and kind of yelling," so the officers asked him some general questions to gauge his mental state. The defendant understood Harkins' commands, but some of his answers to the officers' questions were "non sequitur." According to Harkins, the defendant recounted the incident to the officers "intelligibly" and stated that he believed that he killed the victim. Further, Harkins observed the defendant speaking to someone who was not there, and the defendant asked aloud, "why did you make me do it?" Harkins also testified that the defendant's overall demeanor was volatile; the defendant would be calm one moment, then the next moment, become angry and bang his head.

Susan Hernandez, a fact witness, was called to testify by the defendant. Hernandez testified that her father had raised the defendant and that she considered the

[11] The defendant conceded at oral argument before this court that a claim under the cognitive prong of the mental disease or defect affirmative defense is not at issue. His claim is limited to the volitional prong of that test; that he lacked substantial capacity to control his conduct within the requirements of the law.

defendant her brother. Hernandez recalled that in August, 2012, the defendant was "very distraught, terrified, shaking, [and] crying." She also recalled that the defendant had told her that he was hearing voices and that he had been hearing those voices for a long time. According to Hernandez, the defendant was hospitalized several times for hearing voices, not sleeping for days, and having severe headaches.

The defendant also called Andrew Meisler, a clinical and forensic psychologist, as an expert witness. Meisler conducted a mental health evaluation of the defendant over the course of two meetings in early 2014. Meisler also reviewed the defendant's medical records dating back to 2008 through his hospitalization on July 28, 2013.

During the meetings with Meisler, the defendant told him that he did not recall hearing voices at the time of the incident and that he just told the police that he did. Meisler found this to be significant because the defendant's medical records indicated that he suffered from auditory hallucinations, and Meisler opined that the defendant's failure to recall auditory hallucinations spoke to the defendant's overall diminished mental state.

Meisler's opinion as to the defendant's mental state at the time of his arrest and the assault was that "he was in an acute impaired mental state" and possessed "an inability to control his behavior in a meaningful or willful way."[12] Meisler used the term "ego-dystonic" in his evaluation of the defendant and defined it as

[12] Meisler used several psychological testing procedures, including the MMPI2-RF and the Rorschach Ink Blot test. The results of the MMPI2-RF were not "interpretable in the conventional way" because the defendant endorsed too many distressing symptoms and Meisler could not objectively compute the results. The Rorschach Ink Blot test indicated the defendant's "inability to manage emotions, cope with reality, and essentially stay sane when faced with emotional stress or turmoil."

"actions or behaviors that are inconsistent with the way somebody sees themselves or wants to be seen." Meisler concluded that the defendant was "clearly ego-dystonic." Meisler's opinion was based on the defendant's medical records, the police officers' observations, and Meisler's personal interactions with the defendant.

On cross-examination, the state introduced Meisler's March, 2014 report, which conflicted with his testimony at trial. That report opined that the defendant's impairment on July 28, 2013 "was due to a combination of several factors including . . . the use of alcohol."[13] Meisler was asked if his prior report was still his opinion. Meisler testified that his opinion at trial was "a hybrid of those two opinions." Meisler also testified that he could not rule out the possibility that alcohol or prescription medication was a contributing factor because it "remains an uncertainty given that no one knows exactly whether or not [the defendant] took any of those, [so] those may in fact be contributors."

The state also used the hospital's behavioral assessment of the defendant to cross-examine Meisler. This assessment indicated that the defendant was never treated for auditory hallucinations in the past and that his behavior was within normal behavioral and cognitive limits on the day of the crime. Further, the assessment mentioned that the defendant "calmly [spoke] about beating [T.C.] while eating [french fries] from his lunch," and he appeared to have a "calm demeanor when being evaluated by Dr. Yergen."

[13] The affirmative defense of mental disease or defect is unavailable "if such mental disease or defect was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance, or any combination thereof, unless such drug was prescribed for the defendant by a prescribing practitioner, as defined in subdivision (22) of section 20-571, and was used in accordance with the directions of such prescription." General Statutes § 53a-13 (b). The court here made no findings as to either voluntary intoxication or proximate cause.

"It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 26, 807 A.2d 955 (2002).

"[I]n its consideration of the testimony of an expert witness, the [fact finder] might weigh, as it sees fit, the expert's expertise, his opportunity to observe the defendant and to form an opinion, and his thoroughness. It might consider also the reasonableness of his judgments about the underlying facts and of the conclusions which he drew from them. . . . [T]he [fact finder] can disbelieve any or all of the evidence on insanity and can construe that evidence in a manner different from the parties' assertions. . . . It is the trier of fact's function to consider, sift and weigh all the evidence including a determination as to whether any opinions given concerning the defendant's sanity were undercut or attenuated under all the circumstances." (Citations omitted; internal quotation marks omitted.) *State* v. *Quinet*, 253 Conn. 392, 407–408, 752 A.2d 490 (2000).

The defendant argues that the court's disregard of the "undisputed" testimony of Hernandez and Harkins was not reasonably supported by the evidence. Specifically, the defendant claims that the "trial court made no mention of these two critical pieces of evidence which supported rather than undercut" Meisler's opinion. We base our rejection of these claims on the broad discretion given to the fact finder. See *State* v. *Quinet*, supra, 253 Conn. 408.

First, the court recognized the familial relationship between Hernandez and the defendant. The court reasonably could have concluded that Hernandez possessed a bias because of her sibling like relationship with the defendant. See *State* v. *Calabrese*, 279 Conn. 393, 403, 902 A.2d 1044 (2006) ("[t]he [fact finder] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical" [internal quotation marks omitted]). Further, her testimony primarily identified the defendant's past hospitalizations "due to hearing voices, not sleeping for days, and anxious behavior." The court reasonably could have concluded that the defendant's past hospitalizations were not determinative of his mental state at the time of the incident. Ultimately, the court was not required to "mention" Hernandez' testimony because "[t]he [trier of fact] can disbelieve any or all of the evidence on insanity . . . ." *State* v. *Quinet*, supra, 253 Conn. 408.

Next, the defendant argues that Harkins' "undisputed" testimony was also unreasonably disregarded by the court. Again, we do not find this argument persuasive. Although the defendant argues Harkins' testimony is undisputed, the record indicates a conflict with Harkins' observations of the defendant and the defendant's admissions to Meisler. Specifically, Harkins observed that the defendant was speaking to someone who was not there; however, the defendant later reported to Meisler that he had not heard voices during the commission of the crime. We conclude that the court did not disregard Harkins' testimony but used its discretion, as the fact finder, to resolve conflicting evidence. See *State* v. *Quinet*, supra, 253 Conn. 407 ("[t]he evaluation of . . . conflicting evidence on the issue of legal insanity is [within] the province of the finder of fact").

Finally, the defendant argues the court unreasonably rejected Meisler's expert conclusion that the defendant

lacked substantial capacity to control his conduct within the requirements of the law. The defendant also argues the trial court "gave no reason to discount [Meisler's] assessment based on his professional experience." We disagree.

In its oral memorandum of decision, the court explicated that it was unpersuaded by Meisler's testimony because "both the consistency and the basis" of his conclusions were unreliable. The court also found that Meisler's testimony at trial differed from his prior reports regarding the underlying bases of his opinion. As discussed, in a trial to the court, the court acts as the fact finder to "consider, sift and weigh all the evidence including a determination as to whether any opinions given concerning the defendant's sanity were undercut or attenuated under all the circumstances." (Internal quotation marks omitted.) *State* v. *Quinet*, supra, 253 Conn. 408. We conclude that the court properly considered, sifted, and weighed the evidence in its findings.[14]

Our review of the record leads us to conclude that the court's decision was based on the court's reasonable assessment of the evidence presented. The court identified and analyzed evidence relating to Meisler's opinion that tended to suggest it was unconvincing. Also, the court found that Meisler "appear[ed] to dismiss [differing analyses of the defendant] as just another opinion." Further, the court was convinced that the state undermined Meisler's testimony through its cross-examination.[15]

[14] In reaching its conclusion, the court identified several inconsistencies relating to Meisler's testimony including: (1) the "self-reported [mental health history] from [the defendant] and [that he] doesn't recall hearing auditory hallucinations at the time" of the assault; (2) the initial March, 2014 report drafted by Meisler which conflicted with his testimony at trial; (3) Meisler's prior opinion that alcohol and/or prescription drugs were a contributing factor; and (4) Yergen's observation that the defendant was changing his story regarding hearing voices.

[15] The court stated that it found "the state has successfully undermine[d] the basis for his opinion."

We note that in *Quinet*, our Supreme Court acknowledged that evidence suggesting a defendant had the mental capacity to plan or organize a crime "is relevant to a determination of whether the accused has the capability of conforming his conduct to the requirements of the law." *State* v. *Quinet*, supra, 253 Conn. 410. Further, behavior that conforms within legal requirements "depends upon the specific facts and circumstances of the case, and ultimately is a determination for the trier of fact." Id. Here, evidence was presented at trial that suggested the defendant did not lack substantial capacity to conform his conduct within the requirements of the law.[16] In our view, the court reasonably and thoroughly articulated its reasoning and was under no obligation to accept Meisler's testimony.

We find that the court's findings of fact were reasonably supported by the evidence. Thus, the defendant failed to meet his burden of establishing that the court's rejection of the affirmative defense of mental disease or defect was not reasonably supported by the evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EARL SIMPSON (AC 38643)

Beach, Keller and Bear, Js.

Syllabus

Convicted, on a plea of guilty, of murder as an accessory in violation of statutes (§§ 53a-54a [a] and 53a-8), the defendant appealed, claiming,

[16] "The court took into consideration that the defendant went to the first floor to find a hammer and that was inside the box . . . stating to [the victim that] he's going to kill . . . [her]; follow[ed] her out of the room [and] pushe[d] her down the stairs . . . continue[d] to strike her; [threw] the hammer downstairs outside of the unit; ha[d] footwear on; recognize[d] police officer[s] [and] response[d] appropriately [and was] compliant with the police officer."

inter alia, that the trial court abused its discretion by denying his motion to withdraw his guilty plea prior to sentencing, and by failing to conduct an evidentiary hearing on that motion or to address his complaints about his attorney. The defendant's conviction resulted from a shooting incident in which he and an accomplice allegedly attempted to rob the victim. The defendant initially was charged with, inter alia, murder. Thereafter, the state filed a substitute information that included the accessorial liability statute, § 53a-8, in the count that charged the defendant with murder. At the plea proceeding, the court clerk stated to the defendant that he was charged with murder in violation of § 53a-54a, to which the defendant pleaded guilty. The record did not indicate whether the court clerk read the murder charge from the initial information, which charged the defendant with murder, or from the substitute information, which charged him with murder as an accessory. The trial court then canvassed the defendant and accepted his plea after he stated that he understood the court's questions to him. During the canvass, the court did not refer to or explain the murder charge in terms of accessorial liability. The prosecutor's recitation of the factual basis for the defendant's guilty plea also differed from the factual basis for the murder charge that was set forth in the substitute information. Thereafter, prior to the sentencing proceeding, the defendant wrote two letters to the court in which he stated that he felt pressured to plead guilty, and that he wanted to withdraw his guilty plea and wanted a new attorney to file a motion for an evidentiary hearing. The defendant further claimed in his letters that his attorney had not discussed accessorial liability with him or explained all of the elements of the crime of murder. The defendant's attorney then filed a motion to withdraw the guilty plea, which the court denied before sentencing the defendant in accordance with the plea. In ruling that the defendant had stated no valid reason to withdraw the plea, the court did not conduct an evidentiary hearing to determine if he understood the nature of the charge to which he pleaded guilty, did not inquire into his complaints about his attorney, and did not address his request for the appointment of new counsel. *Held*:

1. The trial court abused its discretion by failing to conduct an evidentiary hearing to determine if the defendant understood the nature of the charge to which he pleaded guilty: the defendant's letters to the court conveyed his confusion about the nature of the charge and, thus, furnished a basis under the rule of practice (§ 39-27 [2]) that permits withdrawal of a plea that was entered without knowledge of the nature of the charge; furthermore, the defendant's representations that his attorney did not discuss accessorial liability with him or explain all of the elements of the crime of murder were not conclusively refuted by the record of the plea proceeding, which showed that the defendant was convicted of murder as an accessory in violation of §§ 53a-54a (a) and 53a-8, that the prosecutor set forth a factual basis for the guilty

plea that differed from the factual basis for the murder charge that was set forth in the substitute information, and that the court clerk had informed the defendant that he was charged with murder in violation of § 53a-54a, to which the defendant pleaded guilty; moreover, during the canvass of the defendant and at the sentencing proceeding, the court did not refer to or explain the murder charge in terms of accessorial liability, and did not ask the defendant if his attorney had explained to him the elements of the crime of murder as an accessory or had discussed guilt as an accessory; accordingly, the judgment was reversed and the case was remanded for an evidentiary hearing to determine if the defendant's plea was knowing and voluntary and, thus, obtained in conformance with his due process rights.

2. The trial court abused its discretion by failing to address or to conduct any inquiry into the defendant's complaints concerning his attorney or his request for the appointment of a new attorney: the defendant's letters to the court sufficiently alerted the court to a seemingly substantial complaint concerning a breakdown in the attorney-client relationship, and the defendant did not state anything at the sentencing proceeding that contradicted those representations or might be viewed as an abandonment of his request for new counsel; moreover, in denying the defendant's motion to withdraw his guilty plea, the court did not set forth any findings of fact as to trial counsel's performance, and did not address the defendant's motion for new counsel or invite him or his counsel to address the matter, and the record was silent as to whether the defendant's attorney adequately explained to him the accessorial nature of the offense to which he pleaded guilty; accordingly, the proper remedy was for the trial court on remand to conduct an adequate inquiry into the defendant's complaints concerning his attorney and to rule on his request for new counsel.

Argued September 9—officially released November 1, 2016

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder and robbery in the first degree, brought to the Superior Court in the judicial district of New Haven, where the defendant was presented to the court, *Clifford*, *J.*, on a plea of guilty to the charge of murder; thereafter, the state entered a nolle prosequi as to the charges of felony murder and robbery in the first degree; subsequently, the court denied the defendant's motion to withdraw the plea and rendered judgment in accordance with the

plea, from which the defendant appealed. *Reversed*; *further proceedings*.

Deren Manasevit, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, former state's attorney, and *Brett R. Aiello*, special deputy assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. Following the trial court's acceptance of his guilty plea under the *Alford* doctrine,[1] the defendant, Earl Simpson, was convicted of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8.[2] The defendant now appeals from the judgment, claiming that: (1) on the basis of facts and circumstances that were apparent to the court at the time of the plea and which undermined a finding that the defendant understood the nature of the charge at issue, the court abused its discretion by denying the defendant's motion to withdraw his plea prior to sentencing and, in the alternative, abused its discretion by failing to conduct an evidentiary hearing on the motion; (2) the court violated the defendant's right to counsel by failing to address the grievances that the defendant raised to the court concerning his attorney and, in the alternative, abused its discretion by failing to inquire with respect to such complaints; and (3) the court abused its discretion by accepting the plea and that its acceptance of the plea violated the defendant's right to due process. We agree with the defendant that the court improperly failed to conduct an evidentiary hearing with respect to his motion to withdraw his plea and failed to undertake a

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

[2] Also, the defendant admitted that, by his criminal conduct, he had violated the terms of his probation.

necessary inquiry with respect to his complaints concerning his attorney. Accordingly, we reverse the judgment and remand the case to the trial court for further proceedings with respect to those issues.

The following undisputed facts, which may be gleaned from the record of the underlying proceedings, are relevant to the claims raised in the present appeal. The defendant, represented by counsel, entered an *Alford* plea in this case on September 19, 2014. The state, by way of a long form information, filed on June 29, 2012,[3] charged the defendant in count one with felony murder under General Statutes §§ 53a-54c and 53a-8, in count two with murder as an accessory under §§ 53a-54a (a) and 53a-8, and in count three with robbery or attempt to commit robbery in the first degree in violation of General Statutes § 53a-134 (a) (1). Count two stated: "And the [state's attorney for the judicial district of New Haven] further accuses [the defendant] of Murder and charges that at the City of New Haven, on or about the 9th day of July, 2011, at approximately 6:00 a.m., in the area of Howard and Putnam Streets, the said [defendant] did, with intent to cause the death of another person, to wit: John Claude James, did shoot such person and caused the death of such person, said conduct being in violation of [§§] 53a-54a (a) and 53a-8 of the Connecticut General Statutes."

At the plea canvass, the prosecutor stated that it was his understanding that the defendant was prepared to

[3] Although the record reflects that the long form information was filed with the clerk of the New Haven judicial district on June 29, 2012, there is no corresponding entry on the court docket sheet and the record reflects that on September 19, 2012, the court marked off a motion for essential facts filed by the defendant under the belief that the state had not yet filed a long form information. A prior information in the court file, dated June 22, 2012, charged the defendant with murder, but not as an accessory, in the second count.

enter an *Alford* plea "on the second count of the information charging murder." The court clerk,[4] addressing the defendant, stated in relevant part: "[Y]ou've been charged in the second count with murder in violation of Section 53a-54a of the Connecticut General Statutes. How do you plead, guilty or not guilty?" The defendant replied, "Guilty." The court acknowledged that the plea was made under the *Alford* doctrine. Thereafter, the defendant admitted that he had violated his probation in violation of General Statutes § 53a-32.

The prosecutor addressed the court to set forth the factual basis underlying the plea with respect to the murder count, as follows: "[W]ith respect to the plea on the second count of murder, the state is prepared to prove the following facts: On July 9, 2011, at about 6 p.m., New Haven police officers responded to the area of Howard Avenue and Putnam Street based upon a report of shots fired. They located the body of John Claude James, age twenty-six. It was evident to them that he had been shot several times. A later autopsy determined that he had been shot five times in the back area. All but one bullet had exited the body. They were never located.

"During the investigation, a witness stated she was in her apartment nearby. Moments after hearing the shots, Cody Franklin and the defendant . . . ran into her apartment. Franklin said that he had just shot someone. The witness also said [the defendant] offered her weed to say that he and Franklin had not been in her apartment. [The defendant] then called his sister, Isis Hargrove, asking her to pick them up. Franklin and the defendant . . . were a short time later seen getting into Isis' car and leaving the area. Also, a witness told police

[4] In putting the defendant to plea, it is not clear from the record whether the clerk was reading from the state's long form information that was filed on June 29, 2012, or from a prior information that charged him with murder but omitted reference to the accessorial liability statute.

he saw Franklin shoot Mr. James and [the defendant] was with Franklin at the time.

"The crime scene investigation resulted in the location of six shell casings found in the immediate area where witnesses saw the shots being fired. A ballistics examination disclosed that five casings had been ejected from the same gun, while the sixth casing was ejected from a different gun. Such [evidence] is clearly consistent with there being two shooters. Another witness told police that he saw Franklin and [the defendant] together just before the shooting and saw Mr. Franklin fire shots, but he did not admit that he had seen [the defendant] fire any shots.

"On May 19, 2014, the defendant . . . was being interviewed by a member of the State's Attorney's Office in Waterbury in connection with another shooting. When asked about the previous shooting of John Claude James, the defendant . . . admitted that he was one of the shooters."

Thereafter, the court canvassed the defendant with respect to his pleas. During the canvass, the defendant stated that he was not under the influence of any alcohol, drugs or medication; he had had a sufficient opportunity prior to the plea canvass to discuss his pleas with counsel; he was satisfied with his counsel's advice; he was entering his "guilty plea" and his "probation plea" voluntarily; and nobody was forcing or threatening him to enter the pleas. The defendant stated that he understood the rights he was giving up by entering his pleas, including his right against compulsory self-incrimination, his right to a trial by jury, and his right to confront his accusers.

The following colloquy between the court and the defendant ensued:

"The Court: A person violates their probation when they are on probation and they violate the terms of it,

and you could have gotten up to three years on that. Do you understand that?

"[The Defendant]: Yes.

"The Court: Do you agree you violated your probation?

"[The Defendant]: Yes.

"The Court: And on that, I'm going to terminate [probation] at the time of sentencing. On the crime of murder, the state would have to prove that with the intent to cause the death of another person, you caused the death of such person or of a third person, and that is punishable by up to sixty years in prison, twenty-five years at the minimum or nonsuspendable portion. Do you understand that?

"[The Defendant]: Yes."

The court proceeded to ask the defendant if he understood the nature of an *Alford* plea and if he understood the sentence to which he was exposed as well as the agreement in place with the state for a sentence of thirty-two and one-half years imprisonment, with a twenty-five year minimum sentence. The defendant stated that he understood these matters and that no additional promises had been made to him with respect to the pleas. The court stated: "Once I accept these pleas, you can't change your mind later on unless there's some valid legal reason. Do you understand that?" The defendant replied affirmatively. At the conclusion of the canvass, the defendant stated that he had understood the questions directed to him by the court and that there was nothing that he wished to raise to the court or his attorney prior to the court's acceptance of the pleas.

The court accepted the defendant's pleas, finding that they were "understandably made with the assistance of

competent counsel." The court found that the defendant was "guilty" and that he had violated his probation. The court then continued the matter to a later date.

By handwritten letter dated October 27, 2014, and addressed to the court, the defendant stated that he wanted to withdraw his plea and that he desired a new attorney. In relevant part, the letter, signed by the defendant, stated: "I request to withdraw my guilty plea. I have a legitimate claim. I am not guilty of murder. I am claiming ineffective counsel. I was not explained all elements of the crime of murder. There was no testimony at Cody Franklin's trial that I assisted, aided, or conspiracy. There was no intent on my part. The mere fact that I did not assist and help Cody Franklin from the testimony of the state witnesses is enough to have the charges against me dismissed.

"Had my attorney investigated and told me all the facts I wouldn't have pled guilty to a charge that I didn't commit. I felt pressured to take the plea because I was told I had 'no chance' of winning [at] trial. Individuals trying to say I confessed to things I did not. I didn't sign anything or state anything on the record. (About this so-called confession.)

"I need a new attorney and I need for him to request a 'Motion to vacate' and a 'evidentiary hearing.' My counsel also failed to file a 'motion to dismiss' the murder charges after . . . Franklin' trial. Please look into this matter."

Additionally, the defendant wrote: "My attorney never told me the difference between accessory after the fact and obstruction of justice, and aiding and abetting. I never and did not encourage, and or facilitate or participate in the crime by the testimony of the state witness. I had 'NO' knowledge that anyone was going to kill anyone. I request a new attorney and to withdraw

my plea. Also a evidence hearing on this matter. Ineffective counsel and evidence hearing. Please withdraw my plea. I couldn't make an intelligent decision. Please look into this matter."

On December 4, 2014, through counsel, the defendant filed a motion to withdraw his guilty plea pursuant to Practice Book §§ 39-26 and 39-27. In relevant part, the motion stated: "In subsequent written and oral communications between the defendant and undersigned counsel, the defendant has indicated he did not possess knowledge or fully understand the sentence that could be imposed or the consequences thereto at the time he entered the guilty plea." The state filed a written opposition to the defendant's motion. Therein, the state asserted that the transcript of the plea canvass of September 19, 2014, reflected that, in compliance with Practice Book § 39-19, the court addressed the defendant with regard to the mandatory minimum sentence and maximum possible sentence on the charge. The state directed the court's attention to the portion of the transcript in which the court indicated, and the defendant verbally acknowledged, that the total sentence exposure on the charges of murder and violation of probation was sixty-three years' incarceration, with twenty-five years being nonsuspendable. Moreover, the state argued, the transcript reflected that the defendant understood that, pursuant to the plea agreement, he would serve a minimum term of incarceration of twenty-five years and a maximum term of incarceration of thirty-two and one-half years. The state argued that the plea transcript reflected that the defendant understood the sentence to be imposed, that the defendant's motion should be denied, and that an evidentiary hearing on the motion was not necessary.

By a second handwritten letter, dated December 8, 2014, and addressed to the court, the defendant renewed his request to withdraw his plea and for new

counsel. The letter, signed by the defendant, stated in relevant part: "[T]here are a few things I would like to bring to your attention. First and foremost, I was in (special aid) in school and didn't have enough time to be fully explained anything about my charges. I just came and it was on the table. (Accept or reject.) My lawyer never explained the full conditions to . . . such charge I was suppose[d] to plea to in which any evidence points to me as an accessory to. I never had a legal visit or anything. I would really like to take this plea back. My lawyer talked me into something I didn't want to do. I was confused. When I came to court I've told him this personally and that I would like a new lawyer. ([In]effective counsel.) He didn't put any motions in to try to get any hearings when I asked for some. When I was explained about my charge after the fact I told him to withdraw my plea. He wants to wait until the last minute going against my wishes. This is my life on the line and I would like to withdraw and go to trial. Because I'm not responsible for this charge that's against me. Please. I would really appreciate it a lot. Also requesting a new lawyer. I told my old lawyer, Thomas Farver, [that] I wanted to request a new one and I don't think he put it in and went around what I said. I have [a] court [appearance on December] 19, 2014 that is suppose[d] to be a sentencing date. I really hope you grant the motion for my plea to be withdrawn."

The defendant, represented by counsel, appeared in court on December 19, 2014, for sentencing. At the beginning of the hearing, the court stated: "I know the defendant had sent some letters to me which seemed to indicate that, possibly, he was interested in withdrawing his plea."[5] The court did not inquire into the defendant's

[5] We observe that the court referred to its receipt of the defendant's letters, which appear in the court file. The record does not reflect that the letters were returned to the defendant or that the court in any manner indicated that it had refused to consider them.

claim that he had not been apprised of the nature of the charge to which he had pleaded guilty. The court, however, referred to the motion to withdraw that was filed on the defendant's behalf by his attorney. The following colloquy then occurred:

"The Court: So, I guess I should . . . ask [the defendant] . . . is he still pursuing a motion to withdraw this plea? . . .

"[The Defendant]: Mm-hm. Yes.

"The Court: All right. And the basis I just read that your lawyer put in [the motion to withdraw the plea], is that . . . you did not possess knowledge or fully understand the sentence or the consequences thereto?

"[The Defendant]: Yes.

"The Court: All right. Do you want . . . to explain it any more than that? Why is it you . . . want to withdraw your plea?

"[The Defendant]: Why do I want to—because I feel like everything wasn't explained. It was like, as soon as I got to court, boom, it's just like . . . take this right now. You go to trial, you losing. It was like I was forced to take it. I felt like I was forced to take the plea.

"The Court: And who forced you to take the plea; the system, you mean, or the court or—

"[The Defendant]: No, my lawyer.

"The Court: Your lawyer, how did he force you?

"[The Defendant]: It's like, he told me right there, if I don't take it . . . I'm gonna lose; that's what he said.

"The Court: But . . . you know, this case was pretried on numerous occasions. As a matter of fact, I know even back in June of 2014 there actually was a different offer, a higher offer of thirty-five years, and

then I think that was retried on August 7th, according to [my] notes, and then on September 19th there was a change in it down to thirty-two and a half years, and you came upstairs that day and I asked you numerous questions, and what you're saying here now is not something you said then.

"[The Defendant]: I wasn't aware of no thirty-five years.

"The Court: No. Well, the day you entered the plea [agreement] was thirty-two and a half.

"[The Defendant]: Yeah.

"The Court: All right. I mean, there were previous offers. You never knew an offer before that that was higher than thirty-two and a half?

"[The Defendant]: No.

"The Court: All right. Well, you certainly knew the thirty-two and a half year sentence because you entered the plea to it that day, on September 19th, correct?

"[The Defendant]: Yes.

"The Court: All right. I mean, it is a matter of, just, you're changing your mind now, kind of, like, buyer's remorse, or did you think about it longer and think you just, you know, maybe you didn't make the right decision; is that what it is?

"[The Defendant]: Yes."[6]

[6] Viewing the court's colloquy with the defendant in its entirety, we do not interpret this answer to the court's leading compound question as an admission on the part of the defendant that he merely had changed his mind. Before answering the court's question, the defendant had advised the court that he did not find that "everything" had been sufficiently explained to him, which would provide a basis for his stating, immediately thereafter, that he did not believe that he had made the correct decision with respect to entering the plea.

The court then referred to the transcript from the plea canvass on September 19, 2014. The court asked the defendant if he remembered the court having asked him a series of questions at that earlier proceeding. The defendant replied, "Yeah. Yeah, somewhat." The court asked the defendant if he recalled answering that he was not under the influence of alcohol, drugs, or medication and that he had had a sufficient opportunity to discuss the plea with his attorney. The defendant replied, "No." The court asked the defendant if he recalled answering that he was satisfied with his attorney's advice concerning the pleas, that he was entering the pleas voluntarily, and that nobody was forcing or threatening him to enter the pleas. The defendant replied, "Yeah, some of it." Additionally, the court asked the defendant if he recalled answering that no additional promises had been made to him, and that he understood that he would not be permitted to change his mind and withdraw his pleas absent a valid legal reason to do so. The defendant replied, "Yes."

The following colloquy then ensued:

"The Court: In other words, so the transcript seems to bear out that a lot of questions I asked you was, did you need more time with your lawyer, are you satisfied with your lawyer's advice, is anybody forcing you to do this. And the transcript reflects, and so does my recollection, that you . . . answered everything appropriately at that time. And as you've just answered me today, it sounds like you just thought . . . longer over it since that day and you really just want to change your mind. Is that right?

"[The Defendant]: Yes."

When asked if he wished to be heard, the defendant's attorney stated: "I don't have anything to add other than the representations in the motion as reasons that my client gave me that he wish[ed] to withdraw the plea.

And I don't see, in the transcript [of the plea canvass], any technical reasons that would be supported by the Practice Book." When afforded an opportunity to address the court with respect to the motion to withdraw the plea, the prosecutor added, in addition to his written objection, that the defendant had prior experience in the criminal justice system.

The court stated: "The problem I'm having . . . and I know it was a big decision, and I know we're talking, obviously, about a . . . very long prison sentence, I certainly understand that, but, you know, there is no right to have a plea withdrawn after the plea has been entered and [the defendant has been] canvassed by the court. And the burden of proof is certainly on you to show a plausible reason for the withdrawal of that. And the problem is that . . . a lot of the statements that are in the written motion are very conclusory type of statements. There aren't a lot of facts or meat to it, so to speak.

"And it certainly sounds like . . . from what you've indicated . . . it's more of the change of heart after thinking about it longer while waiting to be sentenced, by your own admission here today. Because the transcript [of the plea canvass] clearly bears [that] out and, certainly, so does my recollection, that you certainly appeared to understand what was going on. You indicated no force was being used or no threats to you, that your . . . plea was voluntary.

"So, certainly, based on what you said here today, based on the transcript of the plea proceedings, I don't think there's . . . a valid reason to withdraw your plea at this time or even to give you . . . any type of an evidentiary hearing. So, I'm going to deny the request."

After the court asked counsel whether there were any issues regarding the presentence investigation report, the defendant's attorney stated in relevant part:

"My client has read the entire [presentence investigation] report this morning. . . . [H]e had one concern and that is that . . . and I think that we've addressed [it] . . . because as the offense charge it does say . . . murder and it was aiding and abetting—under the aiding and abetting provision. And so I think that should be noted for the record." The following exchange between the court and defense counsel followed:

"The Court: Well . . . are you looking for a formal correction to the presentence report or, just, you're making a—

"[The Defendant's Attorney]: I think if the judge would just put—I mean, that's your understanding as well?

"The Court: That is my—oh, definitely. I agree with you.

"[The Defendant's Attorney]: Yes. I don't think we need a formal correction to it.

"The Court: Okay.

"[The Defendant's Attorney]: But it was aiding and abetting.

"The Court: All right. So noted."

Thereafter, the victim's mother addressed the court and the defendant exercised his right of allocution. He stated that, although he did "not take [the victim's] life or plan to do so," he nonetheless had "blood on [his] hands" and apologized to the victim's family. The court vacated the defendant's probation and imposed a sentence of thirty-two and one-half years of imprisonment, twenty-five years of which is nonsuspendable. This appeal followed. Additional facts will be set forth as necessary.

I

First, we address the defendant's claim that the court abused its discretion by denying the defendant's motion to withdraw his plea prior to sentencing and, in the alternative, abused its discretion by failing to conduct an evidentiary hearing on the motion. We agree with the defendant that, under the unique circumstances in the present case, the court abused its discretion by failing to conduct an evidentiary hearing on the motion to withdraw the plea.

We observe that, "[u]nder [the *Alford* doctrine], a criminal defendant is not required to admit his guilt, but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. . . . The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 204–205, 842 A.2d 567 (2004). " 'A guilty plea under the *Alford* doctrine is . . . the functional equivalent [to an unconditional] plea of nolo contendere' . . . *State* v. *Palmer*, 196 Conn. 157, 169 n.3, 491 A.2d 1075 (1985); which itself 'has the same legal effect as a plea of guilty on all further proceedings within the indictment. . . . The only practical difference is that the plea of nolo contendere may not be used against the defendant as an admission in a subsequent criminal or civil case.' . . . *Groton* v. *United Steelworkers of*

America, 254 Conn. 35, 49, 757 A.2d 501 (2000)." *State* v. *Faraday*, supra, 205 n.17.

"The United States Supreme Court has held that for the acceptance of a guilty plea to comport with due process, the plea must be voluntarily and knowingly entered. *Boykin* v. *Alabama*, 395 U.S. 238, 243–44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). *Boykin* set forth three federal constitutional rights of which a defendant must be cognizant prior to entering a guilty plea: (1) the privilege against compulsory self-incrimination; (2) the right to trial by jury; and (3) the right to confront one's own accusers. Id., 243. Since a guilty plea constitutes a waiver of these constitutional rights, a reviewing court cannot presume from a silent record that a defendant knowingly waived these three rights. *State* v. *Badgett*, 200 Conn. 412, 419–20, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986)." *State* v. *Carter*, 243 Conn. 392, 397, 703 A.2d 763 (1997).

"To be valid, guilty pleas must be made knowingly and voluntarily. . . . [T]he trial court judge bears an affirmative, nondelegable duty to clarify the terms of a plea agreement. [U]nless a plea of guilty is made knowingly and voluntarily, it has been obtained in violation of due process and is therefore voidable. . . . When a defendant pleads guilty, he waives important fundamental constitutional rights, including the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers. . . . These considerations demand the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences. . . .

"We, therefore, require the trial court affirmatively to clarify on the record that the defendant's guilty plea was made intelligently and voluntarily. . . . In order

to make a knowing and voluntary choice, the defendant must possess an understanding of the law in relation to the facts, including all relevant information concerning the sentence. . . . The defendant must also be aware of the actual value of any commitments made to him by the court . . . because a realistic assessment of such promises is essential in making an intelligent decision to plead guilty. . . . A determination as to whether a plea has been knowingly and voluntarily entered entails an examination of all of the relevant circumstances. . . . [W]e conduct a plenary review of the circumstances surrounding [a] plea to determine if it was knowing and voluntary." (Citation omitted; internal quotation marks omitted.) *Almedina* v. *Commissioner of Correction*, 109 Conn. App. 1, 5–6, 950 A.2d 553, cert. denied, 289 Conn. 925, 958 A.2d 150 (2008).

Practice Book §§ 39-19 and 39-20, which encompass the constitutional essentials for the acceptance of a plea of guilty; see *State* v. *Reid*, 277 Conn. 764, 780, 894 A.2d 963 (2006); apply to the acceptance of *Alford* pleas. See, e.g., *State* v. *Carmelo T.*, 110 Conn. App. 543, 553, 955 A.2d 687, cert. denied, 289 Conn. 950, 960 A.2d 1037 (2008); *State* v. *Drakeford*, 54 Conn. App. 240, 249, 736 A.2d 912 (1999). Practice Book § 39-19[7] provides in relevant part: "The judicial authority shall not accept the

[7] Practice Book § 39-19 provides: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands:

"(1) The nature of the charge to which the plea is offered;

"(2) The mandatory minimum sentence, if any;

"(3) The fact that the statute for the particular offense does not permit the sentence to be suspended;

"(4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and

"(5) The fact that he or she has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he or she has the right to be tried by a jury or a judge and that at that trial the defendant has the right to the assistance of counsel, the right to confront and cross-examine

plea without first addressing the defendant personally and determining that he or she fully understands: (1) The nature of the charge to which the plea is offered . . . .'' Practice Book § 39-20 provides: ''The judicial authority shall not accept a plea of guilty or nolo contendere without first determining, by addressing the defendant personally in open court, that the plea is voluntary and is not the result of force or threats or of promises apart from a plea agreement. The judicial authority shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecuting authority and the defendant or his or her counsel.'' ''While the federal constitution requires that the record of the plea canvass indicate the voluntariness of any waiver of the three core constitutional rights delineated in *Boykin*, it does not require that the trial court go beyond these constitutional minima. . . . A defendant can voluntarily and understandingly waive these rights without literal compliance with the prophylactic safeguards of Practice Book [§§ 39-19 and 39-20]. Therefore . . . precise compliance with the provisions [of the Practice Book] is not constitutionally required.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Ducharme*, 134 Conn. App. 595, 605–606, 39 A.3d 1183, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012).

With respect to a defendant's right to withdraw his or her guilty plea, we observe that ''[t]he burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]. . . . Whether such proof is made is a question for the court in its sound discretion, and a denial of permission to withdraw is

witnesses against him or her, and the right not to be compelled to incriminate himself or herself.''

reversible only if that discretion has been abused. . . . In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *State* v. *Anthony D.*, 320 Conn. 842, 850, 134 A.3d 219 (2016). Practice Book § 39-26 provides: "A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon proof of one of the grounds in [Practice Book §] 39-27.[8] A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed." (Footnote added.)

"[T]here is no language in Practice Book §§ 39-26 and 39-27 imposing an affirmative duty upon the court to conduct an inquiry into the basis of a defendant's motion to withdraw his guilty plea." *State* v. *Anthony*

[8] Practice Book § 39-27 provides: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows:

"(1) The plea was accepted without substantial compliance with [Practice Book §] 39-19;

"(2) The plea was involuntary, or it was entered without knowledge of the nature of the charge or without knowledge that the sentence actually imposed could be imposed;

"(3) The sentence exceeds that specified in a plea agreement which had been previously accepted, or in a plea agreement on which the judicial authority had deferred its decision to accept or reject the agreement at the time the plea of guilty was entered;

"(4) The plea resulted from the denial of effective assistance of counsel;

"(5) There was no factual basis for the plea; or

"(6) The plea either was not entered by a person authorized to act for a corporate defendant or was not subsequently ratified by a corporate defendant."

D., supra, 320 Conn. 851. Faced with a request for an evidentiary hearing related to a motion to withdraw a guilty plea, the court must exercise its discretion by carefully evaluating the request in light of the allegations made in the motion or otherwise brought to the court's attention. "In considering whether to hold an evidentiary hearing on a motion to withdraw a guilty plea the court may disregard any allegations of fact, whether contained in the motion or made in an offer of proof, which are either conclusory, vague or oblique. For the purpose of determining whether to hold an evidentiary hearing, the court should ordinarily assume any specific allegations of fact to be true. If such allegations furnish a basis for withdrawal of the plea under [Practice Book § 39-27] and are not conclusively refuted by the record of the plea proceedings and other information contained in the court file, then *an evidentiary hearing is required*. . . .

"An evidentiary hearing is not required if the record of the plea proceeding and other information in the court file conclusively establishes that the motion is without merit. . . . The burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Salas*, 92 Conn. App. 541, 544–45, 885 A.2d 1258 (2005); see also *State* v. *Johnson*, 253 Conn. 1, 50–51, 751 A.2d 298 (2000); *State* v. *Warner*, 165 Conn. App. 185, 192, 138 A.3d 463 (2016).

Before reaching the merits of the defendant's claim that the court erred by failing to conduct an evidentiary hearing related to his motion to withdraw the plea, we observe that the claim is reviewable on appeal. The claim is adequately briefed before this court and,

although it is not necessary to a determination that the claim is reviewable on appeal; see *State* v. *Safford*, 22 Conn. App. 531, 534, 578 A.2d 152, cert. denied, 216 Conn. 823, 581 A.2d 1057 (1990); the record reflects that the defendant requested an evidentiary hearing related to his motion. Specifically, in the first of his handwritten letters that were mailed to and, apparently, considered by the court, the defendant specifically requested an "evidentiary hearing," and in the second letter he referred to the fact that, in connection with his desire "to take this plea back," his counsel had performed deficiently because, in part, he failed "to try to get any hearings . . . ."

Turning to the merits of the claim, we begin by looking to the factual allegations made by the defendant in his letters to the court. Both letters convey the defendant's confusion with respect to the nature of the charge to which he had pleaded guilty under the *Alford* doctrine. In relevant part, the defendant stated in his first letter that all of the elements of "the crime of murder" had not been explained to him, and he expressed his belief that there was no evidence that he had the necessary intent, or that he had assisted, aided, or had been part of a conspiracy. The defendant stated: "My attorney never told me the difference between accessory after the fact and obstruction of justice, and aiding and abetting. I never and did not encourage, aid or facilitate or participate in the [crime] . . . ." In his second letter, the defendant stated in relevant part: "My lawyer never explained the full conditions to the such charge I was suppose[d] to plea to in which any evidence p[o]ints to me as an accessory to." These specific representations concerning the defendant's understanding of the nature of the charge, while not perfect models of clarity, are not conclusory, vague, or oblique. Thus, for purposes of the present claim, we presume their truthfulness. Additionally, these representations furnish a basis to

withdraw the plea under Practice Book § 39-27. Under § 39-27 (2), a court may allow a defendant to withdraw his or her plea of guilty after its acceptance if "it was entered without knowledge of the nature of the charge . . . ."

We next turn to an examination of whether the defendant's representations are conclusively refuted by the record of the plea proceedings and other information contained in the court file. The record reflects that the defendant was convicted of murder, as an accessory, in violation of §§ 53a-54a (a) and 53a-8, the crime charged in the state's long form information filed on June 29, 2012.[9] At the time of the plea canvass, however, the court clerk informed the defendant that he had been charged with murder in violation of § 53a-54a, and the defendant pleaded guilty under the *Alford* doctrine to that charge. During its canvass, the court did not refer to accessorial liability.[10] With respect to the nature of the charge, the court did not explain the charge in terms of accessorial liability, but stated as follows: "On the crime of murder, the state would have to prove that with the intent to cause the death of another person, you caused the death of such person or of a third person . . . ."

In addition to a lack of any reference to the elements of accessorial liability during the plea canvass, the prosecutor at the time of the plea canvass set forth a factual

[9] Again, we observe that a prior information in the court file, dated June 22, 2012, charged the defendant with murder, but not as an accessory.

[10] "Our courts have stopped short of adopting a per se rule that notice of the true nature of the charge always requires the court to give a description of every element of the offense charged. . . . The trial court's failure to explicate an element renders the plea invalid only where the omitted element is a critical one . . . and only where it is not appropriate to presume that defense counsel has explained the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." (Citations omitted; internal quotation marks omitted.) *State* v. *Hackett*, 16 Conn. App. 601, 603, 548 A.2d 16 (1988).

basis for the plea that differed from the factual basis set forth in the state's long form information.[11] In the information, the state alleged that the defendant, intending to cause the victim's death, shot and caused the victim's death. During his recitation of the facts at the time of the plea canvass, which occurred *after* the defendant entered his guilty plea, the prosecutor stated in relevant part that the victim had been shot five times. Then, the prosecutor focused on the defendant's activities following the shooting. The prosecutor stated that the defendant and Franklin, who admitted that he "just shot someone," hid in the apartment of a nearby witness. The defendant offered the witness "weed" in an effort to induce her to say that he and Franklin had not been there. Then, the defendant called his sister, who then arrived at the scene and drove the defendant and Franklin away. The prosecutor stated that a witness observed Franklin, who was with the defendant, shoot the victim. Yet another witness observed the defendant and Franklin just prior to the shooting and observed Franklin, but not the defendant, fire gunshots.

The prosecutor, however, also referred to the state's belief that there were two shooters, and referred to physical evidence, shell casings recovered from the crime scene and the results of ballistics testing, that supported such a theory of the crime. Finally, the prosecutor stated that, during an interview concerning an unrelated shooting, the defendant "admitted that he was one of the shooters." Although the prosecutor appears to have set forth a factual basis for the crime that supported both principal and accessory liability, unlike the facts set forth in the information, the factual

[11] Although we recognize that the court was not required to establish a factual basis for the plea; see *State* v. *Niblack*, 220 Conn. 270, 281, 596 A.2d 407 (1991); we know of no reason to disregard the factual basis provided in the present case in our examination of the events that transpired at the time of the plea canvass.

basis set forth by the prosecutor did not include any reference to the defendant's intent.

In an examination of the plea proceedings, we observe that the court did not ask the defendant if his attorney had explained the elements of murder as an accessory or if his attorney had discussed his guilt as an accessory. Instead, as relevant to the issue of whether the defendant had been apprised of the nature of the charge, the court asked the defendant if he "had enough time on previous dates and today's date to discuss what you're doing here today with your attorney," and whether the defendant was satisfied with his attorney's advice.

At the time of sentencing, when the court addressed the defendant's motion to withdraw his plea, the court referred to the letters that the defendant had addressed to the court. The court also acknowledged that it had reviewed a transcript from the plea canvass, a copy of which the state attached to its written opposition to the defendant's motion to withdraw his plea. The factual representations in the letters, viewed in light of the file and the plea canvass, neither of which conclusively refuted the defendant's representations, sufficiently raised an issue concerning the defendant's understanding of the nature of the charge. Moreover, the events that transpired at the sentencing proceeding did not refute the defendant's representations. At the sentencing proceeding, the court did not specifically address the defendant's concerns as set forth in his letters, with respect to his understanding of the nature of the charge. The court did not ask the defendant if he understood the elements of murder under a theory of accessorial liability and did not ask him or his attorney if those elements had been explained to the defendant before he entered his plea. The defendant's attorney, who bore the responsibility of having advised his client, did not

make any representations concerning the issue. If anything, the inquiry posed by the defendant's attorney to the court prior to the imposition of sentence, set forth previously in this opinion, reflects a degree of confusion on his part with regard to the offense to which the defendant had pleaded guilty.

In light of the foregoing, we conclude that the court abused its discretion in failing to conduct the evidentiary hearing requested by the defendant to determine whether the defendant understood the nature of the charge to which he pleaded guilty under the *Alford* doctrine.

The state raises several arguments contrary to the defendant's claim, none of which we find to be persuasive. First, the state essentially argues that it is of no consequence whether the defendant understood that he had been charged under a theory of accessorial liability. The state argues that "the substantive crime charged in this case was murder [and] the court sufficiently apprised the defendant of the nature of the charge by explaining that he was charged with murder, in violation of . . . § 53a-54a." Additionally, the state draws our attention to the well settled principle that "[a] defendant may be convicted as an accessory, even if charged only as a principal, as long as the evidence presented at trial was sufficient to establish accessorial conduct." (Internal quotation marks omitted.) *State* v. *Hines*, 89 Conn. App. 440, 453, 873 A.2d 1042, cert. denied, 275 Conn. 904, 882 A.2d 678 (2005).

We are hesitant to agree with the state's seemingly broad proposition that whether a defendant is being convicted as a principal or an accessory is not relevant to his understanding of the nature of the charge. This court has explained that "[a]lthough a defendant may plead guilty to a crime without distinguishing whether he was a principal or an accessory, once he has chosen

to plead guilty as an accessory and the court has accepted that choice by accepting that plea, he can be found guilty of only that crime and is entitled to a judgment, sentence and mittimus that reflects that crime. His decision to plead as an accessory has to be influenced by his belief that he will be found guilty as an accessory. . . . Due process requires that the defendant know the specific charge to which he is pleading. A jury may be polled as to the basis of its verdict to determine whether the defendant was convicted as a principal or an accessory. . . . If this is so, a defendant must be able to plead as an accessory or a principal." (Citations omitted.) *State* v. *Gamble*, 27 Conn. App. 1, 11–12, 604 A.2d 366, cert. denied, 222 Conn. 901, 606 A.2d 1329 (1992). Due process concerns require that a defendant intelligently enter into a plea; our Supreme Court has explained that "[d]ue process requires that a plea be entered voluntarily and intelligently. . . . Because every valid guilty plea must be demonstrably voluntary, knowing and intelligent, we require the record to disclose an act that represents a knowing choice among available alternative courses of action, *an understanding of the law in relation to the facts*, and sufficient awareness of the relevant circumstances and likely consequences of the plea. . . . A determination as to whether a plea has been knowingly and voluntarily entered entails an examination of all of the relevant circumstances." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Crenshaw*, 210 Conn. 304, 309, 554 A.2d 1074 (1989). It is difficult to comprehend how a defendant might be said to have understood the relationship between the law and the facts if he is unaware that his liability is accessorial in nature. A defendant's understanding of something as basic and central to the prosecution as the state's theory of liability must be viewed as integral to his assessment of his chances of prevailing at trial. Thus,

such theory is a very practical consideration in terms of deciding whether to accept a plea agreement.

Second, the state argues that, in the absence of a positive suggestion to the contrary, the court may have presumed in the present case that counsel explained the nature of the charge to the defendant. "Defense counsel generally is presumed to have informed the defendant of the charges against him. [E]ven without an express statement by the court of the elements of the crimes charged, it is appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. . . . [U]nless a record contains some positive suggestion that the defendant's attorney had *not* informed the defendant of the elements of the crimes to which he was pleading guilty, the normal presumption applies. . . . [W]e have never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Barnwell*, 102 Conn. App. 255, 259–60, 925 A.2d 1106 (2007).

We disagree with the state that the record supports a finding that the customary presumption applies in the present case. As stated previously in this opinion, the court did not inquire of the defendant with respect to accessorial liability; the court did not inquire whether his attorney had explained the nature of the charge, and neither the defendant nor his attorney made any representations with regard to this specific issue. At the plea canvass, the court clerk informed the defendant that he was charged with murder under § 53a-54a, and

the defendant entered a plea of guilty to that charge.[12] Moreover, at the sentencing proceeding, the defendant's attorney asked the court if it was the court's understanding that the defendant had entered his plea under a theory of accessorial liability or as a principal. Moreover, in his letters to the court, the defendant expressly stated that his counsel had acted ineffectively and that he did not understand the nature of the charge.

Third, the state argues that the factual basis for the plea, in which the prosecutor referred to the two shooter theory, as well as the state's operative long form information, which contained a reference to the accessorial liability statute, "clearly provided notice to the defendant that he was charged with committing the crime of murder based on accessorial liability." In light of the fact that the clerk did not refer to § 53a-8 when putting the defendant to plea, the fact that the factual basis set forth by the prosecutor reasonably might have been interpreted to encompass *both* principal and accessorial theories of liability,[13] and the lack of any reference to accessorial liability during the court's plea canvass, we are not persuaded by the state's argument.

Finally, the state argues that the claim should fail on the basis of what transpired when the court addressed the defendant just prior to sentencing with respect to his motion to withdraw the plea. The state points out

[12] Because in the present case, the court did not refer to the accessorial liability statute during its canvass and the court clerk did not inform the defendant that he was being charged under the accessory statute, the facts at issue in the present case are readily distinguishable from those at issue in *State* v. *Barnwell*, supra, 102 Conn. App. 260–62, a case on which the state heavily relies. We note, as well, that the claim at issue in the present case is distinct from the claims raised in *Barnwell*.

[13] General Statutes § 53a-8 (a) provides: "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

that, at that time, the defendant merely expressed his belief that "everything" had not been explained to him and that he felt like he had been pressured to enter the plea. The state argues that these assertions were belied by the transcript of the plea canvass. Also, the state points out that, when the court addressed the defendant with respect to his motion to withdraw the plea, the defendant agreed with the court's assessment that the defendant's motion to withdraw merely reflected the fact that the defendant wanted to change his mind with respect to his plea. The state argues, correctly, that the defendant's mere remorse with respect to the plea was not a valid basis upon which to grant the motion. See Practice Book § 39-27. Additionally, the state points to the fact that defense counsel's written motion raised an issue concerning the defendant's understanding of the sentence that could be imposed or the consequences of the plea and that, at the sentencing hearing, defense counsel stated that he did not wish to add anything to these representations and that he believed that the transcript of the plea canvass did not support the granting of the motion.

At the time that the court considered the defendant's motion to withdraw the plea, it had reviewed both the defendant's handwritten letters, in which the defendant unambiguously requested permission to withdraw his plea, as well as the written motion to withdraw that was filed on the defendant's behalf by his trial counsel. Although the court referred to the letters, it appears from our review of the proceeding that the court did not inquire about their substance, particularly the representations made therein concerning the defendant's confusion with respect to the nature of the charge. Instead, the inquiries directed at the defendant by the court appear to have been related to the limited ground set forth in the written motion to withdraw that related to whether the defendant possessed knowledge of the

sentence that could be imposed or the consequences of his plea. At the sentencing hearing, when the court afforded the defendant an opportunity to address the court with respect to his motion to withdraw, the defendant did not raise with specificity all of the grounds that he set forth in his letters.

We do not dismiss lightly the state's arguments concerning what transpired at the sentencing proceeding. Certainly, in distilling the issues before it related to the defendant's motion, the court was entitled to rely on arguments and representations made at the sentencing hearing. Yet, we are mindful that the defendant is not an attorney and, in evaluating his communications to the court, it is not reasonable to expect him to engage the court with either the skill or precision of an attorney. In his letters to the court, he raised questions about his understanding of the nature of the charge at the time of the plea, stated that his trial counsel was ineffective, and requested permission to withdraw his plea. The transcript of the plea canvass, in which the defendant was not put to plea consistent with the state's long form information and which did not address any issues related to accessorial liability, did not refute the defendant's representations in this regard. Also, among the statements that the defendant made at the sentencing proceeding, the defendant stated, in general terms, that "everything wasn't explained" to him by counsel at the time of the plea.

Under these circumstances, we are reluctant to conclude that the defendant abandoned the specific representation made in his letters that he was not advised with respect to the elements of the crime, specifically "aiding and abetting," and, thus, that he did not understand the nature of the charge. Nor are we persuaded that the court reasonably could have relied solely on the representations of defense counsel, whom the defendant claimed was ineffective, in determining the

basis of the defendant's motion, which, due to an apparent breakdown in the attorney-client relationship, the defendant presented to the court by means of his handwritten letters as well as the written motion filed by defense counsel.

For the foregoing reasons, we conclude that it was an abuse of the court's discretion not to grant the defendant's request for an evidentiary hearing. The proper remedy is to reverse the judgment and remand the case to the trial court for further proceedings, specifically, to conduct an evidentiary hearing on the defendant's motion for the purpose of determining whether the defendant's plea was knowing and voluntary and, thus, obtained in conformance with his due process rights.[14]

II

Next, we address the defendant's claim that the court violated his right to counsel by failing to address the grievances that he raised to the court concerning his attorney and, in the alternative, abused its discretion by failing to inquire with respect to such complaints. We agree with the defendant that the court abused its discretion by failing to inquire into his complaints in this regard.

As explained previously in this opinion, in the defendant's two handwritten letters, which the court acknowledged that it had received prior to the imposition of sentence, he asked the court for permission to withdraw his plea, explained in some detail why he believed that his counsel was ineffective, and requested the appointment of new counsel. Among the specific complaints concerning counsel's representation made

[14] In light of our resolution of this claim, we need not consider the defendant's third claim—whether the court accepted the plea in violation of the defendant's right to due process—or the other aspect of the defendant's first claim—whether the court abused its discretion in denying the defendant's motion to withdraw the plea.

by the defendant, he alleged that counsel had failed to explain the nature of the crime, failed to investigate the facts of the case, and pressured him into entering his plea. Additionally, the defendant suggested that counsel failed to bring to the court's attention his request for new counsel and had failed to bring to the court's attention his request for an evidentiary hearing related to his request to withdraw his plea. The record does not reflect that the defendant made any prior complaints with respect to his counsel's representation.

At the time that the court considered the defendant's motion to withdraw his plea, the court did not in any manner address the defendant's grievances that led to his request for the appointment of new counsel. The defendant argues that the court neither afforded him an opportunity to "voice his grievances [concerning his attorney] or to make a record of his complaints," and effectively ignored both his stated substantial grievances, which were not contradicted by the record, as well as his request for replacement counsel. The state argues that, even if we were to assume that the defendant's letters were sufficient to preserve the present claim, no further inquiry into the defendant's grievances was necessary in this case and that because the defendant did not furnish the court with a substantial reason for providing new counsel, the court properly denied, albeit implicitly, the defendant's request for substitute counsel.

"Where a defendant voices a seemingly substantial complaint about counsel, the court should inquire into the reasons for dissatisfaction. . . . If [t]he defendant's eruptions at trial, however, fell short of a seemingly substantial complaint, we have held that the trial court need not inquire into the reasons underlying the defendant's dissatisfaction with his attorney. . . . The extent of an inquiry into a complaint concerning defense counsel lies within the discretion of the trial court. . . .

Moreover, the defendant's right to be represented by counsel does not grant a defendant an unlimited opportunity to obtain alternate counsel on the eve of trial . . . and may not be used to achieve delay in the absence of exceptional circumstances. . . . The appellate scrutiny of the trial court's inquiry into complaints concerning adequacy of counsel must be tempered by the timing of such complaints." (Citations omitted; internal quotation marks omitted.) *State* v. *Robinson*, 227 Conn. 711, 725, 631 A.2d 288 (1993). "[A] trial court has a responsibility to inquire into and to evaluate carefully all substantial complaints concerning court-appointed counsel . . . . The extent of that inquiry, however, lies within the discretion of the trial court. . . . A trial court does not abuse its discretion by failing to make further inquiry where the [respondent] has already had an adequate opportunity to inform the trial court of his complaints." (Citation omitted; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 644, 935 A.2d 975 (2007).

As a first step in our analysis of whether the court conducted a sufficient inquiry, we conclude that the defendant's letters sufficiently alerted the court to a seemingly substantial complaint concerning a breakdown in the relationship between the defendant and his counsel. In his letters, the defendant stated, in general terms, that his counsel was ineffective and that he wanted a new attorney. He also stated, in more specific terms, that he felt like he had been pressured at the time of the plea and that he was not satisfied with his attorney's advice concerning the plea and, in particular, advice concerning the elements of the crime and whether the evidence supported a finding that he was an accessory to any crime. The defendant also stated that following the plea proceeding and against his wishes, counsel did not request an evidentiary hearing with respect to his motion to withdraw his plea or

file a motion for the appointment of new counsel. The defendant did not state anything at the sentencing proceeding that contradicted these representations concerning the attorney-client relationship or might reasonably be viewed as an abandonment of his request for the appointment of new counsel. Consistent with his letters, he stated at the hearing that he believed that "everything wasn't explained" and that he had been pressured into entering his plea.

Next we turn to an examination of what inquiry, if any, the court undertook. In the context of ruling on the defendant's motion to withdraw his plea, the court did not set forth any findings of fact related to the performance of trial counsel. The court did not specifically address, let alone deny, the defendant's motion for new counsel. The court did not invite the defendant or his counsel to address the matter. The state urges us to find that the court "implicitly" made findings contrary to the defendant's complaints, yet there is no basis on which to infer that the court considered and rejected the defendant's complaints, which were raised for the first time in his letters. Moreover, we do not agree with the state that, in light of what transpired at the plea canvass, the court reasonably rejected the defendant's grievances on their face. Although the record of the plea canvass reflects that, at that time, the defendant believed that he had been afforded an ample opportunity to discuss his plea with his attorney and that he was satisfied with that advice, the record is silent with respect to whether counsel adequately explained to the defendant the accessorial nature of the offense to which the defendant pleaded guilty.[15] In light of all of the

[15] The state argues that the transcript of the plea canvass "completely belied the defendant's assertion that his counsel failed to provide satisfactory advice or that he pressured him to plead guilty." Although the plea canvass reflects that the defendant had an opportunity to discuss his plea with his attorney, he was satisfied with his advice, and that he was not pressured into pleading guilty, the plea canvass does not reflect that the defendant's attorney adequately advised him with respect to the nature of the charge,

circumstances, it appears that the court failed to conduct *any* type of inquiry into the defendant's grievances or his request for the appointment of a new attorney. In light of the defendant's seemingly substantive complaints, which were raised for the first time in his letters, the court abused its discretion by not inquiring further. The proper remedy, therefore, is for the court, on remand, to conduct an adequate inquiry into the defendant's complaints and his request for new counsel, and to rule on the request.[16]

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOE BALTAS (AC 37921)

Lavine, Mullins and Bishop, Js.

Syllabus

The defendant, who was convicted of assault in the second degree and possession of a dangerous instrument in a correctional institution, appealed to this court. The defendant, who was an inmate in a correctional institution, claimed that the trial court improperly denied his motion to suppress a certain incriminating statement that he made to a correction officer after an altercation in which he stabbed another inmate with a shank. The defendant was taken to a restrictive housing unit after the altercation and placed in a cell separate from other inmates. When a correction officer asked him if he owned a shank, the defendant admitted that he did. On appeal, the defendant claimed that his statement

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murder as an accessory, or that the defendant was satisfied with his counsel's representation subsequent to the plea canvass, in connection with the defendant's motion to withdraw his plea. His request for new counsel, therefore, was not necessarily belied by what transpired at the plea canvass.

[16] We clarify that our holding is limited to the court's obligation to conduct an inquiry into the defendant's grievances. We do not take any position with respect to the proper outcome of that inquiry. Moreover, in light of our resolution of this claim, we need not reach the merits of the defendant's claim that the court violated his right to counsel by failing to address his grievances.

in which he admitted that he owned a shank should have been suppressed because he was subjected to a custodial interrogation while he was detained in the cell in the restrictive housing unit without having first been advised of his constitutional rights pursuant to *Miranda* v. *Arizona* (384 U.S. 436). The defendant further claimed that the admission of his statement into evidence was not harmless error because it was essential to proving the charges against him. *Held* that the admission into evidence of the defendant's statement that he owned a shank was harmless beyond a reasonable doubt, the evidence apart from the statement having been sufficient to support his conviction beyond a reasonable doubt: a correction officer who witnessed the altercation testified that he saw the defendant pull a shank from his waistband and stab the victim with it, that the shank fell out of the defendant's hands when he and the victim were fighting, and that the defendant and the victim were the only inmates in the area where the shank was found; moreover, another correction officer testified that when he took the defendant's statement in the restrictive housing unit, the defendant was covered with Mace residue, which was normally sprayed on inmates involved in physical altercations, and another correction officer testified that he observed the victim's injuries five to ten minutes after the stabbing; furthermore, the shank, medical reports about and photographs of the victim's injuries, and a videotape that depicted the entire altercation were admitted into evidence, and there was no evidence that the victim or a third party ever possessed the shank.

Argued September 13—officially released November 1, 2016

Procedural History

Substitute information charging the defendant with the crimes of possession of a dangerous instrument in a correctional institution and assault in the second degree, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before *Klatt*, *J.*; thereafter, the court denied the defendant's motion to suppress certain evidence; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Cameron R. Dorman, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, former

state's attorney, and *Robert F. Mullins, Sr.*, assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Joe Baltas, appeals from the judgment of conviction, rendered after a jury trial, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (2) and one count of possession of a dangerous instrument in a correctional institution in violation of General Statutes § 53a-174a. The defendant claims that the trial court abused its discretion in denying his motion to suppress an incriminating statement he made to a correction officer because he allegedly was subjected to a custodial interrogation without the benefit of having been advised of his constitutional rights pursuant to *Miranda*.[1] We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant was an inmate at the Cheshire Correctional Institution in the north block five housing unit (unit). The cells in the unit surround a recreation day room. A set of stairs in the recreation room leads up to a second tier of cells. Tables line the opposite ends of the room, leaving an open center aisle in the middle. Surveillance cameras in the unit can zoom in if there is a disturbance in the room.

On January 7, 2014, Correction Officer Richie Johnson was on duty in the recreational room, where he was assigned to sit at the desk in "the bubble," an observational area from which a guard controls the operation of cell and shower doors. The bubble is some forty feet from the bottom of the stairwell. At approximately 11:07 a.m., Joseph Murphy, an inmate, began to berate the defendant. Johnson and his partner told the

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

defendant and Murphy to stop arguing, and Murphy stopped yelling at the defendant. At approximately 11:18 a.m., Murphy was talking to another inmate at the bottom of the stairwell when the defendant approached him. The defendant and Murphy "exchanged words," and the defendant grabbed a shank, a sharp piece of metal, from his waistband. He stabbed Murphy with the shank three times. The two then engaged in a physical altercation and rolled across the floor to the opposite end of the room. The defendant dropped the shank in the middle of the recreation room.

As soon as Johnson saw the defendant pull the shank from his waistband, Johnson announced a code blue, which is a warning to the other staff members that there is an inmate-on-inmate altercation. Johnson stated that a weapon had been used. As Johnson waited for additional correction personnel to arrive, he remained at the bubble and directed the other inmates to secure themselves in their cells. Most of the inmates complied, but a few remained in the recreation room. Only one other inmate other than the defendant and Murphy approached the center aisle where Johnson saw the shank.

Approximately seven seconds after the defendant stabbed Murphy, correction officers arrived and restrained Murphy on the left side of the room and the defendant on the right side of the room. After the defendant and Murphy were separated, Johnson indicated with a beam of light from a flashlight where the shank was located on the floor. Correction Officer Brian Avery picked up the shank and put it in a bag.

Lieutenant Felipe Lugo responded to the scene as soon as Johnson announced the code blue. When he arrived, Murphy and the defendant were restrained at opposite sides of the room. Lugo observed Mace on the defendant, which is normally sprayed on an inmate if

he is involved in a physical altercation. Soon thereafter, Murphy was taken to the restrictive housing unit, where Lugo observed wounds on him five to ten minutes after the altercation occurred. A nurse treated Murphy for the wounds with a tetanus shot.

Lugo and other staff members escorted the defendant to the restrictive housing unit where he was decontaminated to remove the Mace. While he was in hand restraints, the defendant was strip-searched, evaluated by medical personnel, and put in a cell separate from the other inmates. Once the defendant was put in a cell, Lugo gave him the opportunity to make a written statement about the incident. The defendant declined to give a written statement or to press charges against Murphy. Lugo then asked the defendant whether he owned the shank, and the defendant admitted that he did.

The defendant was arrested and charged with one count of assault in the second degree and one count of possession of a dangerous instrument in a correctional institution. On August 25, 2014, the defendant filed a motion to suppress the incriminating statement he made to Lugo, claiming that he was subjected to a custodial interrogation without being read his *Miranda* rights. The trial court denied the motion. On October 24, 2014, the jury found the defendant guilty on both counts. This appeal followed. Additional facts will be set forth as needed.

The defendant claims that the trial court abused its discretion in denying his motion to suppress evidence. Specifically, the defendant argues that the trial court should have suppressed the incriminating statement he made to Lugo because Lugo subjected the defendant to a custodial interrogation "while [he was] detained in a cell within the restrictive housing unit," and therefore, he was entitled to be informed of his constitutional

right against self-incrimination. The defendant argues that the admission of the statement was not harmless error because the statement was essential to proving the charges against him. The state argues that there is "nothing in the record to support a conclusion that the defendant's removal from [the unit] and placement in another restrictive housing unit" subjected him to a custodial interrogation. Because we conclude that the admission of this evidence was harmless beyond a reasonable doubt, we do not reach the question of whether the defendant was subjected to a custodial interrogation.

We set forth the applicable standard of review. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here 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 set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Clark*, 255 Conn. 268, 279, 764 A.2d 1251 (2001).

"If statements taken in violation of *Miranda* are admitted into evidence during a trial, their admission must be reviewed in light of the harmless error doctrine. . . . 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. . . . When an [evidentiary] impropriety is of constitutional proportions, the state

bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . [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]." (Citations omitted; internal quotation marks omitted.) *State* v. *Mitchell*, 296 Conn. 449, 459–60, 996 A.2d 251 (2010).

Assuming, arguendo, that the defendant was subjected to a custodial interrogation, and thus, should have been advised of his rights under *Miranda*, we conclude, on the basis of our review of the entire record, that admission of the defendant's statement into evidence was harmless beyond a reasonable doubt.

The state presented sufficient evidence of the defendant's guilt beyond a reasonable doubt apart from the defendant's statement. Johnson, an eyewitness to the events, testified that he observed the defendant approach Murphy, pull a shank from his waistband, and stab Murphy with the shank three times. Johnson also observed the shank fall out of the defendant's hands when the defendant and Murphy were fistfighting.[2] The shank was found in the center aisle of the room, and the only inmates whom Johnson observed in the middle of the room during the incident were the defendant and Murphy. In short, there was no evidence whatsoever

[2] During direct examination, Johnson testified, in part, as follows: "[The defendant] reached in his waistband and grabbed a sharp object, a shank, a sharpened piece of metal. He—he—he struck inmate Murphy in the elbow a few times. A few times he struck. . . . [A]fter the stabbing, the weapon, the shank, fell out of the hands of [the defendant]. It fell on the floor, and I used the flashlight to light it up so whenever responding staff came, they can actually see it . . . ."

that the victim, or a third party, ever possessed the shank.[3]

Lugo testified that when he arrived in the recreation room, the defendant was restrained by multiple officers and was covered with Mace residue, indicating that the defendant was involved in an altercation. Lugo also testified that he observed Murphy's injuries when he saw him in the restrictive housing unit five to ten minutes after the stabbing occurred.

Through the testimony of Michael Desena, a nurse supervisor at the correctional facility, the state introduced into evidence the medical incident reports as to both the defendant and Murphy. Murphy's medical incident report indicated that he suffered from bleeding cuts on his skin that were treated with a tetanus shot. The defendant's medical incident report indicated that he did not sustain any injuries.

The state introduced into evidence a number of pieces of physical evidence that were indicative of the defendant's guilt, including the shank Johnson saw the defendant use to stab Murphy. The state also introduced into evidence photographs of Murphy's injuries. The photographs were taken within twenty to thirty minutes of the altercation, and the injuries displayed were consistent with the injuries Lugo observed.

Finally, the state introduced into evidence a videotape that depicted the entire incident between the defendant and Murphy. The videotape showed the defendant striking Murphy before the two engaged in the fistfight. Moreover, Johnson testified that the images on the videotape were consistent with what he observed, and Lugo identified the perpetrator in the

[3] Although the videotape of the altercation showed that a third inmate approached the area where the shank was found, the video did not indicate that he bent down to drop the shank or do anything else to suggest that he possessed the shank at any time.

video as the defendant. The videotape also showed Avery recover an object from the middle of the floor. Considering all of the evidence, the only reasonable explanation for what occurred is the one proffered by the state. Accordingly, even if we were to assume that the trial court's failure to grant the defendant's motion to suppress was an error, in light of the evidence before the jury, any such error would be harmless beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE BACIANY R.*
(AC 39142)

Lavine, Beach and West, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights as to his minor son. He claimed, inter alia, that several of the court's factual findings were clearly erroneous in that the court relied on speculation, rather than on evidence in the record, when it found by clear and convincing evidence that it was in the child's best interest to terminate his parental rights. The petitioner, the child's mother, had sought to terminate the respondent's parental rights on the grounds that he had abandoned the child and had no ongoing parent-child relationship with him. The court found that the petitioner had proved both allegations by clear and convincing evidence. The court found that the child, who was four and one-half years old at the time of trial, had affectionate relationships with the petitioner and other relatives who helped the petitioner support him. The court further found that the petitioner met all of the child's needs, and that the child had a happy temperament, age appropriate personal habits and various interests, and that he related well to other children. The court also found that the child did not know that the respondent existed and that the

* 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.

child would not recognize the respondent. Additionally, the court found that the respondent, who was incarcerated, had not financially supported or seen the child since he was six months old, and had made no effort to contact or visit him. Finally, the court found that the respondent, who had a violent criminal history, was disconnected from his emotions, that he pretended to be unaffected by his family's rejection of him, and that he was unwilling to seek counseling to resolve those issues. The court then concluded that the respondent had to address his own emotional problems and manage his anger and aggression, and that until he worked through those emotions, he would not be able to develop a healthy relationship with the child. The court also did not credit the respondent's testimony that he had ready employment available when he was released from prison. *Held* that the trial court properly found that termination of the respondent's parental rights as to his minor son was in the child's best interest: contrary to the respondent's claims that the court committed clear error in several of its factual findings as to his ability to obtain employment when he was released from prison, he failed to demonstrate that those findings were harmful or relevant to the criteria that the court used to determine the child's best interest; moreover, contrary to the respondent's claims that the court improperly found that the petitioner and her family were able to support the child, that he would be unable to contribute to the child's emotional development upon release from prison, and that the child would suffer emotionally if he were involved in his life, the court's finding that termination of his parental rights was in the child's best interest was supported by sufficient evidence, as the petitioner and her family were supporting the child and meeting his needs, a psychologist who evaluated the respondent testified that he would be unable to contribute to the child's emotional development, and there was no evidence that the respondent would be able to contribute financial support for the child upon release from prison.

Argued October 5—officially released October 26, 2016**

Procedural History

Petition by the mother of the minor child to terminate the respondent father's parental rights as to his minor child, brought to the Probate Court for the district of Stamford and transferred to the Superior Court in the judicial district of Stamford-Norwalk, Juvenile Matters, where the matter was tried to the court, *Randolph*, *J.*; judgment terminating the respondent's parental rights,

** October 26, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

from which the respondent appealed to this court; thereafter, the court, *Randolph*, *J.*, issued an articulation of its decision. *Affirmed*.

James P. Sexton, assigned counsel, with whom were *Emily L. Graner Sexton*, assigned counsel, and, on the brief, *Marina L. Green*, assigned counsel, for the appellant (respondent).

Pamela M. Magnano, with whom, on the brief, was *Heather L. Perbeck*, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent father, Baciany R., appeals from the judgment of the trial court terminating his parental rights as to his son, Baciany R. (child). On appeal, the respondent claims that the court improperly concluded that there was clear and convincing evidence that termination of his parental rights was in the best interest of the child. We affirm the judgment of the trial court.

On October 10, 2013, the petitioner, Stephanie P., filed a termination of parental rights petition in the Probate Court for the district of Stamford seeking to terminate the parental rights of the respondent on the grounds of abandonment and no ongoing parent-child relationship. See General Statutes § 45a-717 (g).[1] The

[1] 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) (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 . . . (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 . . . ."

termination petition was transferred to the Superior Court for Juvenile Matters in Stamford. The matter was tried to the court in March, 2016; the court issued a memorandum of decision on March 17, 2016. The court issued an articulation on June 21, 2016.

In its memorandum of decision and articulation, the court made the following findings of fact. At the time of trial, the child was four and one-half years old. Between December, 2011 and May, 2012, the respondent regularly visited the child and a few times bought the child baby items. He has not seen the child, however, since the child was six months old. The petitioner does not talk to the child about the respondent, and the child does not know that the respondent exists and would not recognize him.

The court found that the child has a comfortable, contented, and loving relationship with the petitioner. They play together easily and enjoy one another's company. The petitioner provides the child with a balance of fun, learning, and limits. When he engages with the petitioner, the child is polite and curious. The child has a happy temperament and is not especially given to tantrums or angry outbursts. He has affectionate relationships with the petitioner, his maternal grandparents and aunt, and has age appropriate personal habits and self-care. The child relates well to other children. He has a variety of interests, and a strong capacity to focus on activities and to learn new things. He persists when toys and games present a challenge. His verbal skills and vocabulary are excellent. The child exhibits no serious psychopathy or significant emotional or behavioral concerns.

Since 2012, the respondent has been incarcerated for possession of a gun and expects to be discharged in 2018. He was incarcerated between 2006 and 2009 for firing a gun that injured another person. The petitioner

had a brief intimate relationship with the respondent, who impregnated her. At the time the petitioner was pregnant with the child, the respondent impregnated another woman, whom he later married. The respondent plans to resume living with the other woman when he is released from prison.

The court also found that the respondent had a troubled relationship with his family. His father is unknown, and the respondent no longer sees the woman in Haiti who raised him until he was thirteen. He believed that the woman with whom he resided in the United States from the age of thirteen was his mother, but she told him when he was an adult that she was not his mother and put him out of the house.

The respondent wishes to have a loving relationship with the child, but he has not been able to follow a law-abiding path. He does not want the child to believe that he has abandoned him. The respondent, however, is "disconnected" from his emotions and pretends that he is unaffected by his own family's rejection of him. The court found that the respondent needs to resolve these issues through counseling, but until the time of trial, the respondent was unwilling to seek counseling. Until the respondent works through his emotions concerning his feelings of rejection, he will not be able to develop a healthy relationship with the child. The respondent also is unfamiliar with parenting.

Moreover, the respondent has provided almost no financial support for the child. After the child was born, the respondent did not pay for baby wipes, diapers, or formula. He failed to purchase clothing for the child on a regular basis. He has not paid for any of the child's education expenses. Inasmuch as the respondent is incarcerated, he has no income. The court did not credit the respondent's testimony that he has ready employment available once he is released from incarceration.

The petitioner returned to work two months after the child was born and placed the child in day care at a cost of $250 per week. The respondent did not contribute to the child's day care expenses. In 2011, the petitioner sought child support payments from the respondent. Although the parties reached an agreement, the agreement was not entered as a court order. The respondent had agreed to pay 25 percent of the child support until he could work more hours at his job, but he never made any child support payments, stating that he had no money. He has provided no support for the child since June, 2012.

At the time of trial, the petitioner and the child lived with the child's maternal grandparents, who helped the petitioner with insurance premium payments, food, and babysitting. The child attended a preschool; the petitioner paid a co-pay and Care for Kids paid the balance of the fee. The petitioner's sister and grandfather also provided care for the child. The petitioner worked at a pharmacy, earning $15.50 an hour, and attended nursing school from which she expected to graduate in September, 2016.

In response to the respondent's motion for articulation, the court stated that, with help, the petitioner meets all of the child's needs. Her future earnings as a nurse will allow her to meet the child's needs with less financial assistance from her parents. The respondent has provided no financial support since the child was six months old, and his future earnings are speculative at best. The child's greatest need is permanency in a placement that affords emotional health and development. The petitioner is meeting his physical, emotional, educational, medical, and moral needs. The child does not know his father, the respondent, and would not recognize him. He has no memories of the respondent. The court concluded that it is in the child's best interest

that the respondent be relieved of his financial obligations to the child, an obligation that he has not met since 2012.

The court found by clear and convincing evidence that the respondent had abandoned the child and that he had no ongoing relationship with the child. The court further found by clear and convincing evidence that it is in the child's best interest that the respondent's parental rights be terminated. The respondent appealed and thereafter filed a motion for articulation; see Practice Book § 61-10; which the trial court denied. The respondent then filed a motion for review; see Practice Book § 66-7; which this court granted.

In response to the respondent's request that the court articulate how the child's permanency needs are advanced by terminating the respondent's parental rights, the court repeated its factual findings as to the child's happy temperament, his affectionate relationships with the petitioner, his maternal grandparents and aunt, and his great grandfather. The court also iterated its findings with respect to the child's behavior, personal habits, his relations with other children, his interests, and his excellent verbal skills and vocabulary. The court found that the respondent has played no part in the child's education and social development.

In addition, the court found that the respondent has a troubling, violent criminal history. He was arrested in 2004 in relation to a domestic incident involving his parents; the respondent was convicted pursuant to the arrest. He again was arrested in 2006 because he shot someone and was incarcerated for three and one-half years. Although the respondent was released from prison in 2009, he was arrested again and his probation thereafter was revoked. The respondent was involved in a motor vehicle accident and was found to be in possession of a loaded semiautomatic pistol. Despite

his having been convicted of a violent crime in 2004, the court found that the respondent had not changed his violent behavior. He is currently imprisoned and is not expected to be released until 2018.

In 2015, the respondent underwent a psychological evaluation. The court found, on the basis of the psychological report, that the respondent often described his life in vague terms. He tended to portray himself as being unfazed by events in his life, but his capacity to manage his emotions may be significantly underdeveloped. The respondent has a painful personal history, and he is not in good touch with his emotional life. The court did not find the respondent to be a credible reporter. He is not able to manage his aggression and anger, and denies those problems. Although the respondent wants to play a role in the child's life, he is emotionally immature, has poor impulse control, and is insecure. The respondent has a strong desire for a family, which now includes his wife and the son he had with her. During the psychological evaluation, when asked about playing a role in the child's life, *the respondent directed his comments to his own emotions rather than to the child's*.

Consequently, the court found that it may be difficult for the respondent to achieve the goals he sets for himself after he is released from prison. He will not be able to contribute to the child's emotional development at that time. In fact, if he enters the child's life at that point, the child's emotional and intellectual development may turn downward. The respondent cannot manage his own emotions, much less the emotional development of the child. The child's permanency needs are intact and would suffer under the respondent's involvement in his life. By terminating the respondent's parental rights, the child's healthy development will remain on course.

In addressing the respondent's request to articulate facts regarding the child's future need to know about and potentially visit with him and his half brother, and how terminating the respondent's parental rights will advance those needs, the court stated that the respondent has not seen the child since he was six months old and that he has no relationship with the child. Upon release from prison, the respondent plans to resume living with his wife and their son. The petitioner has not informed the child of the respondent, nor has the child seen a photograph of the respondent. He has not asked about his father, who that person might be, and he has not asked why he has not seen his father.

The court found that the respondent has a strong desire to develop a relationship with the child, but his desire may stem more from his need to see himself as being part of a family rather than from a determination to care for the child financially, educationally, and socially. The respondent has not considered the effect on the child if the child's father appeared in his life at the present time.

The court found that for the respondent to develop a positive relationship with the child, he would have to be out of prison, and established in a stable home and work environment. The respondent would need to have a better understanding of his own emotional deficits and a mature understanding of the emotional needs of his children. The respondent needs time to overcome his own problems to be able to support and care for his wife and their son. It is unlikely that he can soon succeed in establishing himself in his own home with his wife and son, and then establish a positive relationship with the child who does not know him. Moreover, the respondent has not been inclined to participate in counseling to address his own emotional weaknesses. "This is a mountain for a man who will

need to find a job with a felony conviction and with no marketable skills."

The court acknowledged that the child may want to know about his father eventually, but he is not inquiring now. By terminating the respondent's parental rights, the court stated, the child will be able to maintain good emotional, intellectual, and social development without being subjected to the respondent's self-centered need to be part of a family unit. In making its findings and reaching its conclusions, the court relied on the testimony offered by the petitioner and Jill Edgar, a licensed clinical psychologist.

The respondent asked the court to articulate why it did not credit the assessment of the Department of Children and Families (department), which did not recommend that the respondent's parental rights be terminated.[2] The court found that a letter from the Office of the Attorney General stated that unless there was an adoptive parent ready to assume financial responsibility for the child, the child stood to lose $60,000 in future support. The reason for the loss of future support was the Department of Social Services' efforts to initiate a support action against the respondent. If the respondent's parental rights were terminated, his financial responsibility also would be terminated. The court found that the department's recommendation not to terminate the respondent's parental rights was based on a financial consideration of the father's future ability to pay support. It was not predicated on the child's financial, physical, educational, medical, and social needs, which were being met by the petitioner and her family. The court stated that it had not discounted the department's reason for its recommendation, but had credited it. It found that the department's reason was solely financial in nature and did not justify, by itself,

[2] The department did not provide services to the child or the petitioner.

the recommendation not to terminate the respondent's parental rights.

As to the respondent's request that the court articulate why it did not credit Edgar's assessment that, from the child's perspective, there is no need to decide now whether the respondent's parental rights should be terminated, the court stated that Edgar did not recommend an interactional study between the child and the respondent. Because there is no relationship between the child and the respondent, a first meeting would carry emotionality and strangeness for the child. If such a meeting were to occur, there would have to be considerable preparation for both the respondent and the child to increase the likelihood that the meeting would be positive and not traumatic. Requiring the child to see the respondent for the first time when he was in a prison setting would be highly undesirable.

The court was of the opinion that the child's current healthy development and the lack of a relationship with his father militated against a relationship with the respondent for a number of years. The respondent is eligible to be discharged from prison in 2018 and must establish himself in a law-abiding life. He must develop a father's relationship with his other son and a husband's relationship with his wife, if he is to be successful. He must address his own emotional problems, including feelings of loss, impulse control, anger management, and aggression. The respondent is not inclined to engage in counseling to accomplish this. The court found that the respondent's healthy reintegration into society will take years.

The court analyzed the relevant portion of Edgar's report[3] as follows. Taken in context, Edgar's view that

[3] Edgar wrote: The child "appears to have a secure, very positive relationship with [the petitioner]. . . . He apparently has . . . positive male role models in his life, in terms of his grandfather and his uncle. Thus, he is not like a child who urgently needs a permanency plan, which can only be developed and implemented if parents' rights are terminated. At this time,

termination of the respondent's parental rights would be in the child's best interest "*if another stable male figure were to adopt*" is time based. (Emphasis in original.) In other words, if a stable male figure were to adopt the child, the respondent's parental rights "*should* be terminated" and such termination would be in the child's best interest. (Emphasis in original.) The court reasoned that in determining whether to terminate parental rights, it need not focus only on whether there are urgent needs that are not being met. If there is an urgent need in this case, it is the need to allow the child to continue his healthy development without the respondent's involvement. The court found that the respondent has no ongoing relationship with the child. It would take years, if ever, for the respondent to develop a healthy relationship with the child. The respondent, however, has not shown an ability to move beyond his own emotional needs to satisfy his desire for a family unit. The respondent's needs do not contemplate the true needs of the child. Since the respondent married in 2013, the petitioner has not made efforts to foster a relationship between him and the child. Neither has the respondent made significant efforts to develop the relationship. The court read Edgar's statements not to mean that parental rights ought not be terminated, but that the child is not in danger of nonpermanency in his current circumstances. Edgar intimates that the respondent's introduction to the child now is not in his best interest and that it would take years, if ever, for the respondent to become a positive influence in the child's life.

In conclusion, the court found by clear and convincing evidence, pursuant to § 45a-717 (h) (1), that no child

it seems that from [the child's] perspective, there is no particular urgency about resolving this issue . . . . If [the petitioner] formed a new relationship with a stable male partner who wanted to adopt [the child], then it might well be in [the child's] best interests not to let further time elapse . . . ."

care agency was involved in the matter. The child lives with the petitioner, his mother, who has attended to the child's educational, medical, and social needs. The child, who was more than four years old, has affection for and a strong bond with the petitioner, his maternal grandparents and maternal aunt. He would not recognize the respondent and has no bond or contact with him.

The court also found that there were no applicable court orders to be considered. The respondent has made little effort to adjust his circumstances, conduct or conditions, and has made little effort to care for the child's social, educational, emotional and medical needs. The petitioner has not attempted to foster a relationship with the respondent since he married another woman in 2013, and the respondent has not made significant efforts to develop a relationship with the child since that time.

The court found that the petitioner had proven the allegations of her petition to terminate the respondent's parental rights and that it was in the best interests of the child to do so. The court therefore rendered judgment terminating the respondent's parental rights. The respondent appealed.

On appeal, the respondent claims that the court relied on speculation, rather than on evidence in the record, when making factual findings by clear and convincing evidence that it was in the child's best interests to terminate the respondent's parental rights. We disagree.

"In order to terminate a parent's parental rights under § 45a-717, the petitioner is required to prove, by clear and convincing evidence, that any one of the seven grounds for termination delineated in § 45a-717 (g) (2) exists and that termination is in the best interest of the child. General Statutes § 45a-717 (g) (1)." *In re Brian T.*, 134 Conn. App. 1, 10, 38 A.3d 114 (2012). In the

present case, the court found that the petitioner had proved two of the statutory grounds: (1) abandonment and (2) no ongoing parent-child relationship. See footnote 1 of this opinion.

"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." (Internal quotation marks omitted.) *In re S.D.*, 115 Conn. App. 111, 116, 972 A.2d 258 (2009).

"We defer to the trier of fact's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. The trier is the judge of the credibility of all the witnesses and the weight to be given their testimony, and may accept part, all or none of the testimony. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *In re Kamora W.*, 132 Conn. App. 179, 186, 31 A.3d 398 (2011).

"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 grounds for termination of parental rights set forth in . . . § 45a-717 (g) (2) has been proven by clear and convincing evidence. If the trial court determines that

at least one of the statutory grounds for termination has been proved, then it proceeds to the dispositional phase. . . . In the dispositional phase, there must be a showing by clear and convincing evidence whether termination is in the best interests of the child." (Citations omitted; footnote omitted.) *In re Brian T.*, supra, 134 Conn. App. 11.

In the present case, the petitioner alleged, pursuant to § 45a-717 (g) (2), that the respondent had abandoned the child and that there was no ongoing parent-child relationship between him and the child. The court found that the petitioner had proven both allegations by clear and convincing evidence. The respondent does not challenge the court's findings with respect to the statutory grounds for termination. Rather, he challenges that court's finding by clear and convincing evidence that it is in the best interest of the child to terminate the respondent's parental rights.

"The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of its environment. . . . 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. In arriving at this decision, the court is mandated to consider and make written findings regarding [six] factors delineated in [§ 45a-717 (h)]." (Internal quotation marks omitted.) *In re Jaime S.*, 120 Conn. App. 712, 733–34, 994 A.2d 233 (2010), appeal dismissed, 300 Conn. 294, 12 A.3d 566 (2011).

On appeal, the respondent specifically claims that the court made several findings related to his ability to obtain employment when he is released from incarceration. Notably, the respondent points to the court's statement that ready employment is unlikely for him and

that finding a job for someone with a felony conviction and no marketable skills would be a mountainous task for the respondent. The respondent claims that there is no evidence in the record to support these findings. We need not determine whether there is no evidence in the record to support the court's findings,[4] as the respondent has failed to demonstrate how those findings are relevant to the criteria by which the court was to determine the child's best interest. In other words, the respondent has failed to demonstrate that, if there was error, why the error was not harmless. Moreover, as the petitioner has pointed out, there is sufficient evidence in the record, which, standing alone, supports the court's finding that termination of the respondent's parental rights is in the child's best interest.

In its memorandum of decision, the court cited the principles of law applicable in termination of parental rights cases. "The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of its environment. . . . 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

[4] We note, however, that the trial court's function "is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *In re Christine F.*, 6 Conn. App. 360, 366, 505 A.2d 734, cert. denied, 199 Conn. 808, 809, 508 A.2d 769, 770 (1986). During the trial, the respondent testified that he had ready employment in the form of four different job offers, including two offers to work as an electrician in a hospital, one offer to work as a carpenter, and to return to his former position at Petsmart. The respondent also testified that he is not a licensed electrician, has no experience doing electrical work, and that he has not spoken to anyone at Petsmart about employment since 2015. On the basis of the respondent's testimony, the court reasonably and logically inferred that the respondent did not have ready employment at the time he is to be released from incarceration. Contrary to the respondent's argument, the court did not improperly employ a metaphor, "mountainous task," to describe the challenges the respondent faced upon his release from prison.

rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding [six] factors delineated in [§ 45a-717 (h)]." (Internal quotation marks omitted.) *In re Anthony H.*, 104 Conn. App. 744, 764, 936 A.2d 638 (2007), cert. denied, 285 Conn. 920, 943 A.2d 1100 (2008).

The court addressed the statutory factors that it was mandated to consider. In its articulation, the court stated, in relevant part: "The child's greatest need is permanency in placement, which affords emotional health and development. [The petitioner] is meeting [the child's] physical, emotional, educational, medical and moral needs." The evidence, which we have reviewed, supports the court's finding that termination of the respondent's parental rights is in the child's best interest. At the time of trial, the child was enrolled in a preschool program for which the petitioner paid that portion of the fee not provided by Care for Kids. The petitioner and the child resided with the petitioner's parents, who provide financial support, insurance, food, and child care. The child visited with his relatives, including his aunt and great grandfather, frequently. A department study, which was placed into evidence, found that the child timely met his developmental milestones and was in good health and was well nourished. The report also stated that the petitioner was employed and that her monthly salary permitted her to provide for the child's needs. Edgar also found that the petitioner was able to meet the child's needs. The petitioner, with the assistance of her family, with whom she resided, provided the child with permanency and stability, and met his financial, physical, educational, medical and social needs.

The respondent argues that because the child and the petitioner receive certain financial assistance from the state, the court's finding that the petitioner and

her family were able to meet the child's medical and financial needs alone is clearly erroneous.[5] The respondent argues that the court's finding is clearly erroneous because it demonstrates that the petitioner did not need any financial contributions from him. The respondent's argument is unpersuasive; he has never made regular financial contributions on behalf of the child, he is presently incarcerated and without funds to support the child, his discharge from incarceration is expected to take place four years after trial, and there is no evidence of the financial support the respondent will be able to contribute when he is released.

The respondent next claims that the court's finding that he will not contribute to the child's emotional development and that the child would suffer if he were involved in the child's life is clearly erroneous. We disagree, as Edgar's psychological evaluation and her testimony support the court's findings. In her report, Edgar stated that the respondent is not in touch with his own emotions to a marked degree, he has little understanding of parenting skills or the potential effect on the child of introducing him to the respondent, particularly while the respondent is in prison,[6] and that he would benefit from psychotherapy as well as a parenting course or counseling. On the basis of her observations of him, Edgar stated that the respondent likely would reject counseling or parenting education. Edgar observed that the respondent has a strong desire to develop a relationship with the child, but that his desire stems more from his own emotional need to be with a

[5] The respondent also argued that the court's finding that the petitioner's future earnings as a nurse will allow her to meet the child's needs is speculative. In her brief on appeal, the petitioner concedes that there is no evidence in the record to support the court's finding as to her future earnings as a nurse, but she argues that the error is harmless because at the time of trial she was meeting the child's financial needs. We agree.

[6] In his brief on appeal, the respondent did not disagree with Edgar that visiting him in prison could be detrimental to the child.

family rather than from a more altruistic desire to care for the child. Edgar also opined that the respondent has many unresolved issues of his own and so little grasp of a healthy parent-child relationship that it seems unlikely that the respondent quickly and easily could develop a positive relationship with the child. The respondent has many hurdles to surmount in order to have a positive relationship with the child. On the basis of the foregoing evidence, we conclude that the court's finding that the respondent will not contribute to the child's emotional development is not clearly erroneous.

Finally, the respondent claims that it was clearly erroneous for the court to conclude that "despite the fact that . . . Edgar did not ultimately recommend terminating the respondent's parental rights at this juncture, that '[i]t is clear from the context that . . . Edgar's view is that termination of the [respondent's] parental rights would be in the child's best interest if another stable male figure were to adopt.' " Edgar was of the opinion that, because the child is in a stable, permanent environment, there was no urgent need to terminate the respondent's parental rights. Edgar conceded, however, that an advantage to terminating the respondent's rights at the present time would be that he could not pressure the petitioner to let him see the child. On appeal, the respondent argues that the court prematurely terminated his parental rights.

We disagree with the respondent's claim and concur with the court's conclusion that "considerations in determining whether to terminate parental rights need not focus only on whether there are urgent needs which are not being met. If any need is urgent in this case, it is the need to allow [the child] to continue his healthy development without [the respondent's] involvement." Edgar stated that termination of the respondent's parental rights at the time of trial would be appropriate if there were a stable male figure in the child's life willing

to adopt the child. Her opinion, therefore, concerns the timing of the termination of the respondent's parental rights, not whether terminating the respondent's parental rights was not in the best interest of the child.

In a termination of parental rights case, the adjudicatory phase of the case focuses on the parent; the dispositional phase focuses on the best interest of the child. "The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of its environment. . . . 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. . . . In making that determination, the court must consider the factors delineated in § 45a- 717 (h)." (Citations omitted; internal quotation marks omitted.) *In re Sydnei V.*, 168 Conn. App. 538, 554, 147 A.3d 147 (2016).

Section 45a-717 (h) (3), (4), (5) and (6) are applicable in this case.[7] Significantly, the court found that the

[7] General Statutes § 45a-717 (h) provides in relevant part: "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 . . . (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 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."

respondent abandoned the child and that no ongoing parent-child relationship exists between them. The respondent has failed to contribute to the child's financial needs or to play any role in the child's social and educational development. The happy and contented child, who was four and one-half years old at the time of trial, does not know that the respondent is his father, and he does not ask about his father. The respondent is in prison and has made no effort to contact the child or to visit with the child. The respondent lacks employment skills and any means of supporting the child when he is released from prison, when he must establish himself with his wife and their child. He will need counseling and parenting education before he can be introduced to the child. The respondent must address his own emotional problems, control his impulses, and manage his anger and aggression. He is more focused on his own emotional needs than those of the child. The child is bonded with the petitioner and her family. Those circumstances have enabled the child to develop in healthy and age appropriate ways. His environment is stable and permanent. There is no reason to permit the respondent, upon his release from prison, to disrupt the stability and permanency in the child's life by attempting to intervene to satisfy his own emotional needs.[8]

For all of the foregoing reasons, we conclude that the court properly found that termination of the respondent's parental rights was in the child's best interests. We therefore conclude that the judgment terminating the respondent's parental rights should be affirmed.

The judgment is affirmed.

In this opinion the other judges concurred.

[8] In his brief, the respondent has argued that there are legal remedies available to the petitioner if he attempts to enter the child's life when he is released from incarceration. Litigation, especially child custody battles, are disruptive to a family in any circumstance. This argument again demonstrates the respondent's placing his emotional needs above those of the child.

IN RE JACQUELYN W.*
(AC 39013)

Beach, Prescott and Bishop, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court transferring permanent legal guardianship of her minor daughter to the daughter's aunt, S. The child previously had been adjudicated neglected and placed in the care and custody of the petitioner, the Commissioner of Children and Families. Thereafter, the respondent objected to the petitioner's motion to transfer permanent legal guardianship of the child to S, but did not testify at the hearing on the motion. The court concluded, inter alia, that the petitioner, pursuant to statute (§ 46b-129 [j] [6]), had established by clear and convincing evidence that the respondent had failed to achieve that degree of personal rehabilitation that would encourage the belief that, within a reasonable time, she could assume a responsible position in the child's life. The court also determined that the petitioner had established by clear and convincing evidence that the transfer of permanent legal guardianship to S was in the child's best interest. On appeal, the respondent claimed that the court improperly granted the motion to transfer permanent legal guardianship of the child because it failed to canvass her prior to the hearing, in accordance with the rule of *In re Yasiel R.* (317 Conn. 773), and improperly drew an adverse inference against her from her failure to testify during the hearing. *Held*:

1. This court declined to exercise its supervisory authority over the administration of justice to reverse the judgment of the trial court granting the petitioner's motion to transfer permanent legal guardianship of the child to S, and to require a pretrial canvass of the petitioner pursuant to *In re Yasiel R.*; the holding of *In re Yasiel R.*, which pertained to a termination of parental rights trial, has not been extended to require a canvass in the context of hearings on motions to transfer permanent legal guardianship, the canvass was not constitutionally required, the court's failure to canvass the respondent did not constitute plain error, and the transfer of permanent legal guardianship of the child was not as drastic a deprivation as a termination of parental rights such that the circumstances here were not exceptional to the degree necessary to warrant the exercise of this court's supervisory authority.

* 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.

2. The respondent could not prevail on her claim that the trial court improperly drew an adverse inference against her as a result of her failure to testify at the hearing, without having first advised her that it could draw such an inference; the court's statement that it had been presented with no evidence of progress by the respondent toward her rehabilitation and reunification with the child did not suggest that such an inference was drawn, as the court stated that its decision was based on the testimonial and documentary evidence that was admitted during the hearing, and this court had no reason to doubt the veracity of the trial court's articulation, which established that it did not draw an adverse inference against the respondent as a result of her failure to testify.

Argued September 8—officially released October 27, 2016**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Frazzini*, *J.*; judgment adjudicating the minor child neglected; thereafter, the court, *Burgdorff*, *J.*, granted the petitioner's motion for an order of commitment to the custody of the petitioner; subsequently, the court, *Hon. Robert G. Gilligan*, judge trial referee, granted the petitioner's motion to transfer permanent guardianship to the minor child's paternal aunt, and the respondent mother appealed to this court; thereafter, the court, *Hon. Robert G. Gilligan*, judge trial referee, issued an articulation of its decision. *Affirmed.*

Karen Oliver Damboise, for the appellant (respondent mother).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, *Gregory T. D'Auria*, solicitor general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

** October 27, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

BEACH, J. The respondent mother, Wendy F., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, granting a motion to transfer permanent legal guardianship of the respondent's minor daughter, Jacquelyn W., to Jacquelyn's aunt, Shirley R. The respondent claims that the court improperly granted the petitioner's motion for permanent transfer of guardianship because the court failed (1) to canvass her prior to the hearing in accordance with *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015); and (2) to advise her that the court could draw an adverse inference from her failure to testify. We disagree and affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. Jacquelyn was born in 2005. In 2012, the court adjudicated Jacquelyn neglected and ordered six months protective supervision by the Department of Children and Families (department). Six months later, the court granted the petitioner's motion to commit Jacquelyn to the department's care and custody. From September, 2013, until June, 2015, Jacquelyn resided with her paternal aunt, Shirley R. Jacquelyn developed a strong relationship with Shirley. She referred to Shirley as "Auntie," and had her own room in Shirley's apartment. While living with Shirley, Jacquelyn continued to have regular visits and contact with her mother. Jacquelyn expressed a desire to maintain her relationship with her mother, but to continue to reside with Shirley. On June 1, 2015, the petitioner moved to transfer and to vest permanent legal guardianship of Jacquelyn in Shirley. The respondent mother objected to the motion.

The court, *Hon. Robert G. Gilligan*, judge trial referee, conducted a hearing on the motion on January

25, 2016. The respondent was represented by counsel at this hearing, but did not testify. On February 9, 2016, the court granted the petitioner's motion for a permanent transfer of legal guardianship. The court determined that, pursuant to General Statutes § 46b-129 (j) (6), the department had established by clear and convincing evidence that (1) a ground for termination of parental rights existed—that is, that the respondent had been provided with specific steps to take to facilitate Jacquelyn's return, and had failed to achieve the degree of personal rehabilitation as would encourage the belief that, within a reasonable time, the respondent could assume a responsible position in Jacquelyn's life; (2) adoption was not appropriate in this case; (3) Shirley, the proposed legal guardian, was Jacquelyn's relative; (4) Jacquelyn had resided with Shirley for at least one year; (5) Shirley was a suitable and worthy guardian; and (6) the transfer of permanent legal guardianship of Jacquelyn to her aunt was in Jacquelyn's best interest. This appeal followed.

I

Prior to trial, the court did not provide the respondent with the *In re Yasiel R.* canvass, nor was it requested to do so. The respondent argues that the court's failure to provide a pretrial canvass constituted plain error, and that this court should invoke its supervisory authority to expand the canvass requirement to apply to hearings regarding the permanent transfer of guardianship. We disagree.

In *In re Yasiel R.*, supra, 317 Conn. 773, our Supreme Court held that parents must be canvassed prior to any trial for termination of parental rights. Id., 793–94. As part of that canvass, the court must explain the trial process, the parent's rights during trial, and the potential consequences of an adverse determination in the proceeding. Id., 794.

The respondent's claim regarding the canvass was not preserved at trial. *In re Yasiel R.* had been published shortly before trial in this case; the parties, then, had the ability to invoke *In re Yasiel R.* and to request a canvass, but did not do so. In these circumstances, reversal would constitute an ambuscade of the trial court; see *Remillard* v. *Remillard*, 297 Conn. 345, 352, 999 A.2d 713 (2010); and we would not reach the merits of the issue unless application of another doctrine were to except this case from the requirement of preservation.

The court's holding in *In re Yasiel R.* pertained to a trial concerning the termination of parental rights; accordingly, the fact that the respondent here was not canvassed prior to the hearing regarding a permanent transfer of legal guardianship does not constitute plain error. The plain error doctrine[1] is not available because the *In re Yasiel R.* canvass requirement has not been extended to require a canvass in the context of this case; without a requirement to canvass, there is no error.

Additionally, our Supreme Court held in *In re Yasiel R.* that the canvass was not constitutionally required; *In re Yasiel R.*, supra, 317 Conn. 787; and, therefore, the claimed error is not of constitutional dimension. Accordingly, the issue is not reviewable under *Golding*.[2]

[1] "The plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . 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. *Smith*, 275 Conn. 205, 240, 881 A.2d 160 (2005). We perceive no manifest injustice from the record in this case.

[2] See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989) ("a defendant can prevail on a claim of constitutional error not preserved at trial only if . . . [3] the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial," as modified by *In re Yasiel R.*, supra, 317 Conn. 781).

The only other possible avenue for review of the unpreserved claim is the invocation of our supervisory authority.

The respondent argues that this court should exercise its supervisory authority to extend the holding of *In re Yasiel R.* to proceedings regarding permanent transfers of legal guardianship. The respondent argues that such expansion is appropriate in this case because permanent transfers of guardianship are sufficiently similar to terminations of parental rights to warrant a similar canvass. *In re Yasiel R.* held that, with respect to terminations of parental rights, the use of the court's supervisory authority was justified by the appearance of "unfairness" and "lack of concern over a parent's rights" that results from a transfer of guardianship without a pretrial canvass. Id., 794. The respondent suggests that the same considerations compel a similar exercise of supervisory authority in this case.

In response, the petitioner asserts that the use of supervisory authority to expand the *In re Yasiel R.* canvass requirement is not appropriate. First, the petitioner argues that our Supreme Court limited the canvass requirement to termination of parental rights hearings, and that this court should not construe *In re Yasiel R.* more broadly than it was intended. The petitioner points out that the use of a court's supervisory powers "is an extraordinary remedy" to be invoked only when the issue at hand is "of utmost seriousness"; (internal quotation marks omitted) id., 789–90; and that the consequences following a permanent transfer of guardianship do not justify the imposition of such an extreme remedy. In that vein, the petitioner argues that a permanent transfer of guardianship does not qualify as an "exceptional circumstance" warranting the use of our supervisory powers. We agree with the petitioner.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice." (Internal quotation marks omitted.) *In re Yasiel R.*, supra, 317 Conn. 789. "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." (Internal quotation marks omitted.) Id. Three criteria must be met in order for this court to consider exercising its supervisory authority: (1) the record must be adequate for review; (2) all parties must be afforded an opportunity to be heard on the issue; and (3) review of an unpreserved claim must not prejudice a party. Id., 790. "If these three threshold considerations are satisfied, the reviewing court next considers whether one of the following three circumstances exists: (1) the parties do not object; (2) the party that would benefit from the application of this court's supervisory powers cannot prevail; or (3) a claim of exceptional circumstances is presented that justifies deviation from the general rule that unpreserved claims will not be reviewed." Id.

We decline to exercise our supervisory authority to expand the *In re Yasiel R.* ruling to permanent transfers of guardianship. Although the threshold considerations for exercising our supervisory authority may well be met, the circumstances of this case do not satisfy the second set of requirements: the circumstances are not exceptional to the degree necessary to justify exercising our supervisory authority.

In *In re Yasiel R.*, our Supreme Court recognized that "the lack of a canvass of all parents in a parental rights termination trial may give the appearance of unfairness"; id., 793–94; and 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 . . . .'' Id., 794. In deciding that the use of its supervisory authority was appropriate, the court considered the core rights at stake during a termination of parental rights trial, including ''fundamental parental rights and right to family integrity . . . .'' Id., 792. Although a parent's rights are affected by a permanent transfer of guardianship, the consequences of a permanent transfer are not as severe as a complete termination of a parent's rights. In this case, for example, it was expected that the respondent mother would continue to have regular visits and contact with her daughter, even after the transfer of guardianship. Jacquelyn resides with a relative, but she has expressed the desire to continue her relationship with the respondent. Although the transfer of guardianship is by no means insignificant, it is not as drastic a deprivation as a termination of parental rights, and we decline to exercise our supervisory authority to require a pretrial canvass beyond that which *In re Yasiel R.* requires.[3]

II

The respondent next claims that the court erred by drawing an adverse inference from her failure to testify at trial without first advising her that such an inference could be made. Because the record does not reflect that the court drew such an inference, we disagree with the respondent's claim.

In support of her claim that the court drew an adverse inference from her failure to testify, the respondent relies on one sentence in the trial court's memorandum

[3] We note as well that there is nothing in the record to suggest that anything different would have occurred at trial had the suggested canvass been given or that the respondent suffered any actual harm as a result of the absence of such a canvass.

of decision: "The court was presented with no evidence of any progress by [the respondent] despite having more than ample time to encourage the belief that she could assume a responsible position in the life of Jacquelyn." The respondent argues that, in accordance with our Supreme Court's decision in *In re Samantha C.*, 268 Conn. 614, 847 A.2d 883 (2004), the court erred in drawing an adverse inference from the respondent's silence without first warning her that such an inference could be taken.

The petitioner responds that the court did not draw an adverse inference from the respondent's silence, and, therefore, there was no error in not warning the respondent that an adverse inference could be drawn from her failure to testify. The petitioner argues that, on a reading of the trial court's decision as a whole, it is clear that the court's statement was merely "an appropriate observation about the evidentiary record," and not an adverse inference taken from the respondent's silence. Furthermore, the petitioner points out that the court later articulated that it had not drawn an adverse inference from the respondent's failure to testify. The petitioner argues that the court's articulation requires the conclusion that no adverse inference was drawn in this case. We agree with the petitioner.

"We begin our analysis of the respondent's claim by noting that the question of whether the court drew an adverse inference in the present case requires us to interpret the court's memorandum of decision. The construction of a judgment is a question of law for the court, such that our review of the defendant's claim is plenary. As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment." (Internal quotation marks omitted.) *In re Jason B.*, 137 Conn. App. 408, 414, 48 A.3d 676 (2012).

In 2004, our Supreme Court held that "a trier of fact generally may draw an adverse inference against a party for its failure to rebut evidence"; *In re Samantha C.*, supra, 268 Conn. 637; but "respondents [are] entitled to be notified by the court of the prospect that an adverse inference might be drawn from their silence." Id., 666; see also Practice Book § 35a-7A. If the court is not inclined to draw an adverse inference against a respondent, such warning is not required. *In re Lukas K.*, 120 Conn. App. 465, 475 n.4, 992 A.2d 1142 (2010), aff'd, 300 Conn. 463, 14 A.3d 990 (2011).

The respondent argues that the court's statement that it "was presented with no evidence of any progress by [the respondent]" reveals that the court drew an adverse inference against the respondent. Even if this statement in a vacuum could be construed as ambiguous, it does not suggest that any such inference was drawn. The trial court specifically stated that its decision was "[b]ased on the testimonial and documentary evidence admitted," including the department's social study and case status report, as well as testimony from Shirley and from Jacquelyn's social worker. The court noted that the department's social study "document[ed] the multiple services offered to [the respondent] to address her substance abuse, mental health and parenting issues . . . [and her] failure to engage and comply with, or fully benefit from, the programs and services offered or provided, which resulted in [her] leaving or being unsuccessfully discharged from the services . . . ." As stated in the context of another case, "[w]hen read in light of these statements, it is clear that the evidence submitted by the petitioner . . . was found by the court to be both credible and wholly uncontested by the respondent." *In re Jason B.*, supra, 137 Conn. App. 415–16. The sentence at issue simply states that there was no evidence of progress.

Moreover, at the petitioner's request, the trial court issued an articulation confirming that "[t]he court did not draw any adverse inference from the respondent mother's failure to testify, and such failure was not given any consideration in ruling on the matter." The respondent argues that, despite the court's statements in its articulation, its first decision reveals that an adverse inference was drawn. The respondent dismisses the court's articulation too easily. "In the interest of judicial economy and proper presentation of the issues on appeal, this court has repeatedly . . . relied on those articulations to resolve the issues on appeal." *In re Nevaeh W.*, 317 Conn. 723, 738, 120 A.3d 1177 (2015). We conclude that we have no reason to doubt the veracity of the court's articulation, which establishes that the trial court did not draw an adverse inference against the respondent for failing to testify.

The judgment is affirmed.

In this opinion the other judges concurred.

MARIANNE OLSON *v.* FUSAINI MOHAMMADU
(AC 37216)

Alvord, Mullins and Sullivan, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the trial court's denial of his motion to modify alimony and child support after a rehearing pursuant to this court's order on remand. At the rehearing, the plaintiff submitted the defendant's financial affidavit made in preparation for the dissolution proceeding, which contained a lower net income than found by the court in the dissolution judgment. The trial court denied the defendant's motion to modify his support obligations, concluding that his net weekly income had decreased between the date of the dissolution judgment and the date of the filing of the motion for modification, but declining to modify the defendant's support obligations in light of the statutory (§§ 46b-82 and 46b-86) factors regarding modification of support orders. The defendant appealed to this court, claiming that the trial court abused

its discretion in denying his motion to modify with respect to alimony because it improperly relied on the net income in his financial affidavit as opposed to the net income found in the dissolution judgment, and because the trial court's decision was based on the § 46b-82 factors despite there being no evidence presented at the rehearing regarding those factors. Furthermore, the defendant claimed that the trial court improperly denied his motion to modify with respect to child support because it improperly applied the child support and arrearage guidelines regarding deductions from gross income. Subsequently, the trial court granted in part the plaintiff's motion for contempt and order, ordering the defendant to pay an arrearage for child care expenses, and granted the plaintiff's motion for appellate attorney's fees. The defendant filed an amended appeal, claiming that the arrearage had been suspended until all of his appeals were resolved, and that the trial court had improperly granted the plaintiff's motion for appellate attorney's fees. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion to reduce his alimony obligation: contrary to the defendant's claim, the trial court did not improperly rely on the financial affidavit he submitted for purposes of the dissolution judgment, the defendant having presented no persuasive reason why the court was not permitted to rely on that affidavit, which was submitted as an exhibit at the rehearing without objection; furthermore, because the defendant never satisfied his initial burden to establish a substantial change in financial circumstances, the trial court did not abuse its discretion in denying his motion for alimony modification on the basis of the § 46b-82 factors, as the defendant presented no evidence at the rehearing pertaining to those factors.
2. The trial court did not abuse its discretion in denying the defendant's motion to reduce his child support obligation, the defendant having abandoned his claim that the trial court improperly applied the child support and arrearage guidelines regarding deductions from gross income because that claim was inadequately briefed; moreover, it would have been speculative for this court to determine that the trial court would have reduced the defendant's child support obligation if he had demonstrated that the claimed deductions were appropriate, as the trial court did not specify which statutory (§ 46b-84) criteria it found to be most compelling when it denied the defendant's motion to modify child support, and the record supported that court's determinations.
3. The defendant could not prevail on his claim that the trial court improperly ordered him to pay the arrearage for child care expenses because it had failed to follow the law of the case by vacating a prior order that held those arrearage payments in abeyance until all of his appeals were resolved; the law of the case doctrine did not compel the trial court to follow the prior order, as there were new circumstances for the trial court to consider and that court was not bound to follow the decisions of another judge made at an earlier stage of the proceedings.

4. The trial court did not abuse its discretion in awarding the plaintiff appellate attorney's fees, as the record supported the trial court's findings that the plaintiff did not have sufficient liquid assets with which to pay her own legal fees, she did not have enough income to pay those fees without using some of the child support payments, which would have undermined the trial court's prior child support order, and the defendant's income enabled him to pay a certain portion of the plaintiff's appellate legal fees.

Argued September 15—officially released November 8, 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, *Hon. Herbert Barall*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Adelman*, *J.*, denied the defendant's motion to modify alimony and child support, and the defendant appealed to this court, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court with direction to reverse the judgment of the trial court and remand the case to that court for a new hearing on the motion for modification; subsequently, the court, *Ficeto*, *J.*, denied the defendant's motion to modify alimony and child support; thereafter, the court, *Ficeto*, *J.*, granted the defendant's motion to reargue and granted in part the relief requested therein; subsequently, the court, *Ficeto*, *J.*, denied the defendant's motion to reargue, and the defendant appealed to this court; thereafter, the court, *Albis*, *J.*, granted the plaintiff's motion for appellate counsel fees and granted in part the plaintiff's motion for contempt and order, and the defendant filed an amended appeal. *Affirmed.*

John F. Morris, for the appellant (defendant).

Brandon B. Fontaine, with whom were *Emily C. Carr* and, on the brief, *C. Michael Budlong*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Fusaini Mohammadu, appeals from the ruling of the trial court, *Ficeto*, *J.*, denying his postjudgment motion for modification of alimony and child support orders, rendered on remand following the decision of our Supreme Court in *Olson* v. *Mohammadu*, 310 Conn. 665, 81 A.3d 215 (2013). Additionally, in his amended appeal, the defendant challenges a subsequent ruling of the trial court, *Albis*, *J.*, that ordered him to pay the plaintiff, Marianne Olson,[1] $6002 in a previously found arrearage pursuant to an order he claimed had been suspended, and the court's ruling that granted the plaintiff's motion for appellate attorney's fees to defend the present appeal. We affirm the judgments of the trial court.

The following relevant facts and procedural history are set forth in the Supreme Court opinion. "The parties were married on June 7, 2001. During the marriage, the parties had one child together. In September, 2008, the plaintiff . . . who resided in Connecticut with [the child], filed a dissolution of marriage action against the defendant, who at that time resided in Florida. On August 5, 2009, the court [*Hon. Herbert Barall*, judge trial referee] rendered judgment dissolving the parties' marriage. In its orders contained in that judgment, the court ordered joint legal custody of the minor child with primary physical custody to the plaintiff and reasonable visitation rights to the defendant in Connecticut. The court further ordered the defendant to pay the plaintiff periodic alimony in the amount of $777 per week.[2] . . .

[1] The plaintiff's last name has been spelled as "Olsen" and "Olson" during these proceedings. In her complaint and her tax documents, submitted as exhibits at trial and the April 21, 2014 remand hearing, the plaintiff spelled her name "Olson."

[2] The court ordered that the alimony "shall be modifiable only as to amount" and "shall terminate upon the earliest of the happening of one of the following events . . . [the] death of either party . . . [the] [w]ife's remarriage; or . . . five (5) years from the date of dissolution."

In addition, the court ordered the defendant to pay child support in the following amounts: $334 per week and 66 percent of day care, extracurricular activities and unreimbursed medical and dental expenses for the benefit of the minor child. . . .

"On April 14, 2010, the defendant filed a motion to modify the alimony and child support order. The defendant filed an amended motion to modify on June 18, 2010. As the grounds for his amended motion, the defendant alleged a substantial change in circumstances in that he had relocated from Florida to Connecticut and, consequently, had obtained new employment at a reduced salary. At the modification hearing, the court [*Adelman*, *J.*] heard undisputed testimony that the defendant voluntarily left employment as a physician in Florida earning a salary of approximately $180,000 annually. The defendant testified that he voluntarily relocated to Connecticut in order to have a more meaningful relationship with his child. As a result of the relocation, the defendant's salary was reduced to approximately $150,000 annually. According to the defendant's testimony, the $150,000 salary is standard pay for someone of his experience in a comparable position in Connecticut.

"After the hearing, the trial court denied the defendant's motion for modification. In denying the motion, the trial court stated in its memorandum of decision that it relie[d] on the voluntary nature of the income change experienced by the defendant. . . . The defendant appealed from the trial court's decision to the Appellate Court." (Citation omitted; footnotes altered; internal quotation marks omitted.) Id., 667–69. "While the appeal was pending at the Appellate Court, the defendant filed a motion for articulation of the trial court's decision. . . . The trial court granted, in part, the motion for articulation and stated that [t]he court

did not consider the relocation to be a substantial change in circumstance[s] *because the move was a voluntary action* on the part of the defendant." (Emphasis in original; internal quotation marks omitted.) Id., 669.

This court affirmed the judgment of the trial court, concluding that the trial court properly determined that "a change in income resulting from a voluntary decision does not constitute a substantial change in circumstances." *Olson* v. *Mohammadu*, 134 Conn. App. 252, 261, 39 A.3d 744 (2012), rev'd, 310 Conn. 665, 81 A.3d 215 (2013). The defendant filed a petition for certification to appeal from the judgment of this court, which was granted by our Supreme Court. The Supreme Court held that "the Appellate Court improperly concluded that the defendant's voluntary relocation and income change necessarily precluded him from establishing a substantial change in circumstances." *Olson* v. *Mohammadu*, supra, 310 Conn. 670–71. The court reasoned as follows: "[T]he trial court should have taken into account the defendant's motivation for relocating in deciding the threshold issue of whether there was a substantial change of circumstances warranting modification. In other words . . . the trial court should have determined whether the defendant's alleged inability to pay was a result of his own extravagance, neglect, misconduct or other unacceptable reason . . . . Because the trial court made no finding on the culpability of the defendant's conduct, we conclude that the trial court incorrectly applied the law when it denied the defendant's motion for modification." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 680. Accordingly, the Supreme Court remanded the case to this court with direction to reverse the judgment of the trial court and to remand the case to the trial court for a new hearing on the defendant's motion for modification. Id., 686.

The rehearing on the defendant's motion for modification was held before Judge Ficeto on April 21, 2014. Both parties testified as to their financial circumstances beginning at the time of the dissolution judgment in August, 2009, and through the succeeding years up to and including the time of the rehearing in 2014. The parties each submitted financial affidavits that had been prepared in 2009 and 2014. The parties' tax returns for 2010, 2011 and 2012 also were admitted into evidence. During their closing arguments, counsel referenced proposed orders filed with the court. In those proposed orders, the plaintiff requested that there be no modification of the alimony and child support orders, whereas the defendant requested a modification that would decrease his support obligations. For 2010, the defendant requested the court to reduce his child support obligation from $334 per week to $237 per week, and to reduce the percentage of his payments for uninsured medical expenses and day care expenses from 66 percent to 55 percent. He additionally requested in his proposed orders that his alimony obligation be reduced from $777 per week to $120 per week. For 2011 and subsequent years, the defendant requested his child support obligation to be modified to $307 per week and his alimony obligation to be modified to $400 per week.

The court issued its memorandum of decision on May 14, 2014, and modified its ruling in a memorandum of decision filed August 11, 2014.[3] In its May 14, 2014 memorandum of decision, the court found that the defendant was employed in Florida until March, 2010, that he worked part-time in April and June, 2010,[4] and that he became employed full-time by Community

[3] The court modified its decision in response to the defendant's motion for reconsideration and reargument filed on June 2, 2014.

[4] According to the court, "[i]t was during this brief period of unemployment and part-time employment that [the defendant] filed his motion for modification of child support and alimony."

Health Center in New Britain on June 28, 2010, at a salary of $150,000. The court additionally found that he received from his new employer a sign-on bonus of $3000, as well as a payment of $3000 toward his relocation costs. The court found that the defendant worked additional hours at Middlesex Hospital in 2010. In a footnote in its memorandum of decision, the court noted that the defendant was no longer incurring costs for visitation expenses to and from Florida in 2010. Significantly, the court also found that "in the years subsequent to 2010, [the defendant's] income equaled or surpassed $180,000 and therefore there is no substantial change in circumstance in the years 2011, 2012 and 2013. [The defendant] is currently on track to exceed $190,000 in 2014."

In its August 11, 2014 memorandum of decision, the court further found that the defendant's net weekly income in 2009, at the time he was earning $180,000 in Florida, was $2587, as stated in his financial affidavit filed June 4, 2009. As of October 25, 2010, the date of the initial hearing on his motion for modification, the defendant reported his net weekly income to be $1998 on his October 25, 2010 financial affidavit. The court, however, found that the defendant had improperly deducted insurance premiums[5] and contributions to his health care account as " 'above the line' deductions." For that reason, the court determined that his net weekly income, as of October 25, 2010, was $2134.

After concluding that the defendant's net weekly income was reduced by $454, or 17.5 percent, the court denied the defendant's motion for modification: "When considering a motion for the modification of alimony, the court is permitted to consider the factors set forth

[5] In the August 5, 2009 judgment of dissolution, the plaintiff was required to maintain medical insurance through her place of employment for the benefit of the minor child.

in [General Statutes] § 46b-82 namely, the age, health, station, occupation, employability and the amount and sources of income of the parties. . . . The court has carefully considered the facts of this case, the relevant case law and the provisions of [General Statutes §§] 46b-82 and 46b-86 and declines to modify the defendant's support obligations." (Citation omitted; internal quotation marks omitted.)

The defendant appealed from the court's denial of his modification motion on September 29, 2014. Thereafter, on January 19, 2016, Judge Albis heard a number of postjudgment motions filed by both parties. The relevant motions for purposes of this appeal are the plaintiff's motion for contempt and/or for order, and the plaintiff's motion for appellate attorney's fees, both filed on September 10, 2015. In the court's memorandum of decision issued February 10, 2016, Judge Albis determined, inter alia,[6] that the defendant had not wilfully violated the court's April 4, 2013 order to pay the plaintiff an accumulated arrearage of $6002 for his share of child care expenses. Judge Albis found that the order "contained some uncertainty from the outset" and that the defendant had mistakenly believed that payment was suspended until all of his appeals had been decided. After stating that there was no automatic or court-ordered stay with respect to that obligation, Judge Albis ordered the defendant to pay the plaintiff the previously ordered arrearage of $6002 in consecutive monthly installments of $1000 until paid in full.

With respect to the plaintiff's motion for appellate attorney's fees, Judge Albis found that the plaintiff did not have sufficient liquid assets with which to pay her own legal fees. He further found that she did not have sufficient income to pay those fees without using a

[6] The remainder of the court's orders in the February 10, 2016 memorandum of decision have not been challenged by either party.

portion of the child support she received from the defendant, which would undermine the court's prior order of child support. Finally, Judge Albis found that the defendant's income enabled him to pay a portion of the plaintiff's legal fees. Accordingly, the court ordered the defendant to pay the plaintiff $10,000, in monthly installments of $1000, for the defense of the pending appeal. The defendant filed an appeal from Judge Albis' rulings on February 29, 2016, which was treated as an amended appeal by this court.

I

DEFENDANT'S MOTION FOR MODIFICATION

We initially set forth the well established standard of review and principles of law relevant to the defendant's claims pertaining to the denial of his motion to modify his support obligations. "The scope of our 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 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. . . . Nevertheless, we may reverse a trial court's ruling on a modification motion if the trial court applied the wrong standard of law. . . .

"[Section] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When, as in this case, the disputed issue is alimony [or child support], the applicable provision of the statute is § 46b-86 (a), which provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change

has occurred. . . . *To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it.* Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . .

"Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. . . . More specifically, these criteria, outlined in . . . § 46b-82, require the court to consider the needs and financial resources of each of the parties and their children, as well as such factors as the causes for the dissolution of the marriage and the age, health, station, occupation, employability and amount and sources of income of the parties. . . . The power of the trial court to modify the existing order does not, however, include the power to retry issues already decided . . . or to allow the parties to use a motion to modify as an appeal. . . . Rather, the trial court's discretion includes only the power to adapt the order to some distinct and definite change in the circumstances or conditions of the parties. . . .

"Thus, [w]hen presented with a motion for modification, a court must *first determine* whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . *Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the § 46b-82 criteria, make an order for modification.* . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties." (Citations

omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) *Olson* v. *Mohammadu*, supra, 310 Conn. 671–74.

A

Alimony

The defendant claims that the trial court abused its discretion in denying his motion to modify his alimony obligation "by failing to properly find net income and by failing to properly compare circumstances at the time of the remand to the judgment." Specifically, the defendant argues that the court "improperly identified the defendant's June 4, 2009 financial affidavit as the starting point of analysis when the proper starting point was the court's finding of net income in the judgment on August 5, 2009," and that the court improperly declined to reduce his alimony obligation "based on consideration of the [§] 46b-82 factors despite the fact that none of these factors were in evidence."

"[I]t is well settled that a court must base its alimony award on the available net income of the parties . . . ." *Zahringer* v. *Zahringer*, 124 Conn. App. 672, 689, 6 A.3d 141 (2010). "To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it." *Borkowski* v. *Borkowski*, 228 Conn. 729, 737–38, 638 A.2d 1060 (1994). In the present case, the last court order with respect to alimony was set forth in the August 5, 2009 dissolution judgment. Accordingly, the date of the dissolution judgment would be the starting point for the trial court's analysis. The motion for modification, as amended, was filed in June, 2010, and the initial hearing date on that motion was held on October 25, 2010. At that time, the parties submitted copies of financial affidavits that had been prepared for the dissolution trial in 2009, and

current 2010 financial affidavits for the hearing on the defendant's motion for modification.

After the court's 2010 ruling on the motion for modification was reversed; *Olson* v. *Mohammadu*, supra, 310 Conn. 667; a rehearing on the defendant's motion for modification was held on April 21, 2014. The parties submitted 2009 and 2014 financial affidavits, together with tax returns for 2010, 2011, and 2012. Because of the length of time between the filing of the defendant's motion for child support and alimony modification in 2010 and the rehearing on that motion in 2014, the trial court was directed to take into account the period between the date of the filing of the motion and the date that the motion was heard at the rehearing, which spanned a number of years. "The court may examine the changes in the parties' incomes and needs during the time the motion is pending to fashion an equitable award based on those changes." *Zahringer* v. *Zahringer*, supra, 124 Conn. App. 689. "[T]he financial awards in a marital dissolution case should be based on the parties' current financial circumstances to the extent reasonably possible. . . . [T]he proper date for determining income, for the purpose of deciding whether the plaintiff's current alimony award should be increased, decreased or remain the same, is the date of hearing on the motion to modify following the remand from our Supreme Court." (Citations omitted; internal quotation marks omitted.) Id., 688.[7]

[7] In the present case, our Supreme Court emphasized the applicability of the holding in *Zahringer* v. *Zahringer*, supra, 124 Conn. App. 672, for purposes of the remand hearing on the defendant's motion for modification. In *Olson* v. *Mohammadu*, supra, 310 Conn. 686 n.16, our Supreme Court stated: "We note that at oral argument before this court, both parties agreed that, if this court were to conclude that the trial court improperly denied the defendant's motion for modification, a rehearing on the modification motion would be appropriate. *In view of the time that has elapsed since the defendant filed his amended motion for modification, both parties further agreed that, if the trial court were to award a modification on rehearing, the court should follow the principles articulated in* Zahringer *v.* Zahringer, [*supra, 672*], *in fashioning an appropriate modification.* See

On appeal, the defendant claims that the court improperly determined that the parties' net weekly income, at the time of the dissolution judgment, was as represented in the parties' June 4, 2009 financial affidavits. Those were the affidavits submitted by the parties and relied on by Judge Barall at the time the dissolution judgment was rendered. At the rehearing held on April 21, 2014, the defendant submitted the plaintiff's June 4, 2009 financial affidavit as an exhibit, and the plaintiff submitted the defendant's June 4, 2009 financial affidavit as an exhibit, all without objection. Moreover, both parties were questioned as to the information provided in those financial affidavits. During the closing argument, plaintiff's counsel specifically referred to the defendant's June 4, 2009 financial affidavit. The defendant now argues, however, that it was improper for the court to rely on those financial affidavits because Judge Barall found the defendant's net weekly income to be $2674 at the time of the dissolution judgment, rather than $2587 as stated in his June 4, 2009 financial affidavit.[8] No such argument was made before the court at the April 21, 2014 rehearing.

Additionally, the defendant cites no case law or statutory authority in support of his argument. Further, the defendant has presented no persuasive reason why the trial court should not have been allowed to rely on exhibits that were properly admitted at the rehearing

id., 689 ('The retroactive award may take into account the long time period between the date of filing a motion to modify . . . and the date that motion is heard, which in this case spans a number of years. The court may examine the changes in the parties' incomes and needs during the time the motion is pending to fashion an equitable award based on those changes. The current alimony need not be uniformly retroactive, if such a result would be inequitable.')." (Emphasis added.)

[8] We note that the difference in the net weekly income amounts *is less than $100*. Further, in the transcript wherein Judge Barall explains the basis for his orders, he stated that he took into account the defendant's figure in his affidavit and made a slight adjustment for social security deductions.

on the defendant's motion for modification. "The accuracy of financial affidavits submitted at the time of dissolution has proven to be central to the issue of modification on appeal. . . . As a result, [o]ur cases have uniformly emphasized the need for full and frank disclosure in . . . [financial] affidavits. A court is entitled to rely upon the truth and accuracy of sworn statements required by . . . the Practice Book, and a misrepresentation of assets and income is a serious and intolerable dereliction on the part of the affiant which goes to the very heart of the judicial proceeding." (Citation omitted; internal quotation marks omitted.) *Fulton* v. *Fulton*, 156 Conn. App. 739, 746–47, 116 A.3d 311 (2015). For these reasons, the defendant's claim fails.

The defendant additionally claims that the court abused its discretion in denying his motion for alimony modification because it stated that it had considered the factors set forth in § 46b-82 "despite the fact that none of these factors were in evidence." The parties agree that the evidence presented at the April 21, 2014 rehearing related only to the financial circumstances of the parties. In fact, no less than three times, the defendant emphasizes in his appellate brief that neither party presented evidence as to the § 46b-82 factors that a court must consider if it has found a substantial change in financial circumstances.

The defendant's argument is without merit. First, the court never found, for purposes of the defendant's request to reduce his alimony obligation, that there had been a substantial change in either party's financial circumstances. The defendant's burden to establish a substantial change in financial circumstances was a condition precedent to the court's consideration of his motion to modify his weekly alimony obligation from $777 to $120. Only after the defendant satisfied that requirement could the court properly consider his motion to modify his spousal support obligation. *Olson*

v. *Mohammadu*, supra, 310 Conn. 674. Second, any failure to present evidence as to the § 46b-82 factors was a failure by the defendant to satisfy his burden to "demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it." (Internal quotation marks omitted.) Id., 672. It was neither the plaintiff's responsibility to provide, nor the court's responsibility to elicit, information as to those factors. On the basis of this record, we conclude that the court did not abuse its discretion in denying the defendant's motion to reduce his alimony obligation.

B

Child Support

The defendant claims that the trial court abused its discretion in denying his motion to modify his child support obligation because "the court improperly applied the Child Support Guidelines by overriding the definition of permissible deductions from gross income to calculate net income. Specifically, the court held that the defendant's deductions for insurance premiums and his health care account were not permissible deductions. This was plain error."

The defendant's analysis of this claim consists of a citation to a provision in the child support and arrearage guidelines and the statement that the defendant did not have a deduction for his health care account on his financial affidavit.[9] We conclude that the defendant's claim is inadequately briefed and that it would be speculative on the part of this court to determine that the trial court would have reduced the defendant's child support obligation if he had demonstrated that such deductions were appropriate.

[9] The defendant's statement is incorrect. The defendant's signed and dated October 25, 2010 financial affidavit lists a deduction of $41.96 per week attributable to "Health Care Acct."

We first note that the defendant has devoted less than one page to his argument on this claim. Where a claim is simply asserted but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. See *Bicio* v. *Brewer*, 92 Conn. App. 158, 172, 884 A.2d 12 (2005) (this court not required to review inadequately briefed claims); see also *Barros* v. *Barros*, 309 Conn. 499, 503 n.4, 72 A.3d 367 (2013) (claim deemed abandoned for inadequate briefing); *State* v. *Weston*, 164 Conn. 635, 636, 325 A.2d 457 (1973) (claim not briefed on appeal, although argued during oral argument, treated as abandoned); *Braham* v. *Newbould*, 160 Conn. App. 294, 312 n.15, 124 A.3d 977 (2015) (claim abandoned that was not properly briefed because "[i]t is not the role of this court to undertake the legal research and analyze the facts in support of a claim or argument when it has not been briefed adequately" [internal quotation marks omitted]).

The defendant's claim, even if deemed adequately briefed, also fails for the following reason. The court, in its memorandum of decision, as amended, stated: "The court has carefully considered the facts of this case, the relevant case law and the provisions of sections 46b-82 and 46b-86, and declines to modify the defendant's support obligations." Given the court's statement of the basis for its conclusion, it would be sheer speculation to assume that had the court credited the subject deductions it would have granted the defendant's motion to reduce his child support payments. When presented with the defendant's modification motion, the court had to first determine whether there had been a substantial change in the financial circumstances of one or both of the parties. Then, if the court found a substantial change in circumstances, it properly could consider the motion and, on the basis of the criteria set forth in General Statutes § 46b-84, it could

make an order for modification. *Fox* v. *Fox*, 152 Conn. App. 611, 621, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014). "[T]hese criteria, as outlined in . . . § [46b-84], require the court to consider the needs and financial resources of each of the parties and their children . . . ." (Footnote omitted; internal quotation marks omitted.) Id., 620–21.

The court did not specify which particular facts it considered to be determinative, nor did it cite the case law upon which it relied. The court mentioned statutory provisions, but did not specify which criteria in those statutes that it found to be most compelling in this case. The court could have provided a more thorough discussion of the basis for its denial, but it was not required to do so.[10] The court "need not, however, make explicit reference to the statutory criteria that it considered in making its decision or make express finding[s] as to each statutory factor. . . . Nor need it give each factor equal weight." (Citation omitted; internal quotation marks omitted.) *Dombrowski* v. *Noyes-Dombrowski*, 273 Conn. 127, 137, 869 A.2d 164 (2005). "We recognize the well established presumption that a court has acted correctly when entering its orders, and we will affirm a court's orders if the record contains sufficient evidence to support them." *Coury* v. *Coury*, 161 Conn. App. 271, 286, 128 A.3d 517 (2015). Here, the court's determinations are supported by the record. For all of these reasons, we conclude that the trial court did not abuse its discretion in denying the defendant's motion to reduce his child support obligation.

II

ORDER FOR ARREARAGE PAYMENT

The defendant's next claim is that Judge Albis improperly issued an order that required him to pay

[10] The defendant sought no articulation of the trial court's reasoning. See Practice Book § 66-5.

the plaintiff the sum of $6002, as set forth in a previous arrearage order, when the previous arrearage order had been suspended until all of the defendant's appeals were resolved. The following additional facts are necessary to the resolution of this claim.

On April 4, 2013, the court, *Carbonneau*, *J.*, entered the following order: "The defendant owes the plaintiff $6002, subject to any corrections, as his 66 [percent] of work related day care costs under the terms of the final judgment. Good faith payments shall be made within 60 days." This ruling was made after the defendant had appealed from Judge Adelman's 2010 denial of his motion for modification and after this court's decision affirming the trial court, but before the Supreme Court issued its decision on December 10, 2013, reversing this court's judgment and remanding the case back to this court with direction to remand the case to the trial court for a new hearing on the defendant's modification motion. The defendant maintained that the order to pay the $6002 arrearage was stayed because of the pending appeal. There were no good faith payments made by the defendant toward the $6002 day care expense arrearage.

On June 11, 2013, Judge Carbonneau, while presiding over a hearing on similar day care issues between the parties, referenced the pending Supreme Court appeal and discussed past due and future payments for day care expenses. Recognizing that the Supreme Court could issue a decision that would affect the percentage of such expenses owed by the defendant, Judge Carbonneau asked the parties if they could agree that "going forward, the parties will split fifty/fifty until we get some guidance from the Supreme Court. It may jump back up to 66 percent because those orders can only be altered by the Supreme Court at this point, but at least if you start at fifty/fifty, there would not be a great correction down the road depending on what the

Supreme Court does." After further remarks by counsel, Judge Carbonneau stated: "And clearly I am temporizing until we get some finality from the appeal process. The [defendant] is entitled to the appeal process. We will see how it goes. This gives you a plan forward." When questioned further by the plaintiff, Judge Carbonneau responded: "The past bills we'll hold in abeyance right now. You may make any argument that might pertain to that arrearage at a future time when we have the direction of the Supreme Court."

On September 10, 2015, which was nearly two years after the issuance of the Supreme Court's decision, the plaintiff filed a motion for contempt and/or order that would require the defendant to pay her the $6002 arrearage that had been found in April, 2013. The defendant claimed that Judge Carbonneau's "abeyance order" continued until all of his appeals had concluded, including the appeal that he had taken from Judge Ficeto's denial of his motion for modification after the April 21, 2014 rehearing. A hearing on the plaintiff's motion was held before Judge Albis on January 19, 2016. On February 10, 2016, he issued his memorandum of decision. Judge Albis concluded that Judge Carbonneau's "going forward . . . split fifty/fifty" ruling primarily was concerned with the future day care expenses, not the $6002 arrearage found in April, 2013, for past day care expenses.

Although Judge Albis did not find the defendant in contempt for a wilful violation of the arrearage order, because he credited the defendant's statement that he believed his appeals were "part of one continuous appeal process," Judge Albis nevertheless concluded that the "abeyance order" ended when the Supreme Court issued its remand decision and the trial court reconsidered and decided the modification motion. Judge Albis determined that there was no stay in place

with respect to the April, 2013 day care expense arrearage order, that the defendant's present appeal was new and distinct from his prior appeal to the Supreme Court, and that he was not excused from paying the plaintiff the previously ordered sum of $6002. Accordingly, the court ordered the defendant to pay the plaintiff $6002 in consecutive monthly installments of $1000 each. This ruling is the subject of the defendant's amended appeal.

The defendant's claim on appeal is that the court improperly "vacat[ed] a valid prior order of the trial court holding arrearage payments in abeyance." Specifically, the defendant argues that Judge Albis' determination should be reversed by this court because Judge Albis failed to follow the law of the case doctrine. We disagree.

Assuming arguendo that Judge Carbonneau's abeyance order was ambiguous as to whether it would remain in effect until the Supreme Court issued its decision or until all of the defendant's appeals had been resolved, this claim fails because the law of the case doctrine did not compel Judge Albis to follow the prior order. The law of the case doctrine provides that "[w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance." (Internal quotation marks omitted.) *Wasko* v. *Manella*, 87 Conn. App. 390, 395, 865 A.2d 1223 (2005). "A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the *same case*, upon a question of law." (Emphasis added; internal quotation

marks omitted.) *Wagner* v. *Clark Equipment Co.*, 259 Conn. 114, 130–31, 788 A.2d 83 (2002).

By the time the plaintiff's motion for contempt and/or order had been argued before Judge Albis, the Supreme Court's decision had been issued, the parties had participated in a rehearing on the defendant's modification motion, Judge Ficeto had denied the modification motion, and the defendant had filed another appeal with this court. Clearly, there were new circumstances for Judge Albis to consider. At this point, the April, 2013 order requiring the defendant to pay the $6002 arrearage for his share of unpaid child care expenses was several years old. We conclude that the ruling of Judge Albis was not improper.

III

APPELLATE ATTORNEY'S FEES

The defendant's final claim is that Judge Albis improperly granted the plaintiff's motion for appellate attorney's fees to defend the present appeal.[11] The defendant argues that the court erroneously determined that the plaintiff did not have sufficient liquid assets to pay her own fees because she had "substantial retirement assets" and her "financial situation has dramatically improved."

"[General Statutes §] 46b-62 (a) authorizes the trial court to award attorney's fees in a dissolution action when appropriate in light of the respective financial abilities of the parties and the equitable factors listed in § 46b-82. . . . [W]e [have] stated three broad principles by which these statutory criteria are to be applied. First, such awards should not be made merely because

[11] "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." *Pena* v. *Gladstone*, 168 Conn. App. 175, 187 n.10, 146 A.3d 51 (2016).

the obligor has demonstrated an ability to pay. Second, where both parties are financially able to pay their own fees and expenses, they should be permitted to do so. Third, where, because of other orders, the potential obligee has ample liquid funds, an allowance of [attorney's] fees is not justified. . . .

"A determination of what constitutes ample liquid funds . . . requires . . . an examination of the total assets of the parties at the time the award is made. . . . We have recognized, however, that [t]he availability of sufficient cash to pay one's attorney's fees is not an absolute litmus test . . . . [A] trial court's discretion should be guided so that its decision regarding attorney's fees does not undermine its purpose in making any other financial award. . . .

"Whether to allow [attorney's] fees, and if so in what amount, calls for the exercise of judicial discretion by the trial court. . . . An abuse of discretion in granting [attorney's] 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.) *Hornung* v. *Hornung*, 323 Conn. 144, 169–70, 146 A.3d 912 (2016).

In the present case, following a hearing on the plaintiff's motion for appellate attorney's fees, Judge Albis made the following findings: (1) the plaintiff did not have sufficient liquid assets with which to pay her own legal fees; (2) the plaintiff did not have sufficient income to pay those fees without using some of the child support payments she receives from the defendant, which would undermine the court's prior child support order; and (3) the income of the defendant would enable him to pay the sum of $10,000, payable in monthly installments of $1000, toward the plaintiff's appellate legal fees. The court was not persuaded by the defendant's

argument that the plaintiff's retirement assets constituted sufficient liquid assets that would enable the plaintiff to pay her own fees.[12] The record supports Judge Albis' findings, and we, therefore, conclude that he did not abuse his discretion in awarding the plaintiff appellate attorney's fees to defend the present appeal.

The judgments are affirmed.

In this opinion the other judges concurred.

HENRY FLOMO *v.* COMMISSIONER OF CORRECTION (AC 38010)

Alvord, Prescott and Harper, Js.

Syllabus

The petitioner, who had pleaded guilty to risk of injury to a child, sought a writ of habeas corpus. He claimed that his trial counsel rendered ineffective assistance for having failed to advise him properly about the immigration consequences of his plea, and that the trial court failed to ensure that he understood those consequences. The petitioner, who was a citizen of Liberia, had faced a possible sentence of forty-five years imprisonment on several charges that resulted from his sexual misconduct with a minor. The petitioner agreed to plead guilty to risk of injury to a child in exchange for the state's recommendation of a sentence of five years imprisonment, execution suspended after one year. During the court's canvass of the petitioner in the plea proceeding, the petitioner stated that he understood the possible immigration consequences of his guilty plea, and his trial counsel stated that he had discussed those consequences in detail with the petitioner. The court accepted the guilty plea, sentenced the petitioner in accordance therewith, and did not require him to register as a sex offender. At the habeas trial, the petitioner testified, inter alia, that when he entered the guilty plea, he was unaware of its immigration consequences and that his counsel had not discussed those consequences with him. The petitioner also testified that had he been advised that he likely would face deportation as a result of his plea, he would have rejected the plea and gone to trial. The petitioner's

[12] As noted by the court: "The defendant suggests that the plaintiff use her substantial retirement assets to pay her own legal fees for defending the appeal, even if it means incurring taxes and penalties for premature withdrawal. The plaintiff receives no current distributions from her retirement accounts."

trial counsel testified, inter alia, that he discussed with the petitioner the immigration consequences of the guilty plea, and that the petitioner was not concerned about deportation but, rather, with avoiding a conviction that involved misconduct of a sexual nature because there would be a stigma in his native country and in his culture attached to being a convicted sex offender. Counsel testified that his main focus, therefore, had been to minimize the petitioner's sentence and to enable him to avoid sex offender registration. The habeas court rejected the petitioner's testimony, credited that of his trial counsel, and concluded, inter alia, that the petitioner failed to establish that he was prejudiced by his counsel's allegedly deficient performance. The court rendered judgment denying the habeas petition and granted the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court correctly denied the petition for a writ of habeas corpus, that court having properly determined that the petitioner failed to demonstrate that he was prejudiced by his trial counsel's alleged deficient performance: the court's finding that the petitioner was concerned about the stigma attached to being a convicted sex offender and not with the immigration consequences of his plea was not clearly erroneous, as that finding was supported by trial counsel's testimony, and the petitioner's having avoided conviction as a sex offender and the stigma attached thereto by pleading guilty to the risk of injury charge; furthermore, the court was free to credit trial counsel's testimony, and to reject as not credible the petitioner's testimony that had he been advised that he likely would face deportation as a result of the plea, he would have rejected it and gone to trial instead, as the petitioner faced the possibility of a much longer sentence, the requirement that he register as a sex offender and the possibility of deportation had he lost at trial.

2. The habeas court properly denied the petitioner's due process claim that his plea was not made knowingly, intelligently and voluntarily because the trial court failed to ascertain that he understood the precise immigration consequences of his plea: contrary to the petitioner's assertion, the trial court was not constitutionally obligated to canvass him as to the possible immigration consequences of the plea, as those consequences were not a direct consequence of the plea, and they did not implicate constitutional concerns and were collateral in nature; moreover, the trial court substantially complied with the statutory (§ 54-1j) mandate that it not accept the petitioner's plea without first canvassing him to ensure that he fully understood its immigration consequences, that court having informed the petitioner, inter alia, that if he was not a United States citizen, his guilty plea could result in deportation, and the petitioner and his attorney having stated that they had discussed the possible consequences of the guilty plea.

Argued September 13—officially released November 8, 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 denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Erica A. Barber, assigned counsel, for the appellant (petitioner).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *David M. Carlucci*, special deputy assistant state's attorney, and *Leon F. Dalbec, Jr.*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Henry Flomo, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court improperly rejected his claims that (1) he received ineffective assistance of counsel due to his attorney's failure to advise him properly of the immigration consequences of his guilty plea in accordance with *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and (2) his guilty plea was not made knowingly, intelligently, and voluntarily because the trial court failed to ensure that he fully understood the precise immigration consequences of his plea. We conclude that the habeas court properly rejected the petitioner's ineffective assistance of counsel claim on the ground that he failed to demonstrate prejudice, as required under the test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Additionally, the petitioner's second claim fails as a matter of law because immigration and naturalization consequences

[1] The habeas court granted certification to appeal from the judgment.

of a plea, although often significant, are not of a constitutional magnitude for purposes of evaluating whether a plea is knowing and voluntary. See *State* v. *Malcolm*, 257 Conn. 653, 663 n.12, 778 A.2d 134 (2001). Accordingly, we affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. The petitioner is a citizen of Liberia who was admitted to this country in 2010 as a permanent legal resident.[2] He was arrested in July, 2013, on charges stemming from an incident that occurred on March 7, 2013. As found by the habeas court, at the time of the incident, "[t]he petitioner was a youth leader at the fifteen year old victim's church. The petitioner picked [the victim] up after she had requested a ride and took her to his apartment, where he had some physical contact with her, and asked her for sex, which she refused." The petitioner initially was charged with attempt to commit sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1), and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). If convicted on all three charges, the petitioner faced a possible maximum sentence of forty-five years of incarceration.

At a court appearance on October 15, 2013, the court informed the petitioner that the state had extended a plea offer, his defense counsel, Richard E. Cohen, would explain the offer to him, and he would have until November 12, 2013, to accept or to reject the plea offer. In a letter to the petitioner dated October 29, 2013, Cohen memorialized that he had spoken with the petitioner regarding the pending charges, the maximum penalty that he faced if convicted of those charges, and the state's plea offer. According to Cohen's letter, if the

[2] At the time of the habeas trial, the petitioner's mother, his three siblings, and his then ten year old son continued to reside in Liberia.

petitioner agreed to plead guilty to one count of sexual assault in the third degree, the state would recommend a sentence of five years, execution suspended after one year, followed by ten years of probation. Cohen further stated in the letter: "We also discussed immigration consequences. You would most likely be deported after serving your sentence." He ended the letter as follows: "I am inclined to advise you to accept the offer, although I will try to obtain a better offer."

Just prior to the petitioner's November 12, 2013 report back date, the state changed the terms of the plea offer. Instead of requiring the petitioner to plead guilty to sexual assault in the third degree, the state offered to recommend a plea agreement to the risk of injury count. Counsel met with the petitioner to discuss this new plea offer, but, as reported to the court on the record, the petitioner "remained persistent and consistent" that he did not commit any of the charged offenses. Having rejected the state's plea offer at that time, the court placed the matter on the docket for a trial.

Subsequently, on February 6, 2014, the parties appeared before the court, *Alexander*, *J.*, having reached a plea deal. Pursuant to the new agreement, in exchange for the petitioner's guilty plea, the state agreed to file a substitute information charging the petitioner only with risk of injury to a child in violation of § 53-21 (a) (1),[3] and to recommend a sentence of five

[3] The original information had charged the petitioner with risk of injury to a child under subdivision (2) of subsection (a) of § 53-21, which criminalizes contact with the intimate parts of a child in a sexual or indecent manner and is a class B felony. By contrast, subdivision (1) of subsection (a) of § 53-21 does not require proof of misconduct of a sexual nature and is a class C felony. Furthermore, by pleading to risk of injury under § 53-21 (a) (1) rather than § 53-21 (a) (2), the petitioner would avoid mandatory registration as a sex offender in accordance with General Statutes § 54-251 (a). See *State* v. *Davenport*, 127 Conn. App. 760, 766, 15 A.3d 1154 (2011); see also General Statutes § 54-250 (2) (providing that "[c]riminal offense against a victim who is a minor," as term is used in sex offender registry statute § 54-251 [a], includes violation of "subdivision [2] of subsection [a] of section 53-21").

years of incarceration, suspended after one year, followed by three years of probation with special conditions. Following a plea canvass, the court accepted the petitioner's guilty plea under the *Alford* doctrine[4] to the risk of injury charge and sentenced him in accordance with the terms of the plea agreement.

As part of the plea canvass, the court inquired whether the petitioner knew that there were potential immigration consequences of his plea. The following colloquy occurred:

"The Court: If you are not a citizen, a conviction of any crime could result in deportation, exclusion from admission, denial of your naturalization rights pursuant to the laws of the United States. Do you understand that consequence, if it applies to you?

"The Petitioner: Yes, Your Honor.

"The Court: Mr. Cohen, have you discussed that consequence with [the petitioner], if it applies?

"[Defense Counsel]: I did. It does apply, and we've discussed this several times in great detail, so he is aware that there could be some immigration issues here.

"The Court: All right. Do you need to ask your lawyer anything more about that issue at all before I go forward, or are you all set?

"The Petitioner: Yeah.

"The Court: Take a minute. Are you all set?

"The Petitioner: Yeah, I'm all set, Your Honor."

On May 23, 2014, the Department of Homeland Security initiated removal proceedings against the petitioner. On July 10, 2014, the United States Immigration

[4] See *North Carolina* v. *Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Court adjudicated the petitioner to be removable from the United States on the basis of his commission of a removable offense. The petitioner appealed from that decision to the Board of Immigration Appeals (board), which vacated the decision because, in determining whether the petitioner committed a removable offense, the immigration judge had failed to consider a recent United States Supreme Court decision regarding the proper categorization of criminal offenses. See *Descamps* v. *United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). The board remanded the matter for further proceedings. On December 16, 2015, the Immigration Court rendered a new decision in which it concluded that the petitioner had committed a removable offense and that he was ineligible for relief from removal. According to the Immigration Court, any violation of § 53-21 qualifies as a crime of child abuse, child neglect, or child abandonment for immigration purposes and, as such, constitutes a removable offense. It ordered that the petitioner be removed to Liberia.[5]

[5] The petitioner's counsel indicated in her brief to this court that the petitioner has since been deported to Liberia. As a result of that representation, we asked the parties to be prepared to address at oral argument before this court, inter alia, whether the petitioner's deportation rendered the present appeal moot pursuant to our Supreme Court's holding in *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006). In *Aquino*, the defendant, who had been residing illegally in the United States, appealed from the trial court's denial of his motion to withdraw a guilty plea. Id., 294. In his motion, he had claimed that his plea was not knowingly and voluntarily made because counsel never advised him that he faced almost certain deportation as a result of the plea. Id., 297. Our Supreme Court determined that the appeal was moot because the defendant was deported during the pendency of the appeal, and there was an "absence of any evidence that the defendant's guilty plea was the sole reason for his deportation . . . ." Id., 298.

Here, both parties argued that the present appeal is not moot because the record clearly reflects that the petitioner's guilty plea was the sole basis for his removal and, therefore, there was practical relief that could be afforded if this court were to vacate his plea. The parties' assertions are supported by the record. Our review of the record further shows that the petitioner apparently had no other criminal record that would bar his reentering this country legally. See *Quiroga* v. *Commissioner of Correction*, 149 Conn. App. 168, 174–75, 87 A.3d 1171 (finding appeal moot because even

On August 1, 2014, the petitioner filed the underlying petition for a writ of habeas corpus. An amended petition was filed on September 23, 2014. The amended petition contained two counts. Count one alleged a due process violation, claiming that the petitioner's plea was not made knowingly, intelligently, and voluntarily because he did not fully understand the immigration consequences of his plea, including the likelihood of deportation. Count two alleged that his trial counsel had provided ineffective assistance by, inter alia, failing to adequately research the immigration consequences of the plea or to advise the petitioner about potential consequences, and by not negotiating a plea that would have avoided the possibility of deportation.[6]

A trial on the petition for habeas corpus was conducted by the court on November 18, 2014. The petitioner submitted a pretrial memorandum of law, and both parties submitted posttrial briefs. In addition to his own testimony, the petitioner presented testimony from Cohen; Attorney Justin Conlon, an expert on immigration law; Carlene Davis, a counselor supervisor at Robinson Correctional Institution; and Charlotte Neizer, the petitioner's fiancée. The respondent, the Commissioner of Correction, did not call any witnesses.

At the habeas trial, the petitioner testified that he was unaware of the immigration consequences of his plea at the time he entered it. He stated that he never

if immigration court predicated deportation order exclusively on larceny conviction challenged by petitioner, he still could not obtain any practical relief because, as he acknowledged before habeas court, he would be permanently barred from reentering country legally because of prior narcotics convictions), cert. denied, 311 Conn. 950, 91 A.3d 462 (2014). Accordingly, on the basis of the record before us, we conclude that the present appeal is not moot, despite the petitioner's deportation.

[6] The petitioner also alleged that counsel was ineffective because he failed to adequately advise the petitioner about the length of time he actually would have to serve under the terms of the plea agreement. He later withdrew that aspect of his ineffective assistance claim, however, in his posttrial brief.

received any letter from Cohen explaining that he was most likely to be deported if he accepted the terms of the initial plea offer. He also stated that, at the time he spoke with Cohen about accepting the later plea deal, Cohen never discussed the immigration consequences of the plea or informed him about the likelihood of deportation. He claimed that he did not believe there was any significant chance of deportation at the time he entered his *Alford* plea. The petitioner initially testified that he first learned he might have immigration consequences when he applied for and was denied transitional supervision. His habeas counsel then asked him if he remembered the court telling him during the plea canvass that there may be immigration consequences to his plea and whether that may have been when he first learned of such consequences. The petitioner responded yes, but suggested that he had no idea what the judge meant. Counsel asked the petitioner if he remembered Cohen saying during the plea canvass that he had had several discussions with the petitioner about immigration consequences. The petitioner said he remembered that, but stated that when he tried to raise his hand to address the court on the topic, Cohen had stopped him. The petitioner was asked: "If you had been told by [Cohen] that pleading guilty to risk of injury to a child under the terms of the offer that was being presented to you would've meant you pled guilty to a crime of child abuse with a near certain chance of deportation, would you have accepted the plea offer?" The petitioner responded: "No, sir."

Cohen testified, consistent with what he stated during the plea canvass, that he had discussed the immigration consequences of a guilty plea with the petitioner several times, including the potential for deportation. Cohen admitted that he did not consult with an immigration attorney or retain an immigration attorney with whom the petitioner could consult, but he testified that his

understanding was always that there was a distinct possibility that the petitioner could be deported if he pleaded guilty to any of the pending charges, and he communicated that to his client. Cohen also explained during his testimony that the petitioner "was not concerned about going back to Liberia" and was "pretty emphatic" on that point. According to Cohen, "he had no problems with . . . the deportation aspect. He said he didn't care." Cohen testified that the petitioner's primary concern was with avoiding a conviction that involved misconduct of a sexual nature because there would be a stigma attached to being a convicted sex offender, both "in his native country and in his culture." Therefore, Cohen's main focus during plea negotiations had been to minimize the petitioner's sentence and to enable the petitioner to avoid sex offender registration, which he accomplished.

The habeas court issued a memorandum of decision on May 5, 2015. The court found credible Cohen's testimony that he had discussed with the petitioner the immigration consequences of his plea and that he had told him that he would "most likely" be deported. The court also credited Cohen's testimony that the petitioner was not concerned with deportation. The court found that the petitioner's primary goals in obtaining a plea bargain "were to avoid jail time and to eliminate any charge of a sexual nature," and that he accomplished both goals by entering a plea to risk of injury under § 53-21 (a) (1). The court expressly rejected the petitioner's testimony that his counsel had failed to discuss the immigration consequences of his plea with him and that he had no idea he might be deported as a result.

Rather than analyze whether Cohen's performance was deficient under the standard set forth in *Padilla* v. *Kentucky*, supra, 559 U.S. 356, the court instead

focused its analysis on whether the petitioner had established that he was prejudiced by his counsel's alleged deficient performance. The court concluded that he had not met that burden, stating in relevant part: "Here, the court finds that the petitioner was not concerned about the immigration consequences of his plea, but rather the stigma attached to a conviction for a sexual assault of a minor, and reducing his jail sentence. The plea agreement that the petitioner accepted took into account those concerns. Additionally, the petitioner has family in Liberia, including his son, mother and siblings. He presented no credible evidence to prove that it would have been a rational decision for him to reject a very favorable plea deal in favor of going to trial and facing decades in prison after which the petitioner would still likely be deported."

The court also rejected, albeit in summary fashion, the petitioner's claim that his plea had not been knowingly or intelligently made. It appears that the court based its decision primarily on the fact that the petitioner's claim was grounded upon the same evidence as the ineffective assistance claim, in particular the petitioner's testimony at the habeas trial that he did not understand the probability of his deportation at the time he entered his plea. This appeal followed.

I

We turn first to the petitioner's claim that the habeas court improperly rejected his claim that he received ineffective assistance because his counsel failed to advise him adequately of the immigration consequences of his guilty plea in accordance with *Padilla* v. *Kentucky*, supra, 559 U.S. 356.[7] Because we conclude that

[7] "In *Padilla*, the United States Supreme Court considered whether advising a noncitizen criminal defendant of the possible deportation consequences of a guilty plea falls within the scope of representation required of criminal defense attorneys by the sixth amendment to the federal constitution and concluded that it did. . . . The court reasoned that changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal convic-

the habeas court properly determined that the petitioner had failed to demonstrate that he was prejudiced by counsel's allegedly deficient performance, we reject the petitioner's claim.

We begin our analysis with the legal principles that govern our review of the petitioner's claim. "A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings.[8] . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . .

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 687. Under *Strickland*,

tion. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. . . . The court continued: We have long recognized that deportation is a particularly severe penalty . . . but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature . . . deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . . And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it most difficult to divorce the penalty from the conviction in the deportation context. . . . Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. . . . The court thus concluded that advice regarding deportation is not categorically removed from the ambit of the [s]ixth [a]mendment right to counsel." (Citations omitted; internal quotation marks omitted.) *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 101–102, 111 A.3d 829 (2015).

[8] It is well settled that "critical stages" include those related to the entering of a guilty plea. See *Missouri* v. *Frye*, 566 U.S. 134, 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

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. . . . For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Citations omitted; footnote added; internal quotation marks omitted.) *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 100–101, 111 A.3d 829 (2015); see also *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (modifying *Strickland* prejudice analysis in cases in which petitioner entered guilty plea). "It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier." *Lewis* v. *Commissioner of Correction*, 165 Conn. App. 441, 451, 139 A.3d 759 (2016), citing *Strickland* v. *Washington*, supra, 697 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner]").

"The [ultimate] conclusions reached by the [habeas] court in its decision [on 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. . . . 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. . . . [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.) *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 784, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009). A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court "on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude." (Internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 268, 112 A.3d 1 (2015).

Turning to the present case, the habeas court elected not to decide whether Cohen's performance was deficient in the present case. Rather, it denied the habeas petition on the basis of its determination that the petitioner's ineffective assistance claim failed on the prejudice prong of the *Strickland-Hill* test. According to the habeas court, even if the petitioner could satisfy the performance prong by demonstrating that Cohen had not thoroughly researched or competently advised him of the immigration consequences of his plea, including the likelihood of deportation, he nonetheless failed to show that, but for Cohen's deficient performance, he reasonably would have elected to reject the plea agreement offered by the state and would have insisted on going to trial. We conclude that the habeas court's determination is both legally and logically correct and supported by the record.

To satisfy the prejudice prong, the petitioner had the burden to show that, absent counsel's alleged failure to advise him in accordance with *Padilla*, he would have rejected the state's plea offer and elected to go

to trial. See *Hill* v. *Lockhart*, supra, 474 U.S. 59. In evaluating whether the petitioner had met this burden and evaluating the credibility of the petitioner's assertions that he would have gone to trial, it was appropriate for the court to consider whether "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla* v. *Kentucky*, supra, 559 U.S. 372. The habeas court made an explicit finding that the petitioner "was not concerned about the immigration consequences of his plea, but rather the stigma attached to a conviction for a sexual assault of a minor, and reducing his jail sentence." That finding is not clearly erroneous because it is supported by Cohen's testimony at the habeas trial that the petitioner had been adamant throughout their many discussions that he did not care about being deported to Liberia and that his real concern was in avoiding the cultural stigma associated with a conviction involving misconduct of a sexual nature. The court was free to credit Cohen's testimony that the petitioner was not concerned with the immigration consequences of his plea and that he simply wanted to avoid the potential of a conviction that would require him to register as a sex offender, which he accomplished by pleading to the risk of injury charge. The court similarly was free to reject the petitioner's testimony at the habeas trial that he would have rejected the plea and gone to trial had he been advised that he likely would face deportation as a result of his plea. The court could have found that testimony not credible and unreasonable, particularly in light of its rejection of the petitioner's assertion that his counsel had never discussed possible immigration consequences with him, and because the petitioner faced the real possibility, if he had chosen to go to trial and lost, of receiving a much longer sentence, being required to register as a sex offender, and deportation. It is simply not the role of this court on appeal to second-guess credibility

determinations made by the habeas court. *Martin* v. *Commissioner of Correction*, 141 Conn. App. 99, 104, 60 A.3d 997, cert. denied, 308 Conn. 923, 94 A.3d 638 (2013).

In sum, we are convinced that the habeas court properly determined that the petitioner failed to meet his burden of demonstrating prejudice under *Strickland*.[9] Because the petitioner failed to demonstrate that he was prejudiced by his counsel's alleged deficient performance, the habeas court correctly denied his petition for a writ of habeas corpus with respect to his ineffective assistance of counsel claim.

II

The petitioner also claims that his guilty plea to risk of injury to a child was not made knowingly, intelligently, and voluntarily because of the trial court's failure to ascertain whether the petitioner fully understood

[9] At oral argument before this court, the petitioner seemed to suggest that we should view counsel's purported failure to properly advise the petitioner regarding the near certainty of deportation in the present case as something akin to a structural error that should have precluded resolution of the petitioner's claim solely on the basis of his failure to satisfy *Strickland*'s prejudice prong. We are unconvinced.

"A structural error creates a defect in the trial mechanism such that, while it is virtually impossible to pinpoint the exact harm, it remains abundantly clear that the trial process was flawed significantly. For this reason, [e]rrors of this magnitude are per se prejudicial and require that the underlying conviction be vacated." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lopez*, 271 Conn. 724, 739, 859 A.2d 898 (2004). "Structural [error] cases *defy analysis by harmless error standards* because the entire conduct of the trial, from beginning to end, is *obviously* affected . . . . This court has found error to be structural only when the error renders a trial fundamentally unfair and *is not susceptible to a harmless error analysis* . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 504–505, 903 A.2d 169 (2006).

Claims regarding a violation of the standards set forth in *Padilla* simply do not rise to the level of structural error. There may be instances, as in the present case, in which an alien criminal defendant is not particularly concerned with deportation or, in fact, may even wish to return to his native country. In such cases, a defense counsel's failure to properly convey immigration consequences will not play a significant role in the defendant's decision to accept a plea, and, thus, any error would be harmless. We cannot conclude that *Padilla* claims generally will be unsusceptible to harmless

the precise immigration consequences of his plea, specifically, the near certitude of his deportation to Liberia. The petitioner suggests that the trial court had an independent obligation, distinct from his defense counsel's obligation under *Padilla*, to ensure that the petitioner was fully aware of all potential immigration consequences of a guilty plea, including the relative likelihood of deportation in his particular case, and that the court failed in this obligation. We find the petitioner's arguments unpersuasive and are bound by precedent of our Supreme Court holding that courts are not *constitutionally* obligated to canvass a defendant regarding the immigration consequences because they are not a direct consequence of a guilty plea. See *State* v. *Malcolm*, supra, 257 Conn. 663 n.12. "The failure to inform a defendant as to all possible indirect and collateral consequences does not render a plea unintelligent or involuntary in a constitutional sense." *State* v. *Gilnite*, 202 Conn. 369, 383 n.17, 521 A.2d 547 (1987).[10]

We begin our analysis by first setting forth the law governing the entry of guilty pleas. As established by the United States Supreme Court in *Boykin* v. *Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), "unless a plea of guilty is made knowingly and voluntarily, it has been obtained in violation of due process and is therefore voidable. . . . A plea of guilty is, in effect, a conviction, the equivalent of a guilty verdict by

error analysis, a standard that generally is applied whenever assessing claims of constitutional violations. Id., 505.

[10] We note that the respondent argued in his summation before the habeas court that the petitioner's claim was procedurally defaulted and, thus, should not properly be considered by the court. The respondent, however, never raised procedural default in his response to the habeas petition, the habeas court made no findings with respect to this argument, and the respondent has not pursued it on appeal. See *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 479 n.2, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008). Accordingly, we do not reach the issue of whether this claim is one that is subject to the defense of procedural default.

a jury. . . . In choosing to plead guilty, the defendant is waiving several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. . . . These considerations demand the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences. . . . We therefore require the record affirmatively to disclose that the defendant's choice was made intelligently and voluntarily." (Citations omitted; internal quotation marks omitted.) *State* v. *Andrews*, 253 Conn. 497, 502–503, 752 A.2d 49 (2000).

"The *Boykin* constitutional essentials for the acceptance of a plea of guilty are included in our rules and are reflected in Practice Book §§ [39-19 and 39-20]. . . . Those rules provide that the trial court must not accept a guilty plea without first addressing the defendant personally in open court and determining that the defendant fully understands the items enumerated in § 39-19, and that the plea is made voluntarily pursuant to § 39-20. *There is no requirement, however, that the defendant be advised of every possible consequence of such a plea.* . . . Although a defendant must be aware of the direct consequences of a plea, the scope of direct consequences is very narrow." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 504.

Immigration consequences of a plea are among those that our Supreme Court already has indicated are collateral in nature and, therefore, cannot implicate the constitutional concerns of *Boykin*.[11] In *State* v. *Malcolm*, supra, 257 Conn. 653, the issue before the court was whether a trial court properly had granted a defendant's

[11] The petitioner's counsel conceded at oral argument before this court that this is the current state of the law in Connecticut.

motion to withdraw his guilty plea on the ground that the court had failed specifically to mention all three immigration and naturalization consequences set forth in General Statutes § 54-1j, which imposes a statutory requirement that trial courts not accept a guilty or nolo contendere plea without first canvassing the accused to ensure that he or she fully understands the immigration consequences of the plea.[12] Our Supreme Court concluded that, just as with the canvass requirements set forth in Practice Book § 39-19 to ensure that a plea is voluntary, only substantial compliance with § 54-1j, not a verbatim reading of the statutory language, is required. Id., 661–63. In reaching that conclusion, the court also noted: "Although we do not mean to minimize the potential impact of the immigration and naturalization consequences of a plea, *they are not of constitutional magnitude*: The statutory mandate [of § 54-1j] . . . cannot transform this collateral consequence into a direct consequence of the plea. It can only recognize that this collateral consequence is of

[12] General Statutes § 54-1j provides: "(a) The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization, pursuant to the laws of the United States. If the defendant has not discussed these possible consequences with the defendant's attorney, the court shall permit the defendant to do so prior to accepting the defendant's plea.

"(b) The defendant shall not be required at the time of the plea to disclose the defendant's legal status in the United States to the court.

"(c) If the court fails to address the defendant personally and determine that the defendant fully understands the possible consequences of the defendant's plea, as required in subsection (a) of this section, and the defendant not later than three years after the acceptance of the plea shows that the defendant's plea and conviction may have one of the enumerated consequences, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty."

such importance that the defendant should be informed of its possibility." (Emphasis added; internal quotation marks omitted.) Id., 663 n.12.

In the present case, it is undisputed that the trial court substantially complied with § 54-1j. The court informed the petitioner that if he was not a citizen of the United States, pleading guilty to the risk of injury charge could result "in deportation, exclusion from admission, [and] denial of your naturalization rights pursuant to the laws of the United States." The court asked the petitioner whether he had discussed these possible consequences with his attorney, and the petitioner answered in the affirmative. Counsel also indicated to the court that he had discussed the consequences with the petitioner "several times in great detail . . . ." The court asked the petitioner if he wished to consult further with his attorney about "anything more about that issue at all before I go forward," to which the petitioner responded that he was "all set . . . ." A court is permitted to rely upon a defendant's answer given in response to a plea canvass. See *State* v. *Johnson*, 253 Conn. 1, 40, 751 A.2d 298 (2000), citing *Bowers* v. *Warden*, 19 Conn. App. 440, 443, 562 A.2d 588, cert. denied, 212 Conn. 817, 565 A.2d 534 (1989).

Although the petitioner urges that the United States Supreme Court in *Padilla* rejected as an analytical tool evaluating whether immigration consequences are direct versus collateral, it did so only in the context of an ineffective assistance claim, which implicates a petitioner's sixth amendment right to counsel. See *Padilla* v. *Kentucky*, supra, 559 U.S. 366. The present claim involves whether the trial court properly ensured that the plea was knowing and voluntary and, thus, in conformance with those rights identified in *Boykin*, which did not include protection of the petitioner's right to

counsel.[13] *Padilla*, therefore, is not directly applicable. Accordingly, we are bound by the Supreme Court's prior rulings, unless reversed or modified, that immigration consequences are collateral to a guilty plea and, thus, a court is not constitutionally required to canvass a defendant regarding immigration consequences in order to ensure that a plea is knowingly and voluntarily made. See *Anderson* v. *Commissioner of Correction*, 148 Conn. App. 641, 645, 85 A.3d 1240 ("[i]t is axiomatic that this court, as an intermediate body, is bound by Supreme Court precedent and [is] unable to modify it" [internal quotation marks omitted]), cert. denied, 311 Conn. 945, 90 A.3d 976, cert. denied sub nom. *Anderson* v. *Dzurenda*, 574 U.S. 883, 135 S. Ct. 201, 190 L. Ed. 2d 155 (2014). We conclude that the habeas court properly denied the petitioner's due process claim that his plea was not knowingly and voluntarily made.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* WILLIAM ANDRIULAITIS
(AC 38367)

Lavine, Keller and Flynn, Js.

Syllabus

Convicted of the crime of disorderly conduct in connection with an incident during which the defendant prevented his adult daughter and a police

[13] The fundamental rights discussed in *Boykin* v. *Alabama*, supra, 395 U.S. 243, were the fifth amendment privilege against self-incrimination, and the sixth amendment rights to a jury trial and to confront one's accusers. See *State* v. *Fagan*, 280 Conn. 69, 123–24, 905 A.2d 1101 (2006) (*Vertefeuille*, *J.*, dissenting), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). Those rights are applicable to state criminal proceedings pursuant to the due process clause of the fourteenth amendment. See *State* v. *West*, 274 Conn. 605, 622 n.26, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005); see also *State* v. *Moore*, 293 Conn. 781, 784 n.2, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010).

officer from entering the family residence to retrieve the daughter's belongings by yelling profanities at her in an angry and visibly threatening manner, the defendant appealed to this court. He claimed that the trial court improperly failed to explicitly find that his conduct was grossly offensive under contemporary community standards. *Held* that the evidence adduced at trial was sufficient to support the defendant's conviction of the crime of disorderly conduct, as a rational fact finder could have concluded that the defendant intended to interfere with his daughter's lawful request to retrieve her belongings through conduct that was grossly offensive under contemporary community standards when he subjected her to an angry, threatening tirade of profanity and untrue statements, and he stood in the entrance hallway near the door, thus preventing her from entering the residence; moreover, the defendant failed to rebut the presumption that the trial court knew the law and applied it correctly to its determination that the defendant's conduct was disorderly within the meaning of the applicable statute (§ 53a-182 [a] [2]).

Argued September 14—officially released November 8, 2016

Procedural History

Substitute information charging the defendant with two counts of the crime of criminal lockout and with the crime of disorderly conduct, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, and tried to the court, *Schuman, J.*; verdict and judgment of guilty of disorderly conduct, from which the defendant appealed to this court. *Affirmed.*

Rose Longo-McLean, with whom, on the brief, was *John R. Williams*, for the appellant (defendant).

Lisa Riggione, senior assistant state's attorney, with whom were *Judith Dicine*, supervisory assistant state's attorney, and, on the brief, *Brian Preleski*, state's attorney, and *Brett R. Aiello*, special deputy assistant state's attorney, for the appellee (state).

Opinion

FLYNN, J. In *State* v. *Indrisano*, 228 Conn. 795, 640 A.2d 986 (1994), our Supreme Court applied an interpretive gloss to certain provisions of the disorderly conduct

statute, General Statutes § 53a-182,[1] in order to preserve their constitutionality. At issue in this appeal is the gloss providing that the phrase "offensive or disorderly conduct" in § 53a-182 (a) (2) means "conduct that is grossly offensive, under contemporary community standards, to a person who actually overhears it or sees it." Id., 818. The defendant, William Andriulaitis, appeals from the judgment of conviction, rendered after a trial to the court, of disorderly conduct in violation of § 53a-182 (a) (2). On appeal, the defendant claims that there was insufficient evidence to establish beyond a reasonable doubt that he engaged in conduct that was "offensive or disorderly" under the standard set forth in *Indrisano*, and that the court improperly failed to consider the *Indrisano* gloss in its deliberations because it did not reference the gloss when explaining the evidentiary and factual bases for its guilty verdict. The court, however, is presumed to have applied the proper legal standard in arriving at its legal conclusions, and the defendant has not identified any basis in the record to rebut that presumption. In any case, the defendant's argument that his conviction should be reversed simply because the court did not reference the *Indrisano* gloss when announcing its verdict misapprehends this court's standard of review for sufficiency of the evidence claims. Our review, by long-standing precedent, focuses on whether, in light of the entire evidentiary record together with all reasonable inferences that may be drawn therefrom, a rational fact finder could find that the state proved all of the necessary elements of the crime charged beyond a reasonable doubt. We conclude that the evidence adduced at trial meets this standard and, accordingly, affirm the defendant's conviction.

[1] General Statutes § 53a-182 (a) provides in relevant part: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (2) by offensive or disorderly conduct, annoys or interferes with another person . . . ."

The record reveals the following facts and procedural history. The defendant lived at 61 Curtiss Road in Terryville with his wife, Tracy Andriulaitis, and their daughter, Kalie Andriulaitis. The defendant had physically abused Kalie on a consistent basis while she was growing up, and their relationship was strained. In the fall of 2012, Kalie moved some of her belongings out of 61 Curtiss Road in order to attend college at the University of Rhode Island. In early 2013, prior to the start of Kalie's second semester as a freshman, the defendant informed Kalie that her mother, who had been diagnosed with cancer approximately five years earlier, had slipped into a coma. Kalie returned from college and visited her mother in the hospital every day, and slept at 61 Curtiss Road every night, for about a week. On February 9, 2013, her mother died. The evening her mother died, the defendant physically assaulted Kalie and her grandfather in the hospital.

The following day, Kalie, fearing for her safety, obtained a police escort to accompany her to 61 Curtiss Road to collect her belongings. Officer Michael Smegielski of the Plymouth Police Department met Kalie, as well as a few of Kalie's friends and family members, at 61 Curtiss Road. At that time, the defendant was present inside the residence with his mother and Mary Wysocki, a woman with whom the defendant had a long-standing close, personal relationship. Officer Smegielski arrived with Kalie and knocked on the front door, at which point the defendant instructed his mother and Wysocki "to stay in [an upstairs bedroom] and lock the door." When no one answered the front door, Kalie, using a key she had obtained from inside a vehicle in the garage, partially opened a door to the residence that was inside the garage, but did not enter because she saw the defendant inside.

Officer Smegielski, whose testimony the court credited at trial, testified that he called out to the defendant,

intending to speak with him prior to Kalie entering the residence in order to avoid a confrontation. Officer Smegielski further testified that the defendant appeared from a room in the hallway and approached the door. According to Officer Smegielski, he was "angry" and was "shouting profanities," including "F*** you. She doesn't live here. I don't want her here." Officer Smegielski further testified that, at that point, he instructed Kalie to close the door, not to enter the home, and to "reconvene [with him] outside the garage [to] figure out what's going on." As a result of the defendant's conduct, Kalie never entered into 61 Curtiss Road and never retrieved her belongings.

The defendant was charged in a substitute long form information with disorderly conduct in violation of § 53a-182[2] and two counts of criminal lockout in violation of General Statutes § 53a-214. Following a trial,[3] the court found the defendant guilty of disorderly conduct and not guilty on the two counts of criminal lockout. The court imposed a sentence of three months imprisonment, execution suspended, and one year of probation. The court explained its reasoning for finding the defendant guilty of disorderly conduct, in relevant part, as follows: "[A] key piece of evidence in my mind was the testimony of . . . Wysocki quoting the defendant as saying before Kalie came up to the house, the

[2] Although the substitute long form information does not indicate under which subdivision of § 53a-182 (a) the defendant was charged, it specifically alleges that on February 10, 2013, the defendant, with the intent to cause inconvenience, annoyance or alarm, "did *annoy or interfere* with Kalie . . . by denying her access to her dwelling unit and personal possessions," which tracks the language of § 53a-182 (a) (2). (Emphasis added.) See footnote 1 of this opinion. Furthermore, the court found the defendant guilty of disorderly conduct by relying on the language of § 53a-182 (a) (2), although it did not specifically reference that subsection when explaining its verdict, and both parties in this appeal understand this case as arising under § 53a-182 (a) (2). Accordingly, we analyze the issues raised in this appeal under § 53a-182 (a) (2).

[3] At the conclusion of the state's case-in-chief, the defendant moved for a judgment of acquittal, which the court denied.

defendant said stay in the room and lock the door. This to me reveals that the defendant knew, intended and/or planned a confrontation. From that point, the accounts of the incident varied from witness to witness, but I credit [Officer Smegielski's] version of the incident . . . ." The court found that "[b]ased on [Officer Smegielski's] testimony, primarily, what followed once Kalie came to the door was a tirade from the defendant, a tirade of profanities and untruths such as Kalie does not live here. All of this, including the defendant's comments to . . . Wysocki, reveals the defendant's intent to cause inconvenience, annoyance or alarm in engaging in offensive or disorderly conduct." This appeal followed.

The defendant claims that "the court did not find—and the evidence would not support a finding—that the defendant's conduct was 'grossly offensive, under contemporary community standards, to a person who actually overhear[d] it or [saw] it,' " as required under *State* v. *Indrisano*, supra, 228 Conn. 818. While the defendant does not explain the precise nature of this claim, we interpret it, as the state does, as a challenge to the sufficiency of the evidence introduced at trial. We discern two primary arguments from the defendant's briefs. First, the defendant appears to argue that he is entitled to a reversal of his conviction because, in explaining its reasoning for finding him guilty of disorderly conduct, the court did not expressly find that his conduct was "offensive or disorderly" under the *Indrisano* standard, namely, that it was grossly offensive under contemporary community standards. Therefore, the defendant maintains, the court improperly failed to consider the *Indrisano* gloss in reaching its verdict. Second, the defendant argues that the evidence admitted at trial is insufficient to support a finding that his conduct was grossly offensive under contemporary

community standards.[4] We disagree with both arguments.[5]

"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 [finder of fact] if there is sufficient evidence to support the [finder of fact's] verdict." (Internal quotation marks omitted.) *State* v.

[4] We note that the defendant's legal sufficiency claim is limited to whether the state introduced sufficient evidence to support the court's finding that the defendant's conduct was "offensive or disorderly" under the interpretive gloss set forth in *Indrisano*. The defendant explicitly concedes that his conduct "annoyed or interfered with another person" as that phrase was defined in *Indrisano*. At oral argument before this court, the defendant agreed that as a result of his conduct, Kalie "was prevented from doing something *she had a lawful right to do*," namely, enter into 61 Curtiss Road to collect her belongings. (Emphasis added.) See *State* v. *Indrisano*, supra, 228 Conn. 819 (phrase "annoys or interferes with another person" in § 53a-182 (a) (2) means "disturbs or impedes the lawful activity of another person" [internal quotation marks omitted]). Furthermore, the defendant has not briefed the issue of whether the evidence adduced at trial was sufficient to support the court's finding that he harbored the requisite intent "to cause inconvenience, annoyance or alarm . . . ." General Statutes § 53a-182 (a).

[5] The defendant also states, in the headings of his briefs, that "the facts found by the court do not constitute the crime of disorderly conduct," but does not explain or provide any analysis in support of this argument. Accordingly, to the extent the defendant intends this statement to constitute a separate claim or argument, we deem it inadequately briefed and do not address it. See *State* v. *Wahab*, 122 Conn. App. 537, 545, 2 A.3d 7 ("[W]e are not obligated to consider issues that are not adequately briefed. . . . 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." [Internal quotation marks omitted.]), cert. denied, 298 Conn. 918, 4 A.3d 1230 (2010).

Mann, 102 Conn. App. 345, 347, 925 A.2d 413, cert. denied, 284 Conn. 917, 931 A.2d 938 (2007).

We begin by reviewing the individual components of § 53a-182 (a) (2) as defined by the court in *Indrisano*. Section 53a-182 (a) provides in relevant part: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (2) by offensive or disorderly conduct, annoys or interferes with another person . . . ." The court in *Indrisano* held that § 53a-182 (a) (2) was unconstitutionally vague on its face; *State* v. *Indrisano*, supra, 228 Conn. 810; but applied an interpretive gloss to each individual component of the statute in order to preserve its constitutionality. Id., 818–19. First, with respect to the mens rea language of § 53a-182 (a)—"with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof"—the court interpreted it to mean that the defendant's "*predominant* intent [must be] to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm." (Emphasis added.) *State* v. *Indrisano*, supra, 810. Second, as to the language in subdivision (2) of § 53a-182 (a)—"by offensive or disorderly conduct, annoys or interferes with another person"—the court held that "offensive or disorderly conduct" means "conduct that is grossly offensive, under contemporary community standards, to a person who actually overhears it or sees it." *State* v. *Indrisano*, supra, 818. Third, the court defined "annoys or interferes with another person" to mean "disturbs or impedes the lawful activity of another person." (Internal quotation marks omitted.) Id., 819. To summarize, therefore, a person is guilty of disorderly

conduct under § 53a-182 (a) (2) "when, with the predominant intent previously defined or with a reckless disregard for the risks of his or her conduct, the person, by conduct that is grossly offensive under contemporary community standards to a person who actually overhears it or sees it, disturbs or impedes the lawful activity of another person." *State* v. *Scott*, 83 Conn. App. 724, 729, 851 A.2d 353 (2004).

At the outset, we reject the defendant's argument that his conviction should be reversed because the court, in articulating the factual and evidentiary bases in support of its guilty verdict, did not explicitly find that the defendant's conduct was grossly offensive under contemporary community standards.[6] First, this contention ignores the principle that, when reviewing a trial court's legal determinations, "we presume that the trial court . . . undertook the proper analysis of the law and the facts." (Internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, 251 Conn. 59, 72, 752 A.2d 1037 (1999); see also *State* v. *Brown*, 153 Conn. App. 507, 517 n.6, 101 A.3d 375 (2014) ("although the [trial] court did not explicitly discuss the basis of its [evidentiary] ruling . . . or its reasoning . . . we will not infer error from this silence because the court is presumed to know the law and apply it correctly to its legal determinations" [internal quotation marks omitted]), cert. granted on other grounds, 319 Conn. 901, 122 A.3d 636 (2015). In issuing its decision from the bench, the court found that after Kalie came to the door of 61 Curtiss Road, the defendant engaged in "a tirade of profanities and untruths such as Kalie does not live here. All of this . . . reveals the defendant's intent to

[6] The defendant argues that the court's failure to consider *Indrisano* amounts to an abuse of discretion. As previously noted, however, we interpret the defendant's claim on appeal as a challenge to the legal sufficiency of the evidence, and abuse of discretion is not the standard of review applicable to such claims. See *State* v. *Mann*, supra, 102 Conn. App. 347.

cause inconvenience, annoyance or alarm *in engaging in offensive or disorderly conduct*." (Emphasis added.) Thus, the court specifically found that the defendant's conduct was "offensive or disorderly" within the meaning of § 53a-182 (a) (2), and we must presume that the court reached that conclusion by considering and properly applying the "grossly offensive under contemporary community standards" test set forth in *Indrisano*. See *State* v. *Cecil J.*, 291 Conn. 813, 829 n.12, 970 A.2d 710 (2009) (in absence of contrary evidence, "we must presume that the trial court applied the proper legal standard"). There is no evidence in the record to suggest that the court failed to consider *Indrisano*,[7] and we will not infer from the court's silence in that regard that its guilty verdict was not based on a proper application of *Indrisano* to the facts.

Moreover, in relying on the court's failure to reference the *Indrisano* gloss as a basis for a reversal of his conviction, the defendant misapprehends our standard of review for sufficiency of the evidence claims. In ruling on such claims, "the 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." (Emphasis added; internal quotation marks omitted.) *State* v. *Louis*, 163 Conn. App. 55, 63, 134 A.3d 648, cert. denied, 320 Conn. 929, 133 A.3d 461 (2016). Thus, our focus in reviewing the defendant's sufficiency of the evidence claim concerns whether,

[7] To the contrary, another of the court's factual findings affirmatively suggests that it *did* consider *Indrisano*. It found that, by preventing Kalie from entering 61 Curtiss Road, the defendant's conduct "interfer[ed] with Kalie in a lawful request to . . . retrieve her personal belongings," which mirrors the *Indrisano* definition of the phrase "annoys or interferes with another person" as meaning "disturbs or impedes the lawful activity of another person." (Internal quotation marks omitted.) *State* v. *Indrisano*, supra, 228 Conn. 819.

under the proper legal standards as set forth in *Indrisano*, the evidence introduced at trial was sufficient for a reasonable fact finder to conclude that the state proved beyond a reasonable doubt all of the necessary elements for a conviction for disorderly conduct under § 53a-182 (a) (2).

The defendant next argues that the evidence introduced at trial was insufficient to convict him of disorderly conduct. He specifically contends that the state adduced evidence merely that he refused to permit his adult daughter from entering her home to collect her belongings, and that he did so by utilizing a raised voice and a single curse word, which does not amount to conduct that is grossly offensive under contemporary community standards. We are not persuaded.

As previously noted, § 53a-182 (a) (2) proscribes "offensive or disorderly conduct" that annoys or interferes with another person. " '[O]ffensive or disorderly conduct' " is "conduct that is grossly offensive, under contemporary community standards, to a person who actually overhears it or sees it." *State* v. *Indrisano*, supra, 228 Conn. 818. This standard was adopted from obscenity law jurisprudence. See id. In the context of obscenity law, it is well recognized that the concept of "contemporary community standards" requires that the material in question "be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." *Miller* v. *California*, 413 U.S. 15, 33, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); see also *United States* v. *Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 135 (2d Cir. 1983) ("contemporary community standards" means "in the judgment of the average person in the community, rather than the most prudish or the most tolerant" [internal quotation marks omitted]).

In determining whether the use of vulgar language is sufficiently offensive to give rise to the crime of disorderly conduct, "ordinarily, not only the words used, but also all of the surrounding circumstances, must be considered; and generally on a case-by-case basis. Among these surrounding circumstances are the manner of the occurrence, the repetition of the remarks, and the relationship of the persons involved." (Footnotes omitted.) 27 C.J.S. 444, Disorderly Conduct § 4 (2009). "Not all language that is vulgar, obscene, offensive, or insulting rises to the level of disorderly conduct. Conversely, the use of language that in certain situations would not constitute the offense, may in others be subject to prosecution." (Footnotes omitted.) Id., pp. 444–45. Whether particular conduct is grossly offensive under contemporary community standards is a question for the fact finder; the state need not present evidence that a witness to the conduct was grossly offended by it. See *State* v. *Scott*, supra, 83 Conn. App. 730.

In the present case, we conclude, after a careful review of the record, that the state introduced sufficient evidence to prove that the defendant engaged in conduct that was grossly offensive under contemporary community standards. The court heard evidence that, immediately before confronting Kalie and Officer Smegielski, the defendant instructed his mother and Wysocki to stay in an upstairs bedroom and lock the door, suggesting, as the court found, that the defendant intended or planned to enter into a confrontation. Officer Smegielski testified that when he and Kalie opened the door to 61 Curtiss Road, the defendant "came from the room" in a hallway, was "angry" and uncooperative, was "shouting profanities," and at one point shouted: "F*** you. She doesn't live here. I don't want her here." Given this testimony, the court reasonably could have inferred not only that the defendant used profane and vulgar

language in his encounter with Kalie and Officer Smegielski, but also that he shouted a multitude of profanities at them and was untruthful about whether Kalie still lived there. The court also could have inferred from this evidence, as well as the evidence of the defendant's statements to his mother and Wysocki immediately before the incident, that the defendant was shouting the profanities in an angry and visibly threatening manner for the purpose of deterring Kalie from entering the residence to collect her personal belongings, an activity the defendant concedes Kalie had a lawful right to do. Indeed, the defendant's conduct prompted Officer Smegielski to instruct Kalie to remove herself from the situation, rather than attempt to press the matter, further demonstrating that the defendant's demeanor was manifestly aggressive. The cumulative force of this evidence, viewed in the light most favorable to sustaining the conviction, provides a sufficient basis for a reasonable fact finder to conclude beyond a reasonable doubt that the defendant intended to, and did, impede Kalie's ability to engage in the admittedly lawful activity of retrieving her personal belongings, and that he accomplished this result through conduct that is grossly offensive under contemporary community standards.[8] See

[8] The defendant's reliance on *State* v. *Scott*, supra, 83 Conn. App. 724, and *State* v. *Mann*, supra, 102 Conn. App. 345, for the proposition that his behavior in this case was not grossly offensive under contemporary community standards, is misplaced. First, those cases primarily concerned other elements of § 53a-182 (a) (2), rather than the "offensive or disorderly conduct" element. See *State* v. *Scott*, supra, 728–30; *State* v. *Mann*, supra, 347. Moreover, to the extent the courts in those cases implicitly held that the conduct at issue was offensive or disorderly under the *Indrisano* standard, they are of little help in the present case, which involves behavior very different in kind. The defendant in *Scott*, while protesting outside of a Planned Parenthood facility, yelled at people entering the facility with a bullhorn and stopped and chased passing cars, causing one car to nearly hit him. *State* v. *Scott*, supra, 725–26. In *Mann*, the defendant became agitated during a meeting, threw a chair toward a window, and then repeatedly slammed the chair on the floor, damaging the carpeting. *State* v. *Mann*, supra, 347–48. Even if, as the defendant contends, the defendants' conduct in *Scott* and *Mann* was "far more egregious" than the defendant's conduct

State v. *Indrisano*, supra, 228 Conn. 819. Accordingly, the state introduced sufficient evidence to sustain the defendant's conviction for disorderly conduct under § 53a-182 (a) (2).

Finally, we note that the fighting words limitation does not apply in this case because the defendant's conduct did not consist purely of speech. "Our Supreme Court has held that verbal statements, unaccompanied by physical violence, are considered 'violent tumultuous or threatening behavior' [for purposes of § 53a-182 (a) (1)] when they amount to 'fighting words that portend physical violence.' " *State* v. *Parnoff*, 160 Conn. App. 270, 276, 125 A.3d 573, cert. granted on other grounds, 320 Conn. 901, 127 A.3d 185 (2015). The requirement that the verbal statements portend some level of physical violence "is consistent with the fighting words limitation that must be applied when the conduct sought to be proscribed consists purely of speech. . . . The [limitation] permits the state to prohibit speech that has a direct tendency to inflict injury or to cause acts of violence or a breach of the peace by the persons to whom it is directed." (Citations omitted; internal quotation marks omitted.) Id., 276–77. Here, we need not decide whether the defendant's language portended physical violence or amounted to fighting words because the defendant's conduct consisted of more than mere speech. In addition to shouting profanities and that he did not want Kalie to enter the residence, the defendant stood in the entrance hallway near the door, and, through that conduct, prevented Kalie from engaging in the admittedly lawful activity of entering 61 Curtiss Road to retrieve her personal possessions.[9] The

in the present case, that is not a reason for overturning his conviction. Instead, we need only determine whether the evidence in the present case was sufficient to support the court's finding that the defendant's behavior was grossly offensive under contemporary community standards. See *State* v. *Scott*, supra, 730 (whether conduct is grossly offensive under contemporary community standards is question for fact finder).

[9] "*Indrisano* avoided first amendment difficulties that would criminalize mere verbal speech by clarifying that a conviction under § 53a-182 must be

fighting words limitation, therefore, is not implicated here.

The judgment is affirmed.

In this opinion the other judges concurred.

EDWARD PARKER *v.* COMMISSIONER OF CORRECTION (AC 37534)

Beach, Keller and Bear, Js.

Syllabus

The petitioner, who had pleaded guilty under the *Alford* doctrine to murder, sought a third petition for a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. Specifically, he claimed that his trial counsel was ineffective because he had failed to investigate the facts and circumstances of his statements to law enforcement officers and the facts and circumstances concerning the search of his vehicle, to research legal and factual grounds for a motion to suppress his statements to law enforcement officers and to suppress any additional evidence discovered in the search of his vehicle, to adequately advise him about the grounds for moving to suppress such evidence, to adequately advise him of the option to file a motion to suppress, and to adequately advise him about whether to accept the plea deal. He also claimed ineffective assistance of his first and second habeas counsel for failing to argue his trial counsel's ineffectiveness under the *Strickland-Hill* standard for ineffective assistance of counsel claims (*Strickland* v. *Washington*, 466 U.S. 687; *Hill* v. *Lockhart*, 474 U.S. 59). The respondent Commissioner of Correction filed a motion for summary judgment, alleging that the third petition was a successive petition and that the doctrines of res judicata and collateral estoppel barred the claims contained therein. Following a hearing, the habeas court found that counts one and two pertaining to trial counsel and first habeas counsel constituted successive claims, and it granted summary judgment against the petitioner on those counts. As to count three pertaining to second habeas counsel, the court denied the respondent's motion, concluding that no prior claims had been made against the petitioner's second habeas counsel, and, therefore, that count was not barred as successive or by res judicata. Thereafter, the habeas court rendered judgment denying the

based on a defendant's conduct rather than on a defendant's statements." *State* v. *McKiernan*, 78 Conn. App. 182, 188, 826 A.2d 1210, cert. denied, 266 Conn. 902, 832 A.2d 66 (2003).

petition, concluding that it could not grant relief to the petitioner on count three because judgment had been rendered against him on his claims that trial counsel and first habeas counsel were ineffective as alleged in counts one and two of his third petition, and the judgment rendered on counts one and two was binding on the court. The petitioner then filed a motion to open the judgment, which the court granted, but the court also gave notice that a good cause determination would have to be made pursuant to statute (§ 52-470 [b] [1]) before count three could proceed to trial. The respondent thereafter filed a motion to dismiss. Following a hearing, the court dismissed the petition, finding that the petitioner failed to make a showing of good cause to proceed to trial and, alternatively, that the claims set forth in the habeas petition were successive or were barred by the doctrines of res judicata and collateral estoppel. The court then granted his petition for certification to appeal, and this appeal followed. *Held*:

1. The habeas court properly rendered summary judgment on counts one and two of the habeas petition pertaining to trial counsel and first habeas counsel on the ground that they were impermissible successive claims: the petitioner sought to relitigate his claims against his trial counsel and first habeas counsel on the same legal grounds, he sought the same legal relief in his third amended petition in this case, and he failed to allege facts or claims in his petition that were unavailable to him at the time of his prior petitions; furthermore, allowing the petitioner to argue a different standard of prejudice in this proceeding would not have changed the result, as the issue of the deficiency of trial counsel's and first habeas counsel's performance previously had been resolved against him.

2. The habeas court properly dismissed count three of the habeas petition pertaining to second habeas counsel on the ground of collateral estoppel, as the petitioner's claims against his trial counsel and first habeas counsel had been barred as successive, and the doctrine of collateral estoppel thus barred his claims against his second habeas counsel; the doctrine of collateral estoppel precluded the petitioner from raising the issue of whether his second habeas counsel was ineffective for failing to argue claims against his first habeas counsel and trial counsel based on the *Strickland-Hill* standard.

Argued September 9—officially released November 15, 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, *Cobb*, *J.*, granted in part the respondent's motion for summary judgment and rendered judgment thereon; thereafter, the court, *Fuger*,

J., rendered judgment denying the petition; subsequently, the court, *Cobb*, *J.*, granted the petitioner's motion for clarification and denied the petitioner's motion to open the judgment; thereafter, the court, *Fuger*, *J.*, granted the petitioner's motion to open the judgment; subsequently, the court, *Fuger*, *J.*, denied the petitioner's motion to vacate order; thereafter, the court, *Fuger*, *J.*, following a preliminary hearing, dismissed the petition, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Peter A. McShane*, state's attorney, and *David M. Carlucci*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. The petitioner, Edward Parker, appeals from the judgment of the habeas court dismissing his third petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that (1) the habeas court, *Cobb*, *J.*, erred in rendering summary judgment on counts one and two of that petition, in which he alleged ineffective assistance of his trial counsel and first habeas counsel, respectively, because his third petition was a successive petition as to those counts; and (2) the habeas court, *Fuger*, *J.*, erred in granting the motion, filed by the respondent, the Commissioner of Correction, to dismiss count three of that petition, in which the petitioner alleged ineffective assistance of his second habeas counsel, under the doctrines of res judicata and collateral estoppel. We conclude that the court properly granted the respondent's motion for summary judgment

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

on counts one and two because the third petition was a successive petition as to those counts. Additionally, we conclude that the court also properly dismissed count three on the alternative ground of collateral estoppel.[2] We therefore affirm the judgment of the habeas court.

The following factual and procedural background is relevant to our resolution of the petitioner's appeal. On July 20, 1999, the petitioner pleaded guilty under the *Alford* doctrine[3] to murder in violation of General Statutes § 53a-54a (a), and the court, *Iannotti*, *J.*, sentenced him in accordance with a plea agreement to thirty years incarceration in the custody of the respondent. At the sentencing hearing, the defendant sought new counsel and to withdraw his plea. *State* v. *Parker*, 67 Conn. App. 351, 353, 786 A.2d 1252 (2001), cert. denied, 281 Conn. 912, 916 A.2d 54 (2007). The court denied each request. Id. The petitioner thereafter appealed and claimed that his plea was not made knowingly, intelligently, and voluntarily. Id. This court affirmed his conviction. Id., 357.

This is the petitioner's third habeas corpus petition since his conviction. In this petition, he alleges ineffective assistance of his trial counsel, Stephen Gionfriddo; his first habeas counsel, Michael D'Onofrio; and his second habeas counsel, Thomas Mullaney. We describe the petitioner's habeas cases in turn.

[2] The petitioner also appeals from the court's (*Fuger*, *J.*) order for good cause submissions by each party pursuant to General Statutes § 52-470 (b), and its finding that there was no good cause for count three. Because we affirm the dismissal of count three on the ground of collateral estoppel, we do not reach the merits of these arguments.

[3] *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea." (Internal quotation marks omitted.) *State* v. *Webb*, 62 Conn. App. 805, 807 n.1, 772 A.2d 690 (2001).

In 2000, the petitioner filed his first petition for a writ of habeas corpus. *Parker* v. *Warden*, Superior Court, judicial district of New Haven, Docket No. CV-00-0439172-S (January 24, 2003) (*Parker I*). In his third amended two count petition in that proceeding, he alleged both ineffective assistance of trial counsel and actual innocence. The petitioner claimed that trial counsel: (1) did not adequately advise him of his option to plead guilty or to proceed to trial; (2) did not adequately advise him concerning the consequences of his plea; (3) failed to ensure that his plea was made knowingly, intelligently, and voluntarily; (4) did not adequately advise him of the elements of murder; (5) did not conduct a sufficient investigation into possible defenses; (6) failed to conduct a sufficient investigation into the elements of the prosecution's proof or of his case; and (7) failed to conduct a sufficient investigation by not speaking to certain witnesses.

After a trial, the first habeas court denied the petition for a writ of habeas corpus, concluding that trial counsel's representation did not amount to ineffective assistance; that the petitioner failed to prove any of the allegations in his petition; and that he did not prove prejudice. The court also found that the petitioner had failed to prove by clear and convincing evidence that he was actually innocent of murder, the crime to which he pleaded guilty and of which he was convicted. Following the first habeas court's denial of his petition for certification to appeal, this court dismissed his appeal, and our Supreme Court denied certification to appeal. See *Parker* v. *Commissioner of Correction*, 83 Conn. App. 905, 853 A.2d 652 (2004), cert. denied, 281 Conn. 912, 916 A.2d 54 (2007).

In 2005, the petitioner filed his second petition for a writ of habeas corpus. *Parker* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000487-S (January 5, 2009) (*Parker II*). In his amended

petition in that proceeding, he alleged both ineffective assistance of trial counsel and ineffective assistance of first habeas counsel. He claimed that trial counsel was ineffective because he failed to (1) file a motion to suppress the petitioner's statements and other evidence obtained during a stop and search of his vehicle; and (2) advise the petitioner about proceeding with a motion to suppress, and, if the court denied that motion, then entering a nolo contendere plea, which would permit him to appeal the denial of that motion to suppress. As to first habeas counsel, the petitioner claimed that he was ineffective for failing to raise these issues in the first habeas petition.

After a hearing, the second habeas court found that the petitioner was unlikely to prevail on the motion to suppress the petitioner's statements and other evidence, trial counsel discussed this with him, and, thus, trial counsel was not ineffective in failing to pursue the motion. This court dismissed the petitioner's appeal from the second habeas court's judgment, and our Supreme Court denied certification to appeal. See *Parker* v. *Commissioner of Correction*, 124 Conn. App. 905, 4 A.3d 354, cert. denied, 299 Conn. 911, 10 A.3d 527 (2010).[4]

On August 1, 2011, the then self-represented petitioner filed a third petition for a writ of habeas corpus, which is the subject of the present appeal. The habeas court appointed counsel for him. On October 16, 2013, the petitioner amended his petition, claiming that his

[4] Prior to filing the habeas petition at issue in this appeal, the petitioner made two other attacks on his conviction and sentence. He filed a motion to correct an illegal sentence, which was denied, and that denial was affirmed on appeal. See *State* v. *Parker*, 295 Conn. 825, 992 A.2d 1103 (2010). He also filed a habeas corpus petition in federal court, which alleged ineffective assistance of trial counsel for failing to file a motion to suppress and, if that motion were unsuccessful, failing to negotiate a plea of nolo contendere. *Parker* v. *Alves*, United States District Court, Docket No. 3:11CV745 (DJS) (D. Conn. June 6, 2013). The District Court denied his petition. Id.

trial counsel was ineffective because he failed to (1) investigate the facts and circumstances of his statements to law enforcement officers, and the facts and circumstances concerning the search of his vehicle; (2) research legal and factual grounds for a motion to suppress his statements to law enforcement officers and also to suppress any additional evidence discovered in the search of his vehicle; (3) adequately advise him about the grounds for moving to suppress such evidence; (4) adequately advise him of the option to file a motion to suppress; and (5) adequately advise him about whether to accept the plea deal. He also claimed ineffective assistance of first and second habeas counsel for failing to argue trial counsel's ineffectiveness under the *Strickland-Hill* standard[5] for ineffective assistance of counsel.

On November 13, 2013, the respondent filed a motion for summary judgment, pursuant to Practice Book § 23-37,[6] in which he alleged both that the third amended petition was a successive petition and that the doctrines of res judicata and collateral estoppel barred the claims contained therein. Following a hearing on the motion, the habeas court, *Cobb*, *J.*, found that count one concerning trial counsel and count two concerning first habeas counsel constituted successive petitions and granted summary judgment against the petitioner on those counts. As to count three concerning second habeas counsel, however, the court denied the respondent's motion for summary judgment because no prior claims had been made against second habeas counsel,

[5] See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

[6] Practice Book § 23-37 provides: "At any time after the pleadings are closed, any party may move for summary judgment, which shall be rendered if the pleadings, affidavits and any other evidence submitted show that there is no genuine issue of material fact between the parties requiring a trial and the moving party is entitled to judgment as a matter of law."

and, therefore, the count was not barred as successive or by res judicata.

On June 4, 2014, the court, *Fuger*, *J.*, rendered judgment denying the petition for a writ of habeas corpus. The court concluded that it could not grant relief to the petitioner on count three because judgment had been rendered against him on his claims that trial counsel and first habeas counsel were ineffective as alleged in counts one and two of his third petition, and the judgment rendered on counts one and two was binding on the court.

The petitioner filed a motion to open the judgment rendered by the court, *Fuger*, *J.* On July 21, 2014, the court granted the petitioner's motion to open the judgment and restored count three to the docket; however, the court also gave notice that a good cause determination would have to be made under General Statutes § 52-470 (b) (1)[7] before count three could proceed to trial, and it ordered the parties to submit arguments on the good cause issue. On July 29, 2014, the court, *Fuger*, *J.*, denied a motion to vacate the order requiring good cause submissions, finding § 52-470 (b) (1) to be applicable to the petitioner's operative petition. The respondent filed a motion to dismiss pursuant to § 52-470 (b) (1) on August 19, 2014, arguing that good cause to proceed was not present because the factual basis for the claims asserted by the petitioner had already been raised before and determined by the prior habeas courts against him. The petitioner countered that there was good cause to proceed because the claims he asserted in his third petition had not been presented to a court. Specifically, he argued that first and second habeas

[7] General Statutes § 52-470 (b) (1) provides: "After the close of all pleadings in a habeas corpus proceeding, the court, upon the motion of any party or, on its own motion upon notice to the parties, shall determine whether there is good cause for trial for all or part of the petition."

counsel relied on the *Strickland* standard,[8] whereas the applicable law to be applied was the *Strickland-Hill* standard. After a hearing, the court found that the petitioner failed to make a showing of good cause to proceed to trial and, alternatively, that the claims set forth in the petition were successive or were barred by the doctrines of res judicata and collateral estoppel. Thereafter, the third habeas court granted certification to appeal, and this appeal followed.

Additional facts will be discussed where relevant to the issues raised by the petitioner.

I

The petitioner argues that the habeas court erred when it rendered summary judgment on counts one and two because they were successive. Our standard of review of a summary judgment is well established. "[S]ummary 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. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 301–302, 140 A.3d 950 (2016); see also Practice Book § 23-37.

A habeas petition is successive if it is based on the same grounds as those raised in a prior petition. *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 276, 35 A.3d 337, cert. granted on other grounds, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013). "Practice Book § 23-29 (3)[9] provides that a

[8] *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[9] Practice Book § 23-29 provides 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 proffer new evidence not reasonably available at the time of the prior petition . . . ."

petition may be dismissed by the court if 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 . . . .'' (Emphasis omitted; footnote added; internal quotation marks omitted.) Id., 278.

''[A] petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief. . . . But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition.'' (Internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 147 Conn. App. 510, 515, 83 A.3d 1166, cert. denied, 311 Conn. 922, 86 A.3d 467 (2014). We have applied the same standard to successive habeas petitions challenged by motions for summary judgment instead of by motions to dismiss. *Tirado* v. *Commissioner of Correction*, 24 Conn. App. 152, 155–56, 586 A.2d 625 (1991).

''A 'ground' is a sufficient legal basis for granting the relief sought. . . . 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.'' (Internal quotation marks omitted.) *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 141, 712 A.2d 947 (1998). ''Put differently, two grounds are not identical if they seek different relief. . . . Simply put, an applicant must show that his application does, indeed, involve a different legal ground, not merely a verbal reformulation of the same ground.'' (Citation omitted; internal quotation marks omitted.) *Carter* v. C*ommissioner of Correction*, 133 Conn. App. 387, 393, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

We note that "[b]ecause both prongs [of *Strickland*] must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . . Accordingly, a court need not consider the prejudice prong if it determines that the petitioner has failed to meet the burden of proving deficient performance." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 144 Conn. App. 365, 370, 73 A.3d 776, cert. denied, 310 Conn. 918, 76 A.3d 633 (2013).

In the first habeas action, the petitioner claimed ineffective assistance of trial counsel for failing to advise him of his option to plead guilty or to go to trial. See *Parker I*, supra, Superior Court, Docket No. CV-00-0439172-S. The first habeas court fully adjudicated that claim on the merits and resolved it against the petitioner. See id. In the second habeas action, the petitioner claimed ineffective assistance of trial counsel for failing to file a motion to suppress evidence of the petitioner's statements to law enforcement officers and to suppress evidence obtained in a search of his vehicle, for failing to file a motion to suppress, and for failing to advise him to go forward with that motion and, if unsuccessful, to enter a nolo contendere plea. See *Parker II*, supra, Superior Court, Docket No. CV-05-4000487-S. The petitioner also claimed ineffective assistance of first habeas counsel for failing to raise these claims to establish trial counsel's deficient performance. Id. The second habeas court fully adjudicated those claims on the merits and resolved them against the petitioner. Id. In the present habeas proceeding, the petitioner claims that his first habeas counsel was ineffective for arguing his claims under the *Strickland* standard rather than under the *Strickland-Hill* standard because the standard for determining prejudice is different. Both standards, however, require the petitioner to prove that first habeas counsel's and trial counsel's

performance was deficient. See *Hill* v. *Lockhart*, 474 U.S. 52, 58–59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (in proving ineffective assistance of counsel in plea negotiation process petitioner must demonstrate counsel's performance fell below an objective standard of reasonableness [deficiency] and but for counsel's errors petitioner would not have pleaded guilty but instead would have insisted on going to trial [prejudice]); and *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (in proving ineffective assistance of counsel at trial or in sentencing proceedings petitioner must demonstrate counsel's performance was deficient and counsel's deficient performance prejudiced his defense). The first habeas court and the second habeas court each determined that trial counsel's performance was not deficient. See *Parker I*, supra; *Parker II*, supra. Additionally, the second habeas court determined that first habeas counsel's performance was not deficient. See *Parker II*, supra.

The petitioner seeks to relitigate his claims as to trial counsel and first habeas counsel on the same legal grounds, and he seeks the same legal relief in his third amended petition in this case. He has failed to allege facts or claims that were unavailable to him at the time of his prior petitions. Additionally, allowing the petitioner to argue a different standard of prejudice in this proceeding would not change the result, as the issue of the deficiency of trial counsel's and first habeas counsel's performance has been resolved against him. See *Johnson* v. *Commissioner of Correction*, supra, 144 Conn. App. 370.

Accordingly, having compared the petition in this case to the prior petitions and having determined that they raise the same grounds and seek the same relief, we conclude that the habeas court in this case properly rendered summary judgment on counts one and two

because both counts are impermissible successive claims.

II

The petitioner also claims that the habeas court, *Fuger*, *J.*, in the present case improperly dismissed count three of his third petition[10] under the doctrines of res judicata and collateral estoppel. In that count, the petitioner claims that his second habeas counsel's performance was deficient when he argued that the performance of both first habeas counsel and trial counsel was deficient because of their reliance on and use of the *Strickland* standard rather than the *Strickland-Hill* standard. The petitioner has not previously brought an ineffective assistance of counsel claim against his second habeas counsel. Consequently, res judicata does not bar such a claim. See *Johnson* v. *Commissioner of Correction*, 168 Conn. App. 294, 310, 145 A.3d 416 (res judicata limited in habeas cases to claims actually raised and litigated in earlier proceeding), cert. denied, 323 Conn. 937, 151 A.3d 385 (2016). Nevertheless, the related doctrine of collateral estoppel precludes the petitioner from raising the issue of whether second habeas counsel was ineffective for failing to argue claims against first habeas counsel and trial counsel based on the *Strickland-Hill* standard. Accordingly, we affirm the dismissal of count three.

"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, [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. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court

[10] At this point in the procedural history, the only count remaining and before the court was count three.

unless they are clearly erroneous . . . . [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.) *Brewer* v. *Commissioner of Correction*, 162 Conn. App. 8, 13, 130 A.3d 882 (2015).

"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. . . . [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." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 168 Conn. App. 310–11. "[A]lthough most defenses cannot be considered on a motion to dismiss, a trial court can properly entertain a . . . motion to

dismiss that raises collateral estoppel grounds." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 223, 982 A.2d 1053 (2009).

In the present case, the claim involving second habeas counsel is barred by collateral estoppel because the judgment in the first habeas case brought against trial counsel and the judgment in the second habeas case brought against trial counsel and first habeas counsel necessarily resolved issues that would require relitigation if the claim involving second habeas counsel were to proceed. "To succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . Only if the petitioner succeeds in what . . . is a herculean task will he receive a new trial." (Internal quotation marks omitted.) *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 238–39, 965 A.2d 608 (2009).

Successive petitions for a writ of habeas corpus based on ineffective assistance of multiple counsel impose significant challenges on the petitioner. "[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . Therefore . . . a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [trial] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and

(2) that his [trial] counsel was ineffective." (Citations omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 438–39, 119 A.3d 607 (2015). Accordingly, when a petitioner fails to prove after a habeas trial that trial counsel provided him ineffective assistance, that petitioner cannot as a matter of law prove prejudice resulting solely from the first and second habeas counsel's alleged failure to raise claims against trial counsel on the same grounds. See *Johnson* v. *Commissioner of Correction*, supra, 168 Conn. App. 300 (summarizing *Johnson* v. *Commissioner of Correction*, supra, 144 Conn. App. 365).

The petitioner argues that second habeas counsel was ineffective in failing to allege that first habeas counsel failed to argue that trial counsel was ineffective under the *Strickland-Hill* standard. Assuming, arguendo, that this is true, the petitioner still must prove that trial counsel's performance was deficient, which he twice has failed to do, to succeed on his claim. Again, the difference between the *Strickland* standard and the *Strickland-Hill* standard is the prejudice prong. To establish that first and second habeas counsel were ineffective, the petitioner would be required to prove, as he pleaded, that trial counsel was ineffective for failing to (1) investigate the facts and circumstances of his statements to law enforcement and the search of his vehicle; (2) research legal and factual grounds for a motion to suppress his statements to law enforcement or any evidence discovered in the search of his vehicle; (3) adequately advise him about grounds for moving to suppress such evidence; (4) adequately advise him of the option to file a motion to suppress; and (5) adequately advise him about whether to accept the plea deal. The court, *Nazzaro*, *J.*, found in the second habeas case that (1) the petitioner was not in custody when he made incriminating statements, (2) he consented to

the search of his vehicle, and (3) trial counsel was not ineffective for failing to file a motion to suppress the evidence obtained through the petitioner's statements and the search, or by not advising the petitioner to go forward with such a motion. Because the petitioner failed to prove any of these allegations, none of the habeas courts had to reach the issue of whether there was any prejudice to the petitioner under either standard.

We therefore conclude that the first and second habeas courts, inter alia, necessarily decided against the petitioner that trial counsel's performance was not deficient. The second habeas court's determination included the petitioner's statements to law enforcement officers, the search of his car, and the issues concerning the suppression of such evidence. Collateral estoppel precludes the petitioner from relitigating the same claims as part of his claim against second habeas counsel. Additionally, we also conclude that because the first habeas court necessarily decided the underlying issue of whether trial counsel adequately advised the petitioner of whether to plead guilty or to go to trial, collateral estoppel also precludes the petitioner from relitigating the same claims as part of his claim against second habeas counsel. With all of his claims against second habeas counsel in count three barred by collateral estoppel, the third habeas court did not err in granting the respondent's motion to dismiss that count.

The petitioner's claims against trial counsel and first habeas counsel are barred as successive, and the doctrine of collateral estoppel bars his claims against second habeas counsel. Accordingly, the third habeas court properly rendered summary judgment on counts one and two, and properly dismissed count three.

The judgment is affirmed.

In this opinion the other judges concurred.

KWEKU HANSON *v.* COMMISSIONER OF CORRECTION (AC 37389)

Beach, Mullins and Bishop, Js.

Syllabus

The petitioner, who had been convicted on guilty pleas of various crimes, sought a writ of habeas corpus, claiming that he had received ineffective assistant of counsel during the underlying criminal proceedings from B and F, and that the prosecutor vindictively prosecuted the criminal charges against him. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that B had provided ineffective assistance, that court having properly concluded that the petitioner failed to show that B was acting as his counsel in the criminal proceedings and, thus, that the petitioner could not properly assert an ineffective assistance of counsel claim against B; that court's conclusion that B did not represent the petitioner was not clearly erroneous and was amply supported by the evidence in the record, which showed that B did not represent the petitioner during the criminal trial proceedings.
2. The petitioner could not prevail on his claim that the habeas court incorrectly concluded that F did not provide ineffective assistance by failing to consult with the petitioner about what claims to assert in a substitute motion to withdraw his guilty pleas, and in failing to allow him to testify at a hearing on that motion: it was an appropriate and sound strategy for F to determine which arguments to present in the motion on behalf of the petitioner, and the habeas court did not err in finding that the petitioner failed to demonstrate that F's decision not to raise a claim of medical duress in the motion was anything short of such an appropriate and sound strategy; moreover, the petitioner failed to show that F prevented him from testifying or that his advice to the petitioner not to testify was deficient, as the evidence credited by the habeas court showed that F strongly urged the petitioner not to testify, that there was a reasonable basis for the advice, and that the petitioner ultimately acceded to that advice.
3. The habeas court did not err in finding that the petitioner had not satisfied his burden of proving that his cases were vindictively prosecuted, the record having contained no credible evidence of vindictiveness; accordingly, the court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner failed to show that the claims raised involved issues that were debatable among jurists of reason, that

a court could have resolved the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further.

Argued September 8—officially released November 15, 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, *Young, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Kweku Hanson, self-represented, with whom, on the brief, was *Norman A. Pattis*, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Angela R. Macchiarulo*, senior assistant state's attorney, and *Tamara A. Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

BISHOP, J. The petitioner, Kweku Hanson, appeals from the judgment of the habeas court denying his petition for certification to appeal from the court's denial of his habeas corpus petition. Specifically, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and erred in concluding that (1) Attorney Salvatore Bonanno did not represent the petitioner in the underlying criminal proceedings and therefore could not be the focus of an ineffective assistance of counsel claim; (2) Attorney Donald Freeman's representation of the petitioner was not ineffective; and (3) Assistant State's Attorney Thomas O'Brien's prosecution of the petitioner's cases in the criminal proceedings was not improper. We disagree with the petitioner and dismiss the appeal.

The record reveals the following relevant factual and procedural history. The petitioner, an attorney who had practiced law for more than eighteen years, was arrested on four separate occasions on a number of charges arising from allegations that he had sexual relations with two minors, videotaped himself having sexual intercourse with one victim, took sexually provocative pictures of both victims, and later threatened those victims in an effort to dissuade them from cooperating in the prosecution of his cases. He was first arrested on September 23, 2005, and subsequently arrested on January 11, 2006, March 1, 2007, and April 4, 2007.

On August 2, 2007, while self-represented, the petitioner pleaded guilty on a substitute information to the following counts: two counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1); two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2); two counts of tampering with a witness in violation of General Statutes § 53a-151; and one count of possession of child pornography in the first degree in violation of General Statutes § 53a-196 (d). The court, *White*, *J.*, continued the case for sentencing, and, during that time, the petitioner unsuccessfully tried to withdraw his guilty pleas.

On November 2, 2007, pursuant to the petitioner's August 2 pleas, the court, *Koletsky*, *J.*, imposed upon the petitioner a total effective sentence of twenty-five years of incarceration, execution suspended after six years, and thirty years of probation. The petitioner directly appealed the court's judgments of conviction, which this court affirmed. *State* v. *Hanson*, 117 Conn. App. 436, 979 A.2d 576 (2009), cert. denied, 295 Conn. 907, 989 A.2d 604, cert. denied, 562 U.S. 986, 131 S. Ct. 425, 178 L. Ed. 2d 331 (2010).

Thereafter, the self-represented petitioner instituted this habeas action and, on March 4, 2013, filed his second amended petition for a writ of habeas corpus. In his petition, the petitioner alleged, inter alia, ineffective assistance of counsel as to Bonanno and Freeman and prosecutorial vindictiveness as to O'Brien.[1] Following a five day trial, the habeas court, *Young*, *J.*, denied the petition in a written memorandum of decision.[2] The petitioner then filed a petition for certification to appeal from the habeas court's denial of his petition for a writ of habeas corpus, which the habeas court denied. This appeal followed. Additional factual and procedural history will be set forth as necessary.

We begin by setting forth our general 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). In order to prove an abuse of discretion, the petitioner must show "that the issues are debatable among jurists of reason; that the court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Emphasis in original; internal quotation marks omitted.) 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.

"The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Questions of law and mixed

[1] The petitioner asserted nine other claims in his second amended petition for a writ of habeas corpus, all of which were denied by the habeas court. Because he did not pursue any of those claims on appeal, we deem them abandoned.

[2] During trial, the court orally dismissed some of the claims and reiterated those dismissals in its written decision.

questions of law and fact receive plenary review." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 174, 982 A.2d 620 (2009).

To the extent that the habeas court relies on credibility determinations of witnesses in deciding the issues, this court must defer to the trier of fact's assessment of the credibility of the witness that is "made on the basis of its firsthand observations of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 268, 112 A.3d 1 (2015). We turn now to the petitioner's specific claims.

I

The petitioner's first claim on appeal is that the habeas court abused its discretion when it denied his petition for certification to appeal from the court's dismissal of his claim of ineffective assistance of counsel as to Bonanno. The habeas court dismissed the claim after determining that Bonanno was not acting as the petitioner's counsel, and, therefore, could not properly be the focus of a claim of ineffective assistance of counsel. The respondent, the Commissioner of Correction, argues that the habeas court correctly concluded that the petitioner failed to show that Bonanno was acting as his counsel in the underlying criminal proceedings. We agree with the respondent.

The following additional facts are relevant to our resolution of this claim. On March 16, 2007, Bonanno was present in court on the petitioner's behalf without having filed an appearance. There, he told the court, *Prescott*, *J.*, that he was in discussions with the petitioner's family about being retained, and he asked for a short continuance. When Bonanno returned to court on March 19, 2007, he informed the court, *Prescott*, *J.*, that he would not be filing an appearance on the

petitioner's behalf, as he could not work out payment arrangements with the petitioner's family. The record reveals that, at this juncture, Bonanno had been paid $15,000 by the petitioner's family, an amount less than he would require if the petitioner's three files were tried separately, which is how he believed the state would proceed. Bonanno subsequently returned the $15,000 to the petitioner's family. As Bonanno was leaving the courtroom, the petitioner stated that he was interested in discussing a plea deal that day. The court asked Bonanno if he would be willing, even though he had not been retained, to discuss the petitioner's matters with the court, *Gold*, *J.*, and O'Brien in order to facilitate a plea negotiation with the incarcerated petitioner. Bonanno agreed to "speak with [the court] in chambers, and then report back to [the petitioner]," and the petitioner said he would be "content for [Bonanno] to be standby counsel . . . ."

At the habeas trial, Bonanno testified that during the off-the-record discussions that followed, "Mr. O'Brien conveyed some offer, I shared it with [the petitioner]. There were some things [the petitioner] didn't like, [the petitioner] asked me to ask back, I did, and that was it. It wasn't . . . I don't think there was ever anything, any agreement, any meeting of the minds on a plea either . . . ."

When court resumed after these discussions, the court, *Gold*, *J.*, noted its concern with having Bonanno involved in the matter, stating to the petitioner: "You're going to have to be prepared to explain to me . . . on Wednesday when I inquire, exactly what [role] Mr. Bonanno is playing in this. . . . [W]hether you're proceeding pro se, whether you're proceeding pro se with standby counsel, namely, Mr. Bonanno, whether Mr. Bonanno is filing as counsel, but I'm told at this juncture that he has no official standing in the court . . . ." The court later stated, in the same colloquy with the

petitioner, "I understand at this point you are appearing pro se," to which the petitioner responded, "that's correct."

Bonanno was in court on the petitioner's next court date of March 21, 2007, though the court, *Gold*, *J.*, noted that the petitioner still was representing himself. When asked by the court about Bonanno's role moving forward, the petitioner told the court that he had tried unsuccessfully to retain counsel, someone other than Bonanno, and further stated that "I have no choice but to represent myself" and "as of today, I don't have legal counsel. I don't have legal counsel." Thereafter, the court and the petitioner agreed that Bonanno should be excused due to the fact that he had "no official role" in the petitioner's representation. Bonanno subsequently left the courtroom and the petitioner continued to represent himself.

At the habeas trial, the petitioner called Bonanno to testify regarding the petitioner's numerous claims of ineffective assistance of counsel against him. The state immediately moved for an offer of proof as to the relevance of Bonanno's testimony since he had never filed an appearance on the petitioner's behalf. The court allowed Bonanno to take the stand for a limited inquiry as to whether he ever was formally retained by the petitioner. Throughout the petitioner's questioning of Bonanno, the court reminded the petitioner that the questioning should be limited to that issue. Bonanno testified on direct examination and cross-examination that he was not retained and that he told the criminal trial court, on multiple occasions, that he did not represent the petitioner. Finding that "there was no meeting of the minds, there was no retention of Mr. Bonanno to represent [the petitioner]," the habeas court orally dismissed the petitioner's ineffective assistance of

counsel claim as to Bonanno. In its written memorandum of decision, the court highlighted, as further support for its decision, the fact that "[o]n March 21, 2007, the criminal court found that Attorney Bonanno had no official role in the criminal proceedings and the petitioner concurred."

It is of little significance that the habeas court limited Bonanno's habeas testimony solely to the issue of retention, as the court had before it the full record from the trial court proceedings. That record makes it clear, from the trial court's comments, Bonanno's comments, and the petitioner's various assertions on March 16, 19, and 21, 2007, that Bonanno was not acting as the petitioner's attorney. Accordingly, on the basis of our review of the record, we conclude that none of the facts, as found by the habeas court, is clearly erroneous, and that its ultimate conclusion that Attorney Bonanno did not represent the petitioner was amply supported by the record and, therefore, was legally correct.[3]

II

The petitioner's second claim on appeal is that the habeas court abused its discretion when it denied his petition for certification to appeal from the court's rejection of his claim of ineffective assistance of counsel as to Freeman. Specifically, the petitioner contends that he was prejudiced by Freeman's deficient performance when Freeman failed to consult with the petitioner about what claims to assert in a substitute motion

[3] We caution that in reaching this conclusion, we do not hold that the filing of an appearance is the sole determinant of whether an attorney actually is representing a defendant. Rather, it is one factor to be considered as part of the circumstances to be assessed by the trial court when confronted with a question of representation for sixth amendment purposes. Given the totality of the circumstances in this particular situation, we find no error in the court's determination that Bonanno was not acting as the petitioner's attorney in the criminal proceedings, and, therefore, the petitioner could not successfully assert an ineffective assistance of counsel claim regarding Bonanno's performance.

to withdraw the petitioner's guilty pleas. Additionally, the petitioner contends that he was prejudiced by Freeman's deficient performance when Freeman failed to allow the petitioner to testify at a hearing on the substitute motion to withdraw. The respondent argues that the habeas court correctly concluded that the petitioner failed to show that Freeman rendered ineffective assistance. We agree with the respondent.

We begin with our standard of review relevant to this particular claim. We "cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) *Ricks* v. *Commissioner of Correction*, 98 Conn. App. 497, 502, 909 A.2d 567 (2006), cert. denied, 281 Conn. 907, 916 A.2d 49 (2007). In claims of ineffective assistance of counsel, "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." (Internal quotation marks omitted.) Id.

In order 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 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. . . . It is well settled that [a] reviewing court can find against a petitioner on *either* ground, whichever is easier." (Emphasis in original;

internal quotation marks omitted.) *Couture* v. *Commissioner of Correction*, 160 Conn. App. 757, 766, 126 A.3d 585, 592, cert. denied, 320 Conn. 911, 128 A.3d 954 (2015).

In analyzing counsel's performance, "every effort [must] 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. . . . [T]he [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) Id., 767. We turn now to the petitioner's specific claims of ineffective assistance of counsel against Freeman.

A

The petitioner first claims that the habeas court erred in not finding that Freeman provided constitutionally deficient representation by failing to consult with him regarding the nature of the claims to raise in the substitute motion to withdraw the petitioner's guilty pleas. We are not persuaded.

The following additional facts are relevant to our resolution of this claim. The petitioner was self-represented at the time he pleaded guilty, and, after a canvass, the court, *White*, *J.*, accepted his pleas as knowingly, intelligently, and voluntarily made. The court, as well, found that the petitioner had knowingly and voluntarily waived his right to counsel. The petitioner testified at the habeas trial that he had been suffering from various medical issues while his files were pending and that he had wanted to be transported to the hospital because he felt he was not receiving adequate medical attention from the Department of Correction. He further testified that during various plea negotiations, O'Brien promised to have him transported

to the hospital in exchange for pleading guilty. This alleged promise was not mentioned as part of the plea canvass, and when the petitioner was transported back to courthouse lockup after pleading guilty, and not the hospital, he immediately began drafting a motion to withdraw his pleas.

In the motion, filed pro se on September 17, 2007, the petitioner alleged, inter alia, that his guilty pleas were involuntary due to illness because he was "hallucinatory, lassitude, and delusional" at the time of his pleas "due to prescription pain pills, chest cyst, abdominal aches, hurting head, sleep deprivation, and nausea." Before his motion to withdraw his guilty pleas was heard, however, the petitioner retained Freeman, who, on October 19, 2007, filed a substitute motion to withdraw the petitioner's guilty pleas. The substitute motion did not include the petitioner's claim that his pleas were involuntary due to medical duress and instead alleged that the court's plea canvass did not comply with Practice Book §§ 39-19 (2), (3) and (4), or 39-20. Specifically, the petitioner, through Freeman, claimed in the substitute motion that it was insufficient for the court to ask the petitioner, a self-represented attorney, if he was familiar with the range of sentences for the crimes to which he was pleading guilty rather than discussing the sentence range and minimum mandatory sentences on the record.

The petitioner testified at the habeas trial that he wanted Freeman to "raise the claim that [the petitioner's pleas were] not voluntary because [the petitioner] had [a] serious medical condition." Freeman testified at the habeas trial that "the only reasonable chance . . . to get that motion granted to vacate [the petitioner's] pleas was that Judge White . . . failed to articulate the minimum mandatory penalties . . . ." He further testified that the petitioner's claim that his pleas were involuntary due to medical duress "would not fly"

and had "no chance at all." Freeman also testified that his decision to include certain claims in the substitute motion was a strategy decision, which he had discussed with the petitioner.

The habeas court, in denying the petitioner's claim, found no basis for the petitioner's claim that Freeman should have incorporated the petitioner's medical claims in his motion to withdraw the petitioner's guilty pleas. The court concluded: "Attorney Freeman was in the best position to determine proper strategy for successful prosecution of the motion."

This court previously has determined that it is an appropriate and sound strategy for an attorney to determine which arguments to present on behalf of his client. See *Saucier* v. *Commissioner of Correction*, 139 Conn. App. 644, 652–53, 57 A.3d 399 (2012) ("strategy of culling out weaker claims is sound, not deficient, practice"), cert. denied, 308 Conn. 907, 61 A.3d 530 (2013). The habeas court found that the petitioner failed to demonstrate that Freeman's decision not to raise a claim of medical duress in the substitute motion was anything short of such an appropriate and sound strategy. Because the record of the habeas proceedings provides support for the court's determination, we conclude that the habeas court did not err in finding that the petitioner had not satisfied his burden of proving that Freeman's performance was constitutionally deficient as to this claim.

B

The petitioner next claims that the habeas court erred in not finding that Freeman provided constitutionally deficient representation by failing to allow him to testify at the hearing on the substitute motion to withdraw the petitioner's guilty pleas. We are not persuaded.

The following additional facts are relevant to our resolution of this claim. The petitioner did not testify

at the October 26, 2007 hearing on the petitioner's substitute motion to withdraw his guilty pleas. After the court heard argument on the motion, Freeman relayed to the court that the petitioner wanted to testify but that Freeman did not want to put him on the stand. After some discussion, the court noted to Freeman that the petitioner "is looking like he's going to burst if he doesn't get to whisper to you." Freeman and the petitioner then had a brief discussion off the record, but nothing further was mentioned about the petitioner's testifying, and the petitioner did not address the court about his desire to testify. The court denied the petitioner's substitute motion to withdraw his guilty pleas.

The petitioner testified at the habeas trial that Freeman unilaterally decided not to put him on the stand to testify at the hearing. In contrast, Freeman testified that he *did* discuss this decision with the petitioner and "strongly counseled" him against testifying and that the petitioner agreed with him. Freeman testified that he felt the petitioner would hurt his case by testifying at the hearing because he was not in control of his anger. In denying the petitioner's claim of ineffective assistance of counsel, the habeas court credited Freeman's testimony that he advised the petitioner not to testify and that the petitioner heeded this advice, and it further noted that "[t]he petitioner did not attempt to take the stand or voice any objection when Attorney Freeman indicated to the court that he was not calling the petitioner. This is a decision of litigation strategy that is presumptively reasonable, and which the petitioner has not rebutted."

We note that "[a]lthough a defendant has the right to testify on his or her behalf, that privilege is not triggered unless he or she takes some affirmative action regarding his right to testify. . . . The accused must act affirmatively. While the due process clause of the Fifth Amendment 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Hobson*, 68 Conn. App. 40, 45, 789 A.2d 557, cert. denied, 260 Conn. 910, 796 A.2d 557 (2002). In the habeas court, the petitioner failed to demonstrate that Freeman prevented him from testifying or that his advice to the petitioner not to testify was deficient. Rather, the evidence credited by the habeas court was that Freeman strongly urged the petitioner not to testify, that there was a reasonable basis to the advice, and that the petitioner ultimately acceded to this advice.

Accordingly, we conclude that the habeas court did not err in finding that the petitioner had not satisfied his burden of proving that Freeman's performance was constitutionally deficient as to this claim.

III

The petitioner's third claim on appeal is that the habeas court abused its discretion when it denied his petition for certification to appeal from the court's rejection of his claim that his criminal cases were vindictively prosecuted by O'Brien. Specifically, the petitioner contends that O'Brien withdrew a favorable plea offer because the petitioner hired an attorney and filed a request for a bond hearing and discovery motions. The respondent argues that the habeas court correctly concluded that the petitioner failed to show that O'Brien engaged in vindictive prosecution. We agree with the respondent.

We begin with our standard of review relevant to this particular claim. "A . . . court's factual findings on prosecutorial vindictiveness are reviewed for clear error and the legal principles which guide the . . . court are reviewed de novo." (Internal quotation marks

omitted.) *State* v. *Lee*, 86 Conn. App. 323, 326, 860 A.2d 1268 (2004), cert. denied, 272 Conn. 921, 867 A.2d 839 (2005).

In order to succeed on a claim of prosecutorial vindictiveness in the pretrial setting, "the [petitioner] must show actual vindictiveness on the part of the prosecutor. To establish an actual vindictive motive . . . the [petitioner] must show that (1) the prosecutor harbored genuine animus toward the [petitioner], or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a stalking horse, and (2) [the petitioner] would not have been prosecuted except for the animus." (Internal quotation marks omitted.) Id., 328.

The following additional facts are relevant to our disposition of this claim. On April 11, 2007, after the petitioner was arrested on a fourth criminal file, O'Brien offered the petitioner a nine month sentence in exchange for the petitioner's guilty plea to one count of sexual assault in the second degree. The petitioner, who was self-represented at the time, asked for time to consider the offer, to which the court, *Prescott*, *J.*, stated: "I want you to understand . . . that if I give you a month continuance to consider the offer, that nothing else is going to be happening on your case during that time period." With the petitioner's confirmation that he understood, the court gave him until May 9, 2007, to accept or reject the state's offer.

On April 17, 2007, with the offer still pending, Attorney Aaron Romano entered an appearance on behalf of the petitioner on all four files and filed discovery motions and a motion for bond reduction. At a hearing on the bond reduction motion on April 24, 2007, O'Brien stated "there is no offer on the table at this time. But my understanding is that this was continued so that [the petitioner] would consider an offer and nothing

was going to be done in between. From the state's vantage point from bringing in counsel, filing additional request for discovery, the federal action, the request for the bond reduction, that [a]ffects the state's position." O'Brien testified at the habeas trial that he withdrew the offer on April 24, 2007, because the petitioner violated the agreement that there would be "[n]o motions, no changes, no activity on the file other than we come in May [9], accept or reject."

In denying the petitioner's claim of prosecutorial vindictiveness, the habeas court found that the claim was "contrary to the record" and found "no credible evidence of vindictiveness." In so finding, it relied on the fact that both the court and O'Brien stated on the record that the April 11 offer was contingent on there being no intervening circumstances[4] and the "appearance of Attorney Romano and the filing of motions constituted intervening circumstances."

On the basis of our review of the record, we conclude that the habeas court did not err in finding that the petitioner had not satisfied his burden of proving that his cases were vindictively prosecuted by O'Brien.

In light of the foregoing, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal because the petitioner has failed to show that his claims involve 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.

The appeal is dismissed.

In this opinion the other judges concurred.

[4] We note that the habeas court later stated: "There is no evidence that Attorney O'Brien withdrew the offer." While this statement appears to be contradicted by the record, we find no fault with the court's ultimate conclusion on this issue that the prosecutor's withdrawal of a plea offer did not amount to "credible evidence of vindictiveness."

ERIC GOODEN *v.* COMMISSIONER OF CORRECTION (AC 38169)

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

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance by failing to ask the sentencing court to credit an additional 286 days that he had spent in pretrial incarceration. The petitioner had been arrested and charged in the Superior Court at Manchester and held in lieu of bond. While he was in custody on the Manchester charges, he was arrested 286 days later and charged with additional crimes in the judicial district of Tolland. When the petitioner appeared in Tolland to plead guilty to those charges, the prosecutor stated that there was a plea agreement, encompassing both the Manchester charges and the Tolland charges, of ten years incarceration followed by five years of special parole. The petitioner's trial counsel agreed, but indicated to the trial court that the sentence would need to be adjusted to result in a total effective term of ten years incarceration. Specifically, the petitioner's counsel explained that, because the petitioner had first been arrested for the Manchester charges, the sentence to be imposed by the court in Tolland would need to take into account the jail credit that he had earned from his additional 286 days of pretrial incarceration in Manchester. The court stated that it intended to impose a sentence of ten years incarceration followed by five years of special parole without considering the 286 days of jail credit. The petitioner stated that he understood what his sentence would be, the court accepted his guilty plea, and then the petitioner pleaded guilty to the Manchester charges. The petitioner was subsequently sentenced on all charges by the court in Tolland to ten years incarceration followed by five years of special parole in accordance with the plea agreement. At the habeas trial, the petitioner claimed that his trial counsel had performed deficiently by failing to ask the trial court at sentencing to award 286 days of jail credit, and that, but for this allegedly deficient performance, the result of his sentence would have been different. The habeas court denied the petition, concluding that the petitioner had not suffered any prejudice because the sentencing court had unequivocally indicated on the date of the plea that it would not award any additional jail credit. On appeal, the petitioner claimed that the habeas court improperly concluded that his trial counsel had not provided ineffective assistance at his sentencing. *Held* that the habeas court properly denied the petition for a writ of habeas corpus, as the petitioner did not meet his burden of establishing a reasonable probability that his sentence would have been different had his trial counsel renewed the jail credit claim at sentencing; there was no possibility of a more lenient sentence because

the trial court had expressly stated on the date of the plea that it would not adjust the petitioner's sentence as a result of his 286 days of pretrial incarceration for the Manchester charges, and, therefore, even if the petitioner's trial counsel had asked again at sentencing, the court was not going to award the jail credit.

Submitted on briefs September 19—officially released November 15, 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, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Walter C. Bansley IV and *Judie Marshall* filed a brief for the appellant (petitioner).

Gail P. Hardy, state's attorney, *James A. Killen*, senior assistant state's attorney, and *Randall Bowers*, former special deputy assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Eric Gooden, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that his trial counsel did not provide ineffective assistance at his sentencing. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are necessary for our discussion. On April 3, 2007, the petitioner was arrested and charged in the Superior Court at Manchester in docket number H12M-CR-07-0210233-T. He was incarcerated in lieu of bond while awaiting the resolution of these charges from Manchester. While in pretrial custody, he was arrested on January 15, 2008,

286 days later, and charged in the judicial district of Tolland in docket number TTD-CR-08-0091161-T.

On November 21, 2008, the petitioner appeared in Tolland before the court, *Hon. Terrance A. Sullivan*, judge trial referee, to plead guilty to burglary in the first degree in violation of General Statutes § 53a-101 and conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 and 53a-101 in docket number TTD-CR-08-0091161-T. After setting forth the factual bases for these crimes, the prosecutor stated: "The agreement in the case is for a sentence of ten years to serve plus five years special parole. The agreement also incorporates a pending commercial burglary that the [petitioner] has in Manchester. [There] is the understanding—both parties I believe—that the [petitioner] will plead to that case and that that case will be transferred here for sentencing and he will receive a concurrent sentence on that." Leslie Cunningham, the petitioner's attorney in docket number TTD-CR-08-0091161-T, noted her agreement with the prosecutor's statement of the plea, subject to one caveat. "There—there's a possible jail credit issue, and what we contemplated was a total effective sentence of ten [years] to serve, five [years] special parole, so we may adjust one or the other to reflect the ten year sentence." Cunningham explained that the petitioner had been arrested first for the crimes charged in Manchester, and therefore the sentence imposed would need to be adjusted for the petitioner to serve a total of ten years incarceration after receiving credit for all of his pretrial incarceration from April 4, 2007, the date which he first entered the custody of the Department of Correction.

Judge Sullivan immediately noted his concern with the jail credit issue. "Before we go too far on this, that—if you haven't got that straightened out now, then I'm not sure why he's pleading now. If the agreement is the sentence is going to be ten years plus five special parole,

that's the sentence I'm going to impose . . . ten years in prison plus five years special parole. I'm not going to impose a sentence of nine years and eight months and twenty-six days and plus five years of special parole. So if the agreement—I—when we discussed this matter, I thought the agreement—and in fact, I thought it was my offer that I made which was ten, ten [years] plus five special parole." Cunningham mentioned that there had been an off-the-record discussion regarding whether the petitioner's sentence could be structured "so [that] it reflects the ten years." The court iterated that it would impose a sentence of ten years incarceration and five years of special parole and indicated that it did "not want you to come back sometime next month and say, well, I know that the plea agreement is ten plus five special parole, but, Judge, we, that's what we want him to—we want him to get extra credit or some credit for this so you can't really give him ten plus five special parole." Cunningham then asked for and received an opportunity to discuss the matter with the petitioner while the court turned to other matters.

After returning to the petitioner's case, and being told by Cunningham that the matter was ready to proceed, the court conducted a plea canvass of the petitioner. It explained the sentence that would be imposed: "The plea agreement is that, at the time of sentencing on these charges, I'm going to impose a sentence of ten years imprisonment, followed by five years of special parole. And it's also my understanding that [docket number H12M-CR-07-0210233-T] is going to be sent over here and you're going to be sentenced on that at the same time, and that sentence from [docket number H12M-CR-07-0210233-T] will be incorporated into this sentence. *But the sentence that I'm going to impose for both of them combined out of that, out of that proceeding, is going to be ten years of imprisonment plus five years of special parole.*" (Emphasis added.) After

the petitioner indicated that he understood the sentence, the court accepted the plea and found the petitioner guilty of burglary in the first degree and conspiracy to commit burglary in the first degree.

On December 8, 2008, the petitioner appeared before Judge Ward in Manchester, to plead guilty, pursuant to the *Alford* doctrine, to larceny in the first degree in violation of General Statutes § 53a-122 and burglary in the third degree in violation of General Statutes § 53a-103 in docket number H12M-CR-07-0210233-T.[1] The prosecutor set forth the facts underlying these charges, and noted that the plea called for a sentence of five years incarceration to run concurrent with the sentence imposed in docket number TTD-CR-08-0091161-T. The court accepted the petitioner's *Alford* plea and found him guilty of larceny in the first degree and burglary in the third degree.

On December 12, 2008, the petitioner appeared before Judge Sullivan for sentencing in both docket numbers. At this proceeding, the court sentenced the petitioner in accordance with his plea agreements. It imposed a total effective sentence of ten years incarceration and five years special parole. The petitioner expressly agreed that the sentence was consistent with the plea agreements that he had made.

In March, 2012, the petitioner, acting pro se, commenced the present action. He alleged that he had received 332 days of credit for his presentence incarceration from January 15 to December 12, 2008, but claimed that he should have received 618 days, the time period from April 4, 2007 to December 12, 2008. The petitioner filed an amended petition for a writ of habeas corpus, dated August 21, 2012, again claiming that he

[1] The petitioner also admitted to violating his probation in violation of General Statutes § 53a-32. As a result of these proceedings, his probation was terminated.

should have received a credit of 618 days, rather than 332 days, for his presentence incarceration.

On March 26, 2014, counsel for the petitioner filed an amended petition, alleging that the petitioner had received ineffective assistance of counsel and that his pleas in both docket numbers were not knowing, intelligent or voluntary. With respect to the former, the petitioner claimed that Cunningham, inter alia, had failed to ask the sentencing court for credit from April 4, 2007, the first date he was in custody. The petitioner claimed that Cunningham's representation that he would receive jail credit dating back to April 4, 2007, induced him to plead guilty.

Following a one day trial, where Cunningham and the petitioner testified, the habeas court, *Fuger*, *J.*, issued an oral decision denying the petition for a writ of habeas corpus. The habeas court found that the controlling sentence[2] was imposed in docket number TTD-CR-08-0091161-T and that 332 days was all of the jail credit that he was entitled to under General Statutes § 18-98d. It further determined that Cunningham had not performed deficiently by failing to ask Judge Sullivan at sentencing for additional credit. It also concluded that the petitioner had not suffered any prejudice because Judge Sullivan unequivocally indicated on the record on the date of the plea that he would not award any additional jail credit. The habeas court also rejected the claim that the petitioner's pleas were involuntary. Following the denial of the petition, the habeas court granted the petition for certification to appeal.

[2] The ten year period of incarceration in docket number TTD-CR-08-0091161-T is the controlling sentence because that sentence had the longest term to run. See *Tyson* v. *Commissioner of Correction*, 261 Conn. 806, 825, 808 A.2d 653 (2002), cert. denied sub nom. *Tyson* v. *Armstrong*, 538 U.S. 1005, 123 S. Ct. 1914, 155 L. Ed. 2d 836 (2003); see also General Statutes § 53a-38 (b); *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 801, 950 A.2d 1220 (2008).

On appeal, the petitioner claims that the habeas court improperly concluded that Cunningham did not provide ineffective assistance.[3] Specifically, he argues that Cunningham was deficient by failing to request that the court, at sentencing, award presentence credit for the

[3] The habeas court stated in its memorandum of decision: "Judge Sullivan was completely correct when he refused, and had apparently in the past refused, to honor the request by counsel that a defendant receive jail credit. I happen to be in complete accord with Judge Sullivan on that point. I also do not award jail credit when a person is sentenced because it is not within the power of a Superior Court judge to do so.

"I'm well aware that there are some of my colleagues who feel that it's appropriate and they go ahead and award jail credit. In the opinion of this court, that is an illegal ultra vires act. It is beyond the law and the judge has no authority to do so.

"Furthermore, that places the [respondent, the Commissioner of Correction]—when a judge awards jail credit illegally, in this court's opinion, that places the [respondent] in an untenable position where the [respondent] is mandated by statute, Connecticut General Statutes § 18-98d, to correctly determine jail credit. To the extent that the Department of Correction is honoring an order from a judge to award jail credit, this court is of the opinion that that action by the Department [of Correction] is contrary to statute and therefore illegal.

"When a judge illegally awards jail credit, he places—he or she places the [respondent] in a position of which, do I disobey the statutory mandate set forth by the legislature, or do I risk being in contempt of court. . . . There is, simply put, zero authority for Judge Sullivan to have awarded jail credit in [this] case."

To be clear, Judge Fuger determined that there was no authority for Judge Sullivan to award the petitioner a jail credit for the 286 days of incarceration beginning on April 4, 2007, in docket number H12M-CR-07-0210233-T. The petitioner did receive credit for 332 days of presentence incarceration beginning in January 15, 2008. See General Statutes § 18-98d (a) (1).

On appeal, the petitioner also claims that the habeas court improperly concluded that "the practice of awarding jail credit when defendants are not statutorily entitled is an illegal ultra vires act." Specifically, he contends that under the broad discretion afforded to trial judges with respect to sentencing, Judge Sullivan had the authority to craft a sentence of nine years and seventy-nine days that accounted, sub silentio, for the 286 days of jail credit earned under the noncontrolling docket number H12M-CR-07-0210233-T.

We need not decide this issue in the present case, because Cunningham was aware of the jail credit issue and presented it to Judge Sullivan, who clearly rejected any possibility that he would incorporate the jail credit earned from April 4, 2007, into the petitioner's sentence. Judge Sullivan

286 days that he was incarcerated in docket number H12M-CR-07-0210233-T, even though his controlling sentence was in docket number TTD-CR-08-0091161-T.[4] The petitioner also argues that "[t]here was a reasonable probability that—but for [Cunningham's] deficient performance—the result of the petitioner's sentence would have been different. . . . There was a reasonable probability the court would have awarded 286 days of presentence confinement time to be applied to the controlling docket if [Cunningham] had made the request."

We begin our analysis by setting forth our standard of review and the legal principles relevant to this claim. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings [pursuant to *Strickland* v. *Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v.

announced his intention to sentence the petitioner in accordance with the plea bargain reached by the parties, which was ten years incarceration and five years of special parole, following the guilty pleas in the two docket numbers. We leave consideration of whether "the practice of awarding jail credit when defendants are not statutorily entitled is an illegal ultra vires act" for another day.

[4] The petitioner does not claim that he was statutorily entitled, pursuant to § 18-98d (a), to the 286 days of jail credit, but rather bases his claim on the broad discretion afforded to a sentencing court. See, e.g., *Weathers* v. *Commissioner of Correction*, 133 Conn. App. 440, 443–45, 35 A.3d 385, cert. denied, 304 Conn. 918, 41 A.3d 305 (2012).

Washington, supra, 687, this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . .

"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. . . . To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Citation omitted; internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 775–76, 138 A.3d 908 (2016); see also *Stanley* v. *Commissioner of Correction*, 164 Conn. App. 244, 253, 134 A.3d 253, cert. denied, 321 Conn. 913, 136 A.3d 1274 (2016); *Weathers* v. *Commissioner of Correction*, 133 Conn. App. 440, 443, 35 A.3d 385, cert. denied, 304 Conn. 918, 41 A.3d 305 (2012).

In order to prevail, a petitioner must prevail on both *Strickland* prongs. *Lewis* v. *Commissioner of Correction*, 165 Conn. App. 441, 451, 139 A.3d 759, cert. denied, 322 Conn. 901, 138 A.3d 931 (2016). Put another way, "[i]t is axiomatic that courts may decide against a petitioner on either prong, whichever is easier." Id.

During the November 21, 2008 proceeding, the prosecutor stated that the petitioner's plea deal called for a sentence of ten years incarceration, plus five years special parole. When asked by the court if that was the petitioner's understanding, Cunningham raised the issue of presentence jail credit. Judge Sullivan stated that the sentence would be ten years incarceration plus five years special parole and that he would not modify those terms to account for any credit that the petitioner was not statutorily entitled to. At the conclusion of this colloquy, the court emphasized that "the sentence that I'm going to impose is ten [years incarceration] plus five [years] special parole. . . . I just don't want you to come back sometime next month and say, well, I know that the plea agreement is ten plus five special parole, but, Judge, we, that's what we want him to—we want to get extra credit or some credit for this so you can't really give him ten plus five special parole." The court then afforded Cunningham time to speak with the petitioner, who subsequently stated on the record that he understood what sentence would be imposed. During the plea canvass, the petitioner stated that he knew that the court would impose a sentence of ten years incarceration and five years special parole.[5]

At the habeas trial, Cunningham testified on cross-examination that she was familiar with Judge Sullivan's policy of not adjusting sentences based on jail credits earned in situations similar to the petitioner's case. She also stated that Judge Sullivan would not have altered his policy in the present case, even if she had raised the jail credit issue at the petitioner's sentencing.

In *Weathers* v. *Commissioner of Correction*, supra, 133 Conn. App. 445, we concluded that "the mere possibility that the court might have imposed a more lenient

[5] During the habeas trial, Cunningham testified that she did not have any discussions on the record at the sentencing proceedings regarding the jail credit issue.

sentence on account of this pretrial incarceration does not amount to a reasonable probability that it would have done so." In the present case, the facts demonstrate that there was no possibility, much less a probability, of a more lenient sentence. Judge Sullivan expressly stated that he would not adjust the petitioner's sentence of ten years incarceration and five years of special parole as a result of the petitioner's 286 days of pretrial incarceration in docket number H12M-CR-07-0210233-T. As stated by the habeas court: "Judge Sullivan . . . [made] it clear that he [was] not going to impose any sentence other than ten years [incarceration and five years special parole]. . . . Even if . . . Cunningham had asked, it is crystal clear [from] both . . . her testimony and from the transcript that Judge Sullivan was not going to award any jail credit [for the petitioner's pretrial incarceration in docket number H12M-CR-07-0210233-T]." After a review of the record, we conclude that the petitioner did not meet his burden of establishing a reasonable probability that his sentence would have been different had Cunningham renewed the jail credit claim at the sentencing proceeding. Accordingly, the habeas court properly denied the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSUE RIVERA
(AC 36979)

Beach, Prescott and Bishop, Js.

Syllabus

Convicted of manslaughter in the first degree and tampering with physical evidence in connection with the stabbing death of the victim, the defendant appealed to this court, claiming, inter alia, that he was denied his right to a fair trial as a result of certain allegedly improper comments

that the prosecutor made to the jury during closing argument. The defendant, who had given written and videotaped statements to the police that were admitted into evidence, further asserted that the trial court improperly permitted a police detective to testify as an expert witness about body language and other indicators of untruthfulness. The defendant did not testify at trial, but asserted that he had stabbed the victim in self-defense pursuant to statute (§ 53a-19). The defendant also claimed that evidence of his having witnessed a fatal knife fight fourteen years prior to his trial was relevant to support his subjective belief that he needed to use deadly physical force against the victim. *Held*:

1. The defendant could not prevail on his claim that he was deprived of his due process right to a fair trial as a result of certain allegedly improper comments by the prosecutor during closing argument to the jury about his failure to testify, the burden of proof as to self-defense, and facts that were not in evidence:

   a. The prosecutor did not violate the defendant's statutory (§ 54-84 [a]) and fifth amendment rights not to testify, as certain of the prosecutor's remarks were immediately preceded and followed by language that referred to the defendant and to his two statements to the police, and another remark was ambiguous and not of such a character that the jury would construe it to be a comment on the defendant's election not to testify.

   b. The prosecutor's use of the words probable and possible did not mislead the jury by suggesting that the state had to meet a probability standard rather than the beyond a reasonable doubt standard to disprove the defendant's claim of self-defense, the language at issue explicitly referred to courtroom demonstrations by the defendant and his counsel concerning the altercation with the victim, and, thus, pertained to a subsidiary finding by the jury rather than to a finding on one or more of the elements of self-defense, and it was reasonable for the prosecutor to ask the jury to infer that the victim was first attacked when he was asleep, given the nature of the victim's injuries and the testimony by a medical examiner.

   c. The prosecutor did not improperly argue facts that were based on assumptions about professional fighters and drug addicts, the prosecutor having used the rhetorical device of comparing and contrasting concepts and ideas to appeal to the jury's common sense to make the point that the defendant's version of events was not credible.

2. The trial court did not abuse its discretion by permitting a police detective to testify about body language and other indicators of untruthfulness during police interviews: the defendant's claim that such testimony was inherently unreliable and, thus, not a proper topic of expert testimony, was unreviewable, as his objections to the testimony did not apprise the court that he was challenging its reliability, he did not request a hearing on its reliability, and he failed to object to similar prior testimony;

furthermore, contrary to the defendant's assertion, the testimony did not invade the jury's function of assessing his credibility because the detective testified generally about behaviors that were characteristic of untruthfulness, and did not offer an opinion about the defendant's credibility or whether he exhibited such behaviors.

3. The defendant's claim that the trial court improperly admitted into evidence certain photographs of the victim's corpse during a medical examiner's testimony was unavailing, the trial court having heard a lengthy offer of proof and argument from the parties before balancing the probative value of the photographs against the risk of unfair prejudice; moreover, the court did not find anything inflammatory about one image, from which it was difficult to make out details of the appearance of the victim's body, and other autopsy photographs that depicted his wounds were relevant to prove causation and the defendant's intent, and to help the medical examiner explain the autopsy procedure and to describe his observations.

4. The trial court did not abuse its discretion by excluding proffered evidence of a fatal knife fight that the defendant had witnessed fourteen years prior to his trial and which he claimed was relevant to his subjective belief that he needed to use deadly physical force against the victim in self-defense under § 53a-19; the defendant's proffered witnesses could not testify as to what the defendant saw in the knife fight or the nature or degree to which the experience affected him, the proffered testimony of a private investigator who was not at the knife fight presumably would have been riddled with hearsay problems, the incident was remote in time from and did not involve the victim in this case, and the defendant was not a participant in the prior knife fight.

Argued September 8—officially released November 15, 2016

Procedural History

Substitute information charging the defendant with the crimes of murder and tampering with physical evidence, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty of tampering with physical evidence and the lesser included offense of manslaughter in the first degree, from which the defendant appealed to this court; thereafter, the court, *B. Fischer*, *J.*, issued a rectification of the record. *Affirmed.*

Susan M. Hankins, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom were *Brian K. Sibley, Sr.*, senior assistant state's attorney, and, on the brief, *Michael Dearington*, state's attorney, and *Adrienne Maciulewski*, deputy assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Josue Rivera, appeals from the judgment of conviction, rendered after a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1) and tampering with physical evidence in violation of General Statutes § 53a-155 (a). On appeal, the defendant claims that (1) the prosecutor violated his constitutional and statutory right to remain silent, and his constitutional due process right to a fair trial as the result of improper comments made during closing arguments, (2) the trial court improperly permitted a police officer to testify as an expert witness about body language and other indicators of untruthfulness, (3) the trial court abused its discretion by admitting into evidence postmortem photographs of the victim, and (4) the trial court violated the defendant's statutory right to present a defense by excluding evidence relevant to the defendant's theory of self-defense.[1] We affirm the judgment of the trial court.

[1] The defendant's brief to this court includes two additional claims: (1) the trial court improperly denied his motion to suppress the fruits of a warrantless search and seizure; and (2) the trial court improperly charged the jury when, pursuant to the Judicial Branch's pattern jury instructions on self-defense, it engrafted the language, "honestly and sincerely," to define the defendant's "actual belief" as to both the necessity to use force and the necessary degree of force.

With regard to the former claim, the defendant withdrew it at oral argument before this court. With regard to the latter claim, the defendant conceded at oral argument that the recent decision in *State* v. *O'Bryan*, 318 Conn. 621, 123 A.3d 398 (2015), in which our Supreme Court held that the "honestly and sincerely" language constituted "an accurate statement of the law" and was thus not error, is controlling. Id., 634. "[I]t is manifest to our hierarchical judicial system that this court has the final say on matters of Connecticut law and that the Appellate Court . . . [is] bound by our precedent." *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010). The

The jury reasonably could have found the following facts. Sometime in April or May, 2012, the victim, Anthony Pesapane, began living with the defendant and the defendant's family in a first floor unit of a multifamily house in New Haven, an arrangement designed to help the defendant pay rent. The victim regularly attended a local clinic to receive daily methadone treatments, and would often drive the defendant and his wife, Marta Matejkowska, to the clinic for their treatments as well. The last time the victim ever attended the clinic, however, was on June 4, 2012.

Later that day, while in the victim's bedroom, the defendant fatally stabbed the victim twenty-one times. One wound was 3.5 inches deep in the victim's chest and punctured his heart. After the victim died, the defendant cleaned the room with bleach, discarded the knife into the Quinnipiac River, and rolled the victim's body up into a rug. The defendant then obtained a U-Haul truck and placed the body and other bloodstained items in the rear compartment of the truck.

On June 11, 2012, the police conducted a motor vehicle stop of the U-Haul in Woodbridge, and found Matejkowska in the driver seat and the defendant in the passenger seat. The police then opened the back of the truck, where they found the victim's body. After the body was discovered, the defendant gave two statements to the police, one written and one videotaped.[2]

defendant noted to this court, however, that he preserves this claim for further appeal. Because we believe *Stuart* is controlling, further review of this claim is not warranted.

[2] In the defendant's written statement regarding the events leading up to the victim's death, the victim, who appeared to the defendant to be under the influence of crack cocaine, attacked the defendant with a kitchen knife, resulting in a struggle on the victim's bedroom floor until the defendant wrestled the knife away from him. The defendant stated that he then stabbed the victim three times in the arm because the victim would not get off of him, at which point the victim walked over to a night stand, retrieved a second knife, and proceeded to move toward the defendant again. The defendant stated that he responded by stabbing the victim "a few times in

On February 20, 2014, in a long form information, the defendant was charged with murder in violation of § 53a-54a (a) and tampering with physical evidence in violation of § 53a-155 (a). During his jury trial, the defendant claimed that he acted in self-defense, but he did not testify. Ultimately, the defendant was acquitted of murder but convicted of the lesser included offense of manslaughter in the first degree in violation of § 53a-55 (a) (1) and of tampering with physical evidence. The defendant received a total effective sentence of twenty-three years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

PROSECUTORIAL IMPROPRIETY

The defendant first claims that the prosecutor deprived him of his constitutional and statutory right to remain silent as well as his due process right to a fair trial by committing various acts of impropriety during closing argument to the jury. In particular, the defendant argues that the prosecutor improperly (1) commented on the defendant's failure to testify, (2) shifted and misstated the burden of proof with respect to self-defense, and (3) argued facts not in evidence. The state argues that the prosecutor's comments were not improper. Alternatively, the state contends that even if one or more of the prosecutor's comments were improper, none of them deprived the defendant of a fair trial. We disagree with the defendant that the prosecutor's comments were improper.

Before addressing the merits of the defendant's claim, we set forth the applicable standard of review and the law governing prosecutorial impropriety. Although the defendant did not preserve his claim of prosecutorial

the stomach area of his body" and ultimately left him in the bedroom, where the victim died.

impropriety by objecting to the alleged improprieties at trial, "[o]nce prosecutorial impropriety has been alleged . . . it is unnecessary for a defendant to seek to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and it is unnecessary for an appellate court to review the defendant's claim under *Golding*." (Footnote omitted.) *State* v. *Fauci*, 282 Conn. 23, 33, 917 A.2d 978 (2007). "In analyzing claims of prosecutorial impropriety, we engage in 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."[3] (Citations omitted.) Id., 32.

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] 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. . . . Thus, as the state's advocate, a 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. . . . Moreover, [i]t

[3] A reviewing court must apply the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), to decide whether an impropriety denied the defendant his due process right to a fair trial. These factors include a consideration of the extent to which the impropriety was invited by defense counsel's conduct or argument, the severity of the impropriety, the frequency of the impropriety, the centrality of the impropriety to the critical issues in the case, the strength of any curative measures taken, and the strength of the state's case. Id. Because we determine that no impropriety occurred, we do not engage in this analysis.

does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 37, 100 A.3d 779 (2014).

A

Alleged Comment on Defendant's Failure to Testify

We turn first to the defendant's argument that the prosecutor improperly commented during closing argument on the defendant's failure to testify, thereby violating the defendant's fifth amendment rights[4] and General Statutes § 54-84 (a).[5] In response, the state argues that the prosecutor's remarks referred to the two statements that the defendant made to police and that were admitted at trial, not to his failure to give in-court witness testimony. We conclude that the comments in question were not of such a character that the jury naturally and necessarily would construe them to be comments on the defendant's election not to testify.

During closing argument, the prosecutor directed the jury's attention to what he argued were the material pieces of evidence that the jury should consider when determining the defendant's guilt. The prosecutor stated: "What are some things you should look at? The two statements are probably the two most important things that give light to what happened here. In this courtroom there is one person [who] can tell you exactly what happened, to be truthful, and sit and ask questions, and that's [the defendant]. The only other person that we know is [the victim] and, unfortunately,

[4] The fifth amendment to the United States constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

[5] General Statutes § 54-84 (a) provides in relevant part: "Any person on trial for crime . . . may testify or refuse to testify upon such trial. The neglect or refusal of an accused party to testify shall not be commented upon by the court or prosecuting official . . . ."

he's not here, or we wouldn't be here. So, who has something to lose when they start telling the story about why they got caught with a body in the back of a truck? You have to come up with some explanation when the police are banging on that door, saying, tell me what's going on back here."

Shortly thereafter, the prosecutor again returned to the subject of the defendant's statements to the police, imploring the jury to "[t]ake a look at the statements; those are the two closest things that we're going to get to in terms of what happened. The physical evidence speaks for itself. Does it line up with what we know? And what do we know? We know the story one person told. And the judge talks to you about credibility in terms of what you use to determine. Does somebody have a stake in what they're telling the police? Does somebody have a stake when they sit in that chair and testify for you? Who has the most to lose here? So, what does he say? Does his story in the statements make sense? When you're trying to recall a story about what actually happened, most of the time, you're going to get the facts straight because that's the truth you're testifying—you're recalling an event based on memory. But when you start trying to deceive somebody, those little details start falling away from what actually happened." The defendant did not object to these comments.

"It is well settled that comment by the prosecuting attorney . . . on the defendant's failure to testify is prohibited by the fifth amendment to the United States constitution. . . . Our legislature has given statutory recognition to this right by virtue of its enactment of . . . § 54-84. In determining whether a prosecutor's comments have encroached upon a defendant's right to remain silent, we ask: Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment

on the failure of the accused to testify? . . . Further, in applying this test, we must look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact upon the jury. . . . Finally, [w]e also recognize that 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Parrott*, 262 Conn. 276, 292–93, 811 A.2d 705 (2003).

"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. . . . [W]hen 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).

Here, the defendant argues that the prosecutor's remarks were explicitly directed toward the defendant's failure to testify because the plain language, "that's [the defendant]," "[i]n this courtroom," and "sit in that chair," leaves no room for any other possible interpretation. He asserts that the improper remarks attempted to inextricably link the defendant's credibility and viability of his self-defense claim to his failure to take the witness stand, as most clearly illustrated by his comment that the defendant was the "one person" who "can tell [the jury] exactly what happened" because "[t]he only other person" was the victim. The state argues that, if the comments are viewed in their full context, the prosecutor was stating to the jury that it

needed to assess carefully the credibility of the two statements that the defendant provided to police because the only two people who had firsthand knowledge of what occurred on the day the victim was killed were the defendant and the victim.

In this case, we conclude that although, in isolation, the statements relied on by the defendant could be construed as referring to the defendant's decision not to testify, if the statements are put into the context of the entire trial and closing argument, the prosecutor's remarks refer to the evidence of the defendant's two statements to the police. Two of the challenged statements made by the prosecutor—"[i]n this courtroom there is one person [who] can tell you exactly what happened, to be truthful, and sit and ask questions, and that's [the defendant], and "[t]he only other person that we know is [the victim] and, unfortunately, he's not here, or we wouldn't be here"—are immediately preceded and followed by language referring to the defendant's out-of-court statements, i.e., his statements to the police. Moreover, "[i]n this courtroom" arguably describes the current location of the "one person," that is, the defendant, who is able to "tell [the jury]," that is, via his statements to the police, which were admitted at trial, what had happened on the day of the victim's death. To parse the sentence even further by examining what the prosecutor intended when he said, "*can* tell you exactly what happened," instead of, more accurately, "*did* tell you exactly what happened," would be to scrutinize each of the prosecutor's individual words in a vacuum, precisely what this court should not do. (Emphasis added.) See *State* v. *Felix R.*, supra, 319 Conn. 9. We necessarily allow the prosecutor generous latitude in closing argument, lest every inaccurate verb tense be deemed impropriety.

The challenged comment that is most equivocal in its meaning is the prosecutor's question, "Does somebody

have a stake when they sit in that chair and testify for you?" It is unclear whether the prosecutor was referring to the stake that any witness has when he or she sits in the witness chair and testifies at trial, the stake that the defendant specifically has when he sits in the witness chair and testifies at trial, or the stake that the defendant specifically has when he sits in a chair at the police station and gives his version of events, as presented to the jurors at trial. We conclude that this segment of the closing argument was, at worst, sufficiently ambiguous that it clearly was not "manifestly intended to be, [nor] was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify . . . ." (Internal quotation marks omitted.) *State* v. *Parrott*, supra, 262 Conn. 293. Because "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning"; *State* v. *Felix R.*, supra, 319 Conn. 9; we decline to accept the defendant's interpretation of the prosecutor's comments. Accordingly, we conclude that the challenged statements do not constitute improper comments by the prosecutor on the defendant's failure to testify.[6]

B

Alleged Misstatement of Burden of Proof

The defendant next contends that the prosecutor misled the jury by misstating the burden of proof regarding

[6] We note that although the defendant also asserts in his brief to this court that the prosecutor improperly commented on the defendant's interest in the outcome of the case, the defendant frames this assertion not as a separate claim of prosecutorial impropriety, but as additional support for his contention that the prosecutor impermissibly commented on the defendant's failure to testify. In his brief, the defendant states: "Improperly arguing the nontestifying defendant's interest in the outcome, in view of *State* v. *Medrano*, [308 Conn. 604, 65 A.3d 503 (2013), which was decided] less than ten months before, made the impropriety far more severe." Because, as previously discussed, we do not find that the prosecutor's challenged remarks constituted impropriety, we need not address this assertion by the defendant.

self-defense. More specifically, the defendant argues that the prosecutor improperly used the language "probable" and "possible" instead of "beyond a reasonable doubt." The state responds by arguing that the prosecutor's language was not improper because it was made in reference to a subsidiary finding by the jury, not a finding on one or more elements of self-defense. We agree with the state.

During the state's direct examination of James R. Gill, the state's chief medical examiner, the prosecutor asked if the victim's wounds were consistent with the victim having been lying down at the time he was stabbed, to which Gill replied: "Certainly, if he's [lying] down prone . . . on his back, it would be a matter of having that surface of the body where the stab wound was to be able to be reachable or exposed to the knife." Subsequently, during cross-examination, the defendant's counsel engaged Gill in the following exchange:

"Q. Dr. Gill, from your examination of the body of [the victim], who started the fight?

"A. I have no idea if there even was a fight. . . .

"Q. And you don't know where [the victim] was standing in relation to the person who stabbed him, correct?

"A. Yeah, I don't know if he was standing, sitting, lying down; that's correct.

"Q. Actually, it could be—as long as the—the arm could reach to the spot where the stab wound went in, it could be in any position, correct?

"A. It could be from behind, reaching around, yeah, a variety of positions, yeah."

After this line of questioning, the defendant and his counsel performed demonstrations in the courtroom in

which they modeled several positions that the defendant and the victim may have been in when the altercation began and the victim sustained various injuries. The defendant's counsel then followed up the presentations by asking Gill if each demonstration was consistent with the wounds of the victim as contained in the autopsy findings.[7] Subsequently, during closing argument, the prosecutor referenced these enactments and stated: "You saw the defendant and his attorney provide demonstrations here in the courtroom; seemed pretty creative. Is it *possible*? Yes, it's *possible*. But what is more *probable* in light of the injuries?" (Emphasis added.)

We turn then to the authorities relevant to this claim. The defense of self-defense is codified in General Statutes § 53a-19, which provides in relevant part: "(a) Except as provided in subsections (b) and (c) of this section, 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

[7] For example, in one instance, the following exchange took place between the defendant's counsel and Gill:

"Q. Now, with regard to—there were several stab wounds on the right elbow of [the victim]; is that correct?

"A. Correct.

"Q. And they were clustered right around here?

"A. Yes, around the elbow.

"Q. Okay. Is that consistent with somebody—well, let me have the defendant stand up and—and model with me to see if it's consistent with his findings. . . .

"Q. If I—if [the victim], who's about this height, had the defendant in a headlock like this, and the defendant had a knife in his right hand, and—[the defendant]—and would stab him here, would that be consistent with your findings?

"A. Yes."

about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

"Under our Penal Code, self-defense . . . is a defense . . . rather than an affirmative defense. . . . Consequently, a defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt. . . . The state may defeat a defendant's claim of self-defense involving deadly physical force by proving, beyond a reasonable doubt, any of the following: (1) the defendant did not reasonably believe that the victim was using or about to use deadly physical force or inflicting or about to inflict great bodily harm; or (2) the defendant knew that he could avoid the necessity of using deadly physical force with complete safety by retreating . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Singleton*, 292 Conn. 734, 747, 974 A.2d 679 (2009).

Although, in a criminal prosecution, a material fact must be proven beyond a reasonable doubt, "[t]his does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a jury's factual inferences that support a guilty verdict need only be reasonable. . . . [I]t is a function of the jury to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . Because [t]he only kind of inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon

the evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Niemeyer*, 258 Conn. 510, 518, 782 A.2d 658 (2001).

Here, the defendant argues that the prosecutor's use of the language "probable" and "possible" misled the jury by suggesting a probability standard for self-defense rather than the state's burden of disproof beyond a reasonable doubt. We do not agree.

The prosecutor's remark—"Yes, it's possible. But what is more probable"—explicitly refers to the courtroom demonstrations that the defendant and his counsel engaged in during the trial. Those demonstrations attempted to show the different positions that the victim may have been in in relation to the defendant at the time the altercation began and escalated, in an effort to cast doubt on the state's theory that the victim was lying down when the dispute started. The only two elements of self-defense that the state must disprove "beyond a reasonable doubt" are (1) that the defendant reasonably believed that the victim was using or about to use deadly physical force or inflicting or about to inflict great bodily harm, and (2) that the defendant did not know that he could avoid the necessity of using deadly physical force with complete safety by retreating. Therefore, although evidence offered to prove how the victim was positioned when the dispute began is certainly useful information for the jury to consider, it is not an element of self-defense pursuant to § 53a-19. Accordingly, as a subordinate conclusion of the jury, the conclusion need only be reasonable, but cannot be based on " 'possibilities, surmise or conjecture.' " *State* v. *Niemeyer*, supra, 258 Conn. 518.

Because the prosecutor characterized the defendant's demonstrations to the jury as providing only a *possible* version of the events in question, he referenced

the proper "reasonable" versus merely "possible" standard assigned to subsidiary findings. We conclude, therefore, that the prosecutor did not commit impropriety by using the "possible" versus "probable" language during closing argument.

Relatedly, the defendant also claims in this section of his brief that the prosecutor improperly communicated to the jury during closing argument the state's theory that the defendant initially stabbed the victim while the victim was sleeping. More specifically, the defendant argues that this theory was unsupported by the evidence. The state responds that this theory constituted a reasonable inference drawn from both the testimony of Gill and the physical evidence of the victim's injuries.

"[T]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. . . . But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment." (Internal quotation marks omitted.) *State* v. *Niemeyer*, supra, 258 Conn. 518.

As previously discussed, Gill testified during direct examination that the victim's wounds were consistent with having been in a prone position at the time he was stabbed. On redirect, the state again followed up on this theory, asking Gill "if a person was prone, face

down, and a right-handed person approached the person that's prone up toward the head area, and the person would be lower, wouldn't that also be consistent with the type of wounds that were received on the—the left side of the neck and shoulder," and whether "[i]t would be easier for a shorter person to reach a taller person at that—at that level," to both of which Gill answered in the affirmative. Given this testimony and the one-sided nature of the victim's injuries, and especially in light of the generous latitude we afford prosecutors during closing arguments, it was reasonable for the prosecutor to ask the jury to infer that the victim was first attacked when he was asleep. We conclude that this did not constitute impropriety.

C

Alleged Interjection of Facts not in Evidence

Finally, the defendant contends that the prosecutor committed an impropriety during closing argument when he interjected facts that were not in evidence. Specifically, the defendant argues that the prosecutor improperly brought in "facts" that were based on assumptions about professional fighters in general, drug addicts in general, and the defendant and the victim in particular. The state responds that these comments constituted an appropriate use of a rhetorical device designed to appeal to the jury's common sense. We agree with the state.

In his rebuttal argument, the prosecutor, in an effort to cast doubt on the defendant's self-defense claim and, more specifically, on the statements that the defendant made to the police regarding the nature and length of the struggle he had with the victim, stated the following: "Professional fighters don't even fight all out for an hour, and they're trained. It's not like either one of these people was trained in anything; drug addicts, they don't

eat right, they're using drugs. Are they going to be physically capable of fighting all out for an hour? That's—that's for you to decide. But it's really, kind of, making a huge stretch."

Our law is well settled that "[the prosecutor's] conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he [or she] represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice or resentment. . . . That is not to say, however, that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . . The state's attorney should not be put in [a] rhetorical straitjacket . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 435, 64 A.3d 91 (2013). Moreover, "jurors, in deciding cases, are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to a jury's common sense in closing remarks." (Internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 790–91, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

In the present case, the defendant argues that the prosecutor's remark was improper because no evidence was presented at trial about the abilities of professional fighters or the physical abilities, stamina, and nutrition of drug addicts.[8] We are not convinced that there needed

[8] To the extent that the defendant claims that there was no evidence in the record for the prosecutor to properly allude to the defendant and the victim being drug addicts, we disagree. For example, there was testimony that the victim regularly attended a local clinic to receive daily methadone treatments, and would often drive the defendant and his wife to the clinic for their treatments as well. As further testimony conveyed, methadone is used to treat opioid dependence. Accordingly, it was not improper for the

to be. The use of juxtaposition, wherein one places a person, concept, or idea parallel to another to highlight the contrast between the two and compare them, as a rhetorical device to make a point in closing argument, is not prohibited. In this case, the prosecutor used the device in appealing to the jury's common sense that, because even professional fighters lack the stamina to fight continuously for an hour, the defendant's version of events simply was incredible. We agree with the state that the prosecutor "naturally presented [his argument] to the jury with the warmth and color of advocacy." *State* v. *Chapman*, 103 Conn. 453, 476, 130 A. 899 (1925). To hold otherwise would be to put the prosecutor in the prohibited "rhetorical straitjacket," which we decline to do.

In sum, we conclude that none of the challenged comments by the prosecutor was improper. Accordingly, the defendant was not deprived of his right to a fair trial.

II

ADMISSION OF EXPERT TESTIMONY BY DETECTIVE WUCHEK

We next turn to the defendant's claim that "[t]he trial court erred in permitting [Michael Wuchek, a detective with the New Haven Police Department] to testify as an expert witness to body language and other indicators of untruthfulness during police interviews, thereby invading the credibility determinations and fact-finding province of the jury." In response, the state argues that (1) the defendant's claim is unpreserved, (2) the trial court did not abuse its discretion in permitting this testimony because Wuchek did not opine on the defendant's credibility, and (3) the defendant's failure to

prosecutor to ask the jury to infer that the defendant and the victim were both drug addicts.

object to other similar evidence rendered Wuchek's testimony cumulative, thus rendering any error in permitting his testimony harmless. We conclude that to the extent the defendant claims on appeal that Wuchek's testimony is not a proper topic for expert testimony because it is inherently unreliable, this claim was not properly preserved at trial, and to the extent that the defendant claims that the testimony invaded the jury's exclusive function as trier of fact to assess the defendant's credibility, the trial court's ruling was not an abuse of discretion.

During its case-in-chief, the state presented the testimony of Joseph Pettola, a detective with the New Haven Police Department. Pettola, who participated in the videotaped interview of the defendant along with Wuchek, described the defendant's demeanor during that meeting as "kind of on the nervous side." He further testified, without objection, that the defendant "wouldn't look Detective Wuchek in our eye—in the eye, in our eyes, which is an indicator of, you know, if you're telling the truth or not, and doing many, many—hundreds of interviews in my career." The prosecutor then engaged in the following exchange with Pettola:

"Q. All right. Were you also sort of paying attention to things like body language and things of that nature as [the defendant is] answering questions?

"A. Of course.

"Q. All right. What are you looking for when you're doing interviews and you're in that role, you're just observing somebody? What are some of the cues that you're looking for, sir?

"A. About—like I said before about looking you in the eye and not keeping your head down and looking up forward. . . .

"Q. All right. So, now, you—what—you said—you were looking for what, sir?

"A. Like, if the person you're interviewing [is] actually looking, you know, one-on-one, looking—look you right in the eye and wouldn't keep their head down or being fidgety, you know, all the time saying something and moving—moving certain body parts, as being very nervous or irritable when they're—when they're giving their version of what happened."

The state later presented the testimony of Wuchek, during which the defendant's videotaped statement was admitted into evidence. After the videotape concluded, the state asked Wuchek if he "[pays] any particular attention to such things like body language" during his police interviews, to which Wuchek answered in the affirmative. When the state asked him to elaborate on why he does that, the defendant objected on the ground of relevance, without further elucidation, which the trial court overruled. Wuchek then replied that "[b]ody language helps [him] gauge the truthfulness of people's answers," to which the defendant again objected, stating: "The jury has seen a videotape of the entire interview. The witness' interpretation of my client's credibility is—is taking on the jury's job." The trial court disagreed and again overruled the objection. Wuchek continued: "Through interview and interrogation courses, we've learned that—I learned that people who are interviewed, sometimes, when they are untruthful they'll cover their mouth, they'll—they'll hunch down. Other indicators just help us get a feel for that person." The prosecutor went on to ask for other indicators of untruthfulness, to which Wuchek cited various behaviors such as repeating interview questions, taking long pauses, and looking down or away from the interviewer.

In a final exchange relevant to this claim, the prosecutor asked Wuchek if, during the course of his interview

with the defendant, he had at his disposal bank records, phone records, evidence from the U-Haul scene, and/or evidence from the rental unit scene. Wuchek stated, "No, I don't think so." The following colloquy then took place between the prosecutor, Wuchek, the defendant's counsel, and the trial court:

"[The Prosecutor]: All right. So, how does . . . a lack of information such as being able to do those things affect your interview in this case?

"[The Witness]: Well, I want to have as many facts as I—as I can to the case, both background and facts of the physical evidence so that I can gauge that person—gauge that person's truthfulness. A lot of times that's why I'll repeat the—

"[The Defendant's Counsel]: Objection, Your Honor. He's testifying as to evaluating a person's truthfulness. This is the sole province of the jury.

"The Court: No, it's an interview technique that he is discussing that he's been trained for, so I'm going to allow it.

"[The Defendant's Counsel]: Well, I—I didn't hear a foundation of how—what training and experience—well, the training that he's received in determining people's truthfulness. I didn't hear anything about his courses at the police academy or anything that he did in order to prepare himself to determine somebody's truthfulness.

"The Court: All right. Do you want to get into more of a foundation on that?

"[The Prosecutor]: Judge, I believe the officer testified he's conducted over thousands of interviews, and he just testified that through courses in interrogations and interviews, he's had training.

"The Court: All right. I will allow it. Go ahead."

As a threshold matter, we first address the state's initial argument that the defendant's evidentiary claim was not preserved at trial and, thus, is unreviewable by this court on appeal. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

Although the defendant's brief on appeal is somewhat unclear regarding the precise ground upon which he challenges Wuchek's testimony, a careful reading of the defendant's appellate brief, as well as remarks made at oral argument, lead us to conclude that he primarily argues that physical indicators of a person's untruthfulness is not an appropriate topic for expert testimony because it is inherently unreliable.[9] As support for this argument, the defendant asserts that "[n]umerous studies refute the police human lie detector theory," and

[9] Additionally, the defendant's brief to this court states: "The [trial] court permitted Detective Wuchek . . . to testify over repeated defense objection, regarding interview techniques, verbal and physical indicators of untruthfulness, and the reasons that suspects would employ deceptive strategies and make inconsistent statements. Body language and suspect motivations are not a proper subject for expert testimony. . . . In the present case, admission of Detective Wuchek's expert testimony was unreasonable, untenable, and in clear contravention of Connecticut precedent. It is black letter law that juries are the sole arbiters of credibility, unaided by experts to help them decide truthfulness. Such expert testimony is not only unhelpful and unnecessary . . . but it may actually be counterproductive."

cites to a lengthy footnote in the majority opinion of *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 332 n.83, 112 A.3d 1 (2015), in which our Supreme Court noted that "at the petitioner's first habeas trial, Richard Leo, a leading authority on police interrogation methods and false confessions, testified that the commonly held belief among police officers that deception can be determined merely by observing someone's body language is totally pseudoscientific . . . . [I]f somebody is slumped over, if somebody is passive, if somebody utters quiet denials, if somebody is in a runner's position, somebody is sweating, evasive or nervous, that is not necessarily indicative of guilt . . . ." (Internal quotation marks omitted.) Our Supreme Court in *Lapointe* continued: "We acknowledge Leo's testimony . . . to point out that any testimony by [the police interrogation witness] at a new trial concerning the petitioner's purportedly incriminating body language may well be subject to substantial impeachment, thereby minimizing or even eliminating whatever adverse effect that testimony might have had on the petitioner at his criminal trial."[10] Id., 333 n.83.

[10] The entirety of the footnote in *Lapointe* is as follows: "[Detective Paul] Lombardo [the police interrogation witness] testified at length regarding the petitioner's body language during the interrogation. Lombardo told the jury that, in his experience, the petitioner's passivity and failure to object loudly, as well as the way he sat in 'a runner's position' and wrung his hands, was indicative of 'someone who [was] being deceptive or trying to hide something.' It bears mention, however, that, at the petitioner's first habeas trial, Richard Leo, a leading authority on police interrogation methods and false confessions, testified that the commonly held belief among police officers that deception can be determined merely by observing someone's body language is 'totally pseudoscientific . . . . [I]f somebody is slumped over, if somebody is passive, if somebody utters quiet denials, if somebody is in a runner's position, somebody is sweating, evasive or nervous, that is not necessarily indicative of guilt . . . .' Leo's observation that the police officers make poor lie detectors has been confirmed in a number of recent studies. See, e.g., G. Gudjonsson, 'False Confessions and Correcting Injustices,' 46 New Eng. L. Rev. 689, 696 (2012) ('[c]oncerns have been raised that the [Reid behavioral analysis interview] indicators represent little more than common-sense beliefs about deception that are contradicted by scientific studies and place innocent . . . suspects at risk of being misclassified

With regard to expert testimony in general, "the trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed. . . . Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, 280 Conn.

and giving a false confession'); R. Leo, 'False Confessions: Causes, Consequences, and Implications,' 37 J. Am. Acad. Psychiatry L. 332, 334 (2009) ('[S]ocial scientific studies have repeatedly demonstrated across a variety of contexts that people are poor human lie detectors and thus are highly prone to error in their judgment about whether an individual is lying or telling the truth. Most people get it right at rates that are no better than chance [that is, 50 percent] or the flip of a coin. Moreover, specific studies of police interrogators have found that they cannot reliably distinguish between truthful and false denials of guilt at levels greater than chance; indeed, they routinely make erroneous judgments. The method of behavior analysis taught by [one well established] police training firm . . . has been found empirically to lower judgment accuracy, leading [two researchers] to conclude that the [foregoing method of behavior analysis] may not be effective—and, indeed, may be counterproductive—as a method of distinguishing truth and deception . . . .' [Citation omitted; footnotes omitted; internal quotation marks omitted.]); J. Masip et al., 'Is the Behaviour Analysis Interview Just Common Sense?,' 25 Applied Cognitive Psychol. 593, 595 (2011) ('[T]he behavioural indicators of deception [established by earlier research] do not coincide with the scientific evidence accumulated over several decades of [more recent] empirical research. . . . [More recent research reveals] that observers' accuracy in judging the veracity of truthful and deceptive [video-recorded] statements was *lower* if the observers had previously been trained to detect deception using . . . cues [established by that earlier research] than if they had not been trained.' [Emphasis in original.]). We acknowledge Leo's testimony and the foregoing related scholarly articles merely to point out that any testimony by Lombardo at a new trial concerning the petitioner's purportedly incriminating body language may well be subject to substantial impeachment, thereby minimizing or even eliminating whatever adverse effect that testimony might have had on the petitioner at his criminal trial." *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 332–33 n.83.

336, 342, 907 A.2d 1204 (2006), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 230 (2007). "In other words, [i]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion. . . . It is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 230, 49 A.3d 705 (2012).

We agree with the defendant that a significant question exists regarding whether the type of testimony in the present case is inherently reliable and, thus, "helpful to the . . . jury in considering the issues." (Internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, supra, 280 Conn. 342. As previously mentioned, our Supreme Court recently suggested in a lengthy footnote in *Lapointe* that, at a minimum, this method of behavior analysis by police would be subject to substantial impeachment, without necessarily opining on its admissibility. We need not decide this issue in the present case, however, because the three objections made by the defendant in response to Wuchek's testimony did not apprise the trial court that the basis of the objection was a challenge to the reliability of this type of testimony. Instead, the objections included a generic reference to its relevance,[11] a claim that the testimony

[11] An objection on the ground of relevance without further elucidation could have been construed by the trial court in a number of ways. For instance, the defendant could have meant that police interrogation tactics in general are irrelevant to the issues in the case, or that the witness' reasons for studying interviewees' body language to determine truthfulness is irrelevant because such a determination is a core jury function. In any event, the trial court should not have been expected to construe the vague objection as an attack on the inherent reliability of Wuchek's testimony.

invaded the exclusive province of the jury to assess the defendant's credibility, and a claim that there was a lack of foundation for the expert opinion.[12] The objections raised to the trial court contained no reference to any studies that would suggest that this type of testimony is inherently unreliable. Moreover, the defendant never asked for a *Porter*[13] hearing on the reliability of the expert testimony, or argued that although the expert testimony is nonscientific in nature and thus not subject to *Porter* review, the court should still exclude it as inherently unreliable as an exercise of its gatekeeping

[12] We note that the defendant's objection was tied explicitly to the officer's training and experience, and was not a reference to the lack of foundation regarding the reliability of such evidence. It is unclear from his brief to this court whether the defendant is now asserting a claim that is based on this last objection. If so, this specific claim is confined to half of a single sentence, wherein the defendant argues that "[t]he court abused its discretion in determining . . . that the state had laid an adequate foundation for admission." As "[i]t is well settled that [w]e are not required to review claims that are inadequately briefed" and that "[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly"; (internal quotation marks omitted) *Lucarelli* v. *Freedom of Information Commission*, 136 Conn. App. 405, 407 n.1, 46 A.3d 937, cert. denied, 307 Conn. 907, 53 A.3d 222 (2012); to the extent that the defendant attempts to raise this claim, we deem it inadequately briefed and, thus, abandoned.

[13] See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997) (en banc), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). "In [*Porter*], we adopted the test for determining the admissibility of scientific evidence set forth in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, [509 U.S. 579, 589–92, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]. We noted therein two requirements established under *Daubert*. First, [we noted] that the subject of the testimony must be scientifically valid, meaning that it is scientific knowledge rooted in the methods and procedures of science . . . and is more than subjective belief or unsupported speculation. . . . This requirement establishes a standard of evidentiary reliability . . . as, [i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity. . . . Second, [we noted that] the . . . scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract." (Internal quotation marks omitted.) *State* v. *Sorabella*, 277 Conn. 155, 215, 891 A.2d 897, cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006). We note that in *Lapointe*, our Supreme Court suggested, without deciding, that this type of evidence is scientific in nature. See footnote 10 of this opinion.

function. See *Kumho Tire Co., Ltd.* v. *Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) ("[w]e conclude that [the] general holding [of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge"). Finally, in light of the fact that the defendant failed to object in any way to the similar testimony given by Pettola, we are further convinced that the defendant did not make the same objection at trial that he now advances on appeal. As "the sine qua non of preservation is fair notice to the trial court"; (internal quotation marks omitted) *State* v. *Dixon*, 318 Conn. 495, 500, 122 A.3d 542 (2015); we conclude that this claim was not preserved and, thus, is unreviewable by this court on appeal.

To the extent that the defendant challenges on appeal Wuchek's testimony on the ground that it invaded the jury's exclusive function as trier of fact to assess the defendant's credibility, we conclude that this claim was properly preserved at trial.[14] At the same time, however, because "[t]he trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done"; (internal quotation marks omitted) *State* v. *Polynice*, 164 Conn. App. 390, 405, 133 A.3d 952, cert. denied, 321 Conn. 914, 136 A.3d 1274 (2016); we conclude that the trial court did not abuse its discretion in allowing Wuchek's testimony on this ground.

[14] As previously noted, after Wuchek testified that "[b]ody language helps me gauge the truthfulness of people's answers," the defendant's counsel objected, stating: "The jury has seen a videotape of the entire interview. The witness' interpretation of my client's credibility is—is taking on the jury's job."

"[I]t is a jury's duty to determine the credibility of witnesses and to do so by observing firsthand their conduct, demeanor and attitude." *State* v. *Johnson*, 288 Conn. 236, 265, 951 A.2d 1257 (2008). "Expert witnesses cannot be permitted to invade the province of the jury by testifying as to the credibility of a particular witness or the truthfulness of a particular witness' claims." *State* v. *Iban C.*, 275 Conn. 624, 634, 881 A.2d 1005 (2005). Moreover, our Supreme Court held in *State* v. *Favoccia*, 306 Conn. 770, 51 A.3d 1002 (2012), that an expert should not be permitted to testify as to whether a particular complainant exhibited specific behaviors that the expert also identified as those characteristic of sexual assault victims because (1) such testimony amounts to an implicit opinion on whether the complainant's claims are truthful, and (2) the subject of such testimony is not beyond the knowledge of an average juror.

We previously have emphasized, however, that "a critical distinction must be recognized between admissible expert testimony limited to general or typical behavior patterns and inadmissible testimony directly related to a particular witness' credibility." *State* v. *Leniart*, 166 Conn. App. 142, 223, 140 A.3d 1026, cert. granted on other grounds, 323 Conn. 918, 149 A.3d 499 (2016) and cert. granted on other grounds, 323 Conn. 918, 150 A.3d 1149 (2016), citing *State* v. *Spigarolo*, 210 Conn. 359, 378–79, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989). Thus, in *Leniart*, we held that the trial court abused its discretion by excluding expert testimony that was "narrowly tailored to provide only general information related to [jailhouse] informant testimony and its unreliability"; *State* v. *Leniart*, supra, 224; because the expert "offered no testimony regarding any of the particular informants in this case, either with respect to their status as informants, how they had obtained their information, or their potential reliability as witnesses." Id., 223.

Similarly, in the present case, the trial court record reveals that Wuchek was never asked for, nor did he offer, his opinion as to either the credibility of this particular defendant, the truthfulness of this particular defendant's statements, or whether the defendant exhibited any behaviors characteristic of untruthful behavior. Although Wuchek did testify generally as to various behaviors concerning eye contact, posture, and speaking patterns that, on the basis of his training and experience, he opined are characteristic of people who are being untruthful, Wuchek, unlike the expert in *Favoccia*, did not directly comment on whether this particular witness exhibited any of those discussed behaviors. The jury remained free to assess independently, untainted by expert testimony, whether the defendant actually engaged in such behaviors.[15] Accordingly, we conclude that the trial court did not abuse its discretion by overruling the defendant's objection to Wuchek's testimony on the ground that it invaded the province of the jury.

In sum, we conclude that to the extent the defendant is now claiming that body language and other behavioral indicators of untruthfulness are not proper subjects for expert testimony because they are inherently unreliable, this claim was not properly preserved at trial. To the extent that the defendant is claiming that Wuchek's testimony invaded the jury's exclusive function as trier of fact to assess the defendant's credibility, we conclude that the trial court did not abuse its discretion in making this evidentiary ruling.

III

ADMISSION OF POSTMORTEM PHOTOGRAPHS OF VICTIM

We next turn to the defendant's claim that the trial court improperly admitted postmortem photographs of

[15] In so concluding, we do not mean to suggest an opinion as to whether we believe this is a proper topic for expert testimony because, as previously

the victim's corpse in advanced decomposition. The defendant argues that the limited evidentiary value of the photographs was outweighed by their prejudicial effect because the photographs improperly inflamed the emotions of the jury. In response, the state argues that the defendant has failed to establish that the trial court abused its discretion in admitting the subject photographs. We agree with the state.

During the state's case-in-chief, Matthew Greenstein, a state police trooper responsible for collecting evidence at the scene where the victim's body was found, identified five photographs that depicted various items as they appeared in the back of the U-Haul truck. The defendant objected to the admission of one of the photographs that depicted the victim's body partially rolled in the rug amid other items in the back of the truck, and the trial court excused the jurors. The defendant conceded that the photograph was relevant, but argued that its probative value was outweighed by its prejudicial effect because it portrayed a decaying head that would be shocking to the jury. Moreover, he contended that the state had already established that there was a body found in the back of the U-Haul and that the body was that of the victim. The state argued that the photograph was relevant to the case, as the manner in which the victim's body was discovered was relevant both to the charge of tampering with physical evidence as well as to the defendant's state of mind.

The trial court examined the photograph and overruled the defendant's objection, noting that the photograph was part of the history of the case and relevant to both counts, and that it was not inflammatory because it merely depicted the left arm of a person, presumably the victim, with the top of the body being "dark; this

discussed, an objection to this type of testimony on the ground that it is inherently unreliable was not properly preserved at trial.

court cannot even make out what that entails." Ultimately, the trial court concluded that the photograph was "not so prejudicial that it cannot be seen [by] the jury."

The defendant next objected to autopsy photographs of the victim that the state sought to admit during its direct examination of Gill, the chief medical examiner. After the jury was excused from the courtroom, the defendant again asserted that the probative value of the photographs was very small compared to the prejudicial effect they would have on the jury, as the photographs contained shocking depictions of "a body that's been decaying and skin has slipped off and the skin is discolored."[16] He also argued that although the photographs may better show the jury the specific locations of stab wounds on the victim's body, the same information was already presented to the jury through other means, specifically, the medical examiner's report, a diagram with markings representing the locations of the stab wounds on the body, and the testimony of Gill. In contrast, the state argued that it had selected the fewest number of photographs from the autopsy that it believed would sufficiently convey the full examination, and that the photographs were necessary to aid the jurors in "[listen]ing to the testimony of [Gill], putting together the written version along with a visual aspect in order for them to gasp the totality of what the examination included."

The trial court, which had previously examined the photographs in chambers, overruled the defendant's objection, citing the state's heavy burden to prove every element of the two count information beyond a reasonable doubt, and the defendant's self-defense theory of the case on which the jury was to be instructed in the

[16] The defendant's first ground for his objection to the autopsy photographs was hearsay. The ruling on that ground is not being challenged in this appeal.

future. More specifically, the trial court stated that "it's very relevant for this jury to see . . . the number of stab wounds, the location of the stab wounds because that gets into the subjective, objective thoughts of the defendant and his claim of self-defense. So, that's relevant. . . . I understand that the photos are not the easiest to see. The record will reflect that I have seen the photos in chambers. So, I am going to allow them in. I find that they would be an aid to this jury and they are relevant evidence, so I will allow them in." Accordingly, the trial court engaged in a weighing of the probative value of these photographs against their prejudicial effect.

As previously mentioned, our standard of review for evidentiary rulings is well established. "The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done. . . . The exercise of such discretion is not to be disturbed unless it has been abused or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *Bunting* v. *Bunting*, 60 Conn. App. 665, 670, 760 A.2d 989 (2000). "[S]ound discretion has long meant a discretion that is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." (Internal quotation marks omitted.) *State* v. *Williams*, 195 Conn. 1, 8, 485 A.2d 570 (1985). Furthermore, "[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. *Rolon*, 257 Conn. 156, 173, 777 A.2d 604 (2001).

Section 4-3 of the Connecticut Code of Evidence provides: "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair

prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." "A potentially inflammatory photograph may be admitted if the court, in its discretion, determines that the probative value of the photograph outweighs the prejudicial effect it might have on the jury." *State* v. *Williams*, 227 Conn. 101, 111, 629 A.2d 402 (1993). "The principles governing the admission of potentially inflammatory photographic evidence are clear. . . . [W]e adhere to the general rule that photographs which have a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry are not rendered inadmissible simply because they may be characterized as gruesome. . . . When, however, an initial determination is made by the trial court that such photographs may have the tendency to prejudice or inflame the jury, the admissibility of such evidence is dependent upon the trial court's determination as to whether their value as evidence outweighs their possible prejudicial effect. . . . Since the trial court exercises its broad discretion in such circumstances, its determination will not be disturbed on appeal unless a clear abuse of that discretion is shown." (Internal quotation marks omitted.) *State* v. *Walker*, 206 Conn. 300, 314–15, 537 A.2d 1021 (1988).

In the present case, the comprehensive trial court record reveals that we need not engage in a lengthy analysis of the court's ruling. As previously recounted, the trial court heard a lengthy offer of proof and arguments from the parties before balancing the probative value of the photographs against the risk of unfair prejudice. With respect to the photograph showing what appeared to be the victim's body in a rug in the back of the U-Haul truck, the trial court had difficulty even finding anything inflammatory about the image because it was difficult for the viewer to make out any details

concerning the appearance of the victim's body. With respect to the autopsy examination photographs, we have previously held that "[a]utopsy photographs depicting the wounds of victims are independently relevant because they may show the character, location and course of the [weapon]," and that it is not an abuse of discretion to admit them when they are presented "to prove intent and causation, to help explain the autopsy procedure, [and] to assist the medical examiner in describing his observations . . . ." *State* v. *Howard*, 88 Conn. App. 404, 428, 870 A.2d 8, cert. denied, 275 Conn. 917, 883 A.2d 1250 (2005). On the basis of our review of the record, including the photographs in question, therefore, we conclude that the trial court did not abuse its discretion by admitting the photographs into evidence.

IV

EXCLUSION OF PROFFERED SELF-DEFENSE EVIDENCE

The defendant finally claims that the trial court improperly excluded evidence relevant to his state of mind and self-defense claim, thereby violating his right to present a defense. Specifically, the defendant argues that the trial court should have allowed the jury to hear evidence of his prior experience as a witness to a fatal knife fight many years earlier because it was relevant to support his subjective belief that he needed to use deadly physical force against the victim pursuant to § 53a-19. In response, the state argues that the trial court acted well within its discretion in concluding that the proffered evidence lacked a sufficient nexus to the defendant's altercation with the victim in this case. We agree with the state that the trial court did not abuse its discretion in excluding the evidence.

During his case-in-chief, the defendant, as support for his self-defense claim, sought to admit evidence of

a fatal knife fight that he had witnessed fourteen years earlier. Outside the presence of the jury, the defendant offered the testimony of private investigator Deborah Curtis, who did not witness the altercation but had investigated the fatal stabbing back in 2000. Curtis testified that the defendant, who was fourteen years old at the time of the incident, was at home with his mother and stepfather when his mother's former boyfriend arrived at the home with a knife and began fighting with his stepfather. After a struggle in which his stepfather was repeatedly stabbed, his stepfather ultimately wrestled the knife away and fatally stabbed the former boyfriend.

Before the defendant could finish his questioning of Curtis, however, both the state and the trial court interjected. The state proceeded to object to the admission of the evidence on relevance grounds, citing its remoteness in time from the events of the present case, and the lack of correlation between the proffered evidence and the alleged events of the present case. In response, the defendant argued that "the fact that he witnessed two of his stepfathers in a knife fight and one of them died is a subjective aspect of this—of his psyche and what he was anticipating the threat to be when [the victim] came at him with a knife." The defendant also informed the trial court that he intended to call to the witness stand Sergio Estrada, the defendant's stepfather and one of the two individuals involved in the knife fight in 2000, as part of his offer of proof. Specifically, the defendant's counsel stated that he intended "to have [the defendant's] stepfather, who survived, testify; he's going to show scars on his hand where the knife severed almost all of his fingers off, scars on his back where he was stabbed on the back, and we're going to hear about how bloody this confrontation was, how the family was at risk, and how the individual who came into the house with a knife was intoxicated." This proffer

did not include any indication that Estrada could testify to what precisely the defendant saw during the altercation.

The trial court ultimately sustained the state's relevancy objection to the offer of proof, without hearing Estrada testify. It ruled that the offer of proof was not relevant to what the jury had to decide, stating that it "thought [the trial court] was going to hear an offer of proof concerning that [the victim] was somehow involved in a prior altercation or this defendant heard about [the victim] being involved in a stabbing incident and was fearful," and that the defendant was "basically saying then that if somebody's charged with a violent assault, like we are here, which ended up in a murder, and they're pleading self-defense . . . that every episode that he or she was exposed to that has no bearing whatsoever on the deceased in the case on trial . . . the jury should hear . . . ."

We first set forth our standard of review. "As we recently observed, [a] defendant's right to present a defense does not include a right to present evidence that properly is excluded under the rules of evidence. . . . The sixth amendment to the United States constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The defendant's sixth amendment right, however, does not require the trial court to forgo completely restraints on the admissibility of evidence. . . . Generally, [a defendant] must comply with established rules of procedure and evidence in exercising his right to present a defense. . . . A defendant, therefore, may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right is not violated." (Internal quotation marks omitted.) *State* v. *Abreu*, 106 Conn. App. 278, 282, 941 A.2d 974, cert. denied, 286 Conn. 919, 946 A.2d 1249 (2008).

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010). "[A]buse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." *State* v. *Peeler*, 271 Conn. 338, 416, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

"When a defendant charged with murder asserts that he killed in self-defense, his state of mind—the existence and reasonableness of apprehension of such violence by the deceased as to justify the defensive measures adopted—becomes material." (Internal quotation marks omitted.) *State* v. *Collins*, 68 Conn. App. 828, 832, 793 A.2d 1160, cert. denied, 260 Conn. 941, 835 A.2d 58 (2002). "We have articulated the requirements of self-defense as follows. A person may justifiably use deadly physical force in self-defense pursuant to . . . § 53a-19 (a) only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force

is necessary to repel such attack. . . . We repeatedly have indicated that the test a jury must apply in analyzing the second requirement, i.e., that the defendant reasonably believed that deadly force, as opposed to some lesser degree of force, was necessary to repel the victim's alleged attack, is a subjective-objective one." (Internal quotation marks omitted.) Id., 833–34.

In this case, we do not conclude that the trial court ruled on the relevancy of the defendant's proffered evidence so arbitrarily as to vitiate logic, or decided it on the basis of improper or irrelevant factors. The two proffered witnesses could not testify to exactly what the defendant saw in the fatal knife fight, or the nature or degree to which the experience subjectively affected him. Moreover, the testimony of Curtis, a private investigator who was not even present at the scene of the altercation when it occurred, would presumably be riddled with hearsay problems had she been permitted to testify at trial. We also note that we need not decide whether evidence regarding this dispute would have been admissible had it been offered through the defendant's testimony because this was not the manner in which the defense offered it.

Ultimately, the knife fight incident occurred more than one decade before the events of the present case took place. Thus, it was remote in time from the present case. Further, in addition to the fact that the prior incident did not involve the victim in this case in any capacity, the prior incident did not feature the defendant as an actual participant in the knife fight. Moreover, as noted previously, a substantial question regarding the admissibility of this evidence could have arisen, thereby interfering with the orderly administration of the trial. Finally, the trial court made clear its concern that accepting the defendant's theory of relevance would mean that whenever a person charged with a violent assault alleges that he or she acted in self-defense, then

every violent episode that he or she was exposed to throughout his or her life would be admissible evidence. In light of the fact that we are guided in abuse of discretion review not by "whether we would reach the same conclusion in the exercise of our own judgment, but only [by] whether the trial court acted reasonably"; (internal quotation marks omitted) *State* v. *Riddick*, 61 Conn. App. 275, 282, 763 A.2d 1062, cert. denied, 255 Conn. 946, 769 A.2d 61 (2001); we conclude that the trial court acted reasonably in excluding this particular evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN YATES
(AC 35731)

Lavine, Prescott and Mihalakos, Js.

Syllabus

The defendant, who had been convicted on guilty pleas of robbery in the first degree and being a persistent felony offender, appealed to this court from the judgment of the trial court denying his motion to correct an allegedly illegal sentence. The defendant had entered guilty pleas pursuant to a *Garvin* agreement, under which he would receive a certain sentence if he appeared before the court for the scheduled sentencing hearing and was not arrested before that time. The defendant failed to appear at the scheduled sentencing hearing, and arrest warrants for three additional robberies were issued before the defendant was subsequently apprehended. He appeared for a sentencing hearing regarding his pleas to the original robbery and persistent felony offender charges. The court concluded that the defendant had violated the *Garvin* agreement by failing to appear at the scheduled sentencing hearing and as a result of the three new arrest warrants, which at the time of the sentencing hearing had been issued but not served. The trial court sentenced the defendant to eight more years of unsuspended jail time than he would have received under the original agreed upon sentence. The defendant subsequently entered guilty pleas to the three new robbery charges, and the court sentenced him to one year imprisonment on each charge, concurrent to the sentence imposed for the original charges. Thereafter, the defendant, as a self-represented party, filed a motion to correct an

illegal sentence as to the original charges, claiming that the sentencing court had improperly considered the three pending arrest warrants and effectively had sentenced him for those robberies despite the fact that those warrants had not been served. The trial court appointed counsel for the defendant pursuant to *State* v. *Casiano* (282 Conn. 614) for the limited purpose of reviewing the motion, and counsel reported to the court that he found no sound basis for the defendant's motion to correct an illegal sentence. The court then granted appointed counsel's motion to withdraw his appearance and, following a hearing, the court denied the motion to correct an illegal sentence. The court concluded that the pending arrest warrants fell within the scope of information that could be considered by the sentencing court and, furthermore, that the sentencing court had properly increased the term of the defendant's sentence because he had not complied with the *Garvin* agreement by failing to appear at the scheduled sentencing hearing, and because there was probable cause to issue the three arrest warrants. The trial court dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. On appeal, the defendant claimed that the trial court improperly granted appointed counsel's motion to withdraw his appearance, and that the trial court improperly determined that his sentence had not been imposed in an illegal manner. This court then stayed the appeal pending the outcome of our Supreme Court's decision in *State* v. *Francis* (322 Conn. 247), which held that counsel appointed pursuant to *Casiano* may be permitted to withdraw his appearance if he concludes that no sound basis exists for the motion to correct an illegal sentence, and he informs the defendant and the court of his reasoning. After lifting the stay, the defendant submitted a supplemental brief claiming that the trial court improperly allowed appointed counsel to withdraw his appearance without articulating the reasoning behind his determination that there was no sound basis to pursue the motion to correct an illegal sentence. *Held*:

1. The trial court properly permitted appointed counsel to withdraw from further representation after accepting his determination that there was no sound basis for the defendant's motion to correct an illegal sentence: counsel's failure to provide a detailed discussion or legal analysis of the soundness of the defendant's claims did not constitute reversible error in this case, as a review of the motion to correct an illegal sentence and the attached relevant sentencing transcripts revealed that the motion failed to recognize or challenge the fact that the defendant had violated his *Garvin* agreement by failing to appear for his original sentencing hearing, which exposed him to the sentence imposed by the court; moreover, because counsel's reasoning for his no sound basis determination was readily apparent from the record, it would have elevated form over substance to conclude that a remand was necessary to vindicate the newly envisioned procedure set forth in *Francis*.

2. The defendant could not prevail on his claim that the trial court unlawfully sentenced him by considering the three unserved arrest warrants and by effectively sentencing him for those three additional robberies before taking his pleas: the defendant forfeited his right to be sentenced under the *Garvin* agreement when he failed to appear for the originally scheduled sentencing hearing, and, therefore, his sentence, which was within the range authorized by the original charges, was not imposed in an illegal manner; furthermore, it was entirely appropriate for the sentencing court to have considered the pending arrest warrants in deciding what sentence to impose, as nothing in the record suggested that the warrants lacked the requisite minimum indicium of reliability and, for purposes of determining whether the defendant had violated the terms of the *Garvin* agreement by committing additional crimes, it would have elevated form over substance to recognize any significant difference between having three valid arrest warrants pending and having been arrested on those warrants; moreover, the trial court did not render de facto sentences on the three new robbery charges when it sentenced the defendant on the original charges, as the defendant was sentenced on those additional robbery charges only after being formally arrested and voluntarily entering *Alford* pleas.

3. The form of the judgment here was improper because the trial court technically should have denied rather than dismissed the defendant's motion to correct an illegal sentence, that motion having properly invoked the trial court's jurisdiction by attacking the legality of the defendant's sentence and the manner in which it was imposed.

Argued December 11, 2014—officially released November 22, 2016*

Procedural History

Two part information charging the defendant, in the first part, with the crime of robbery in the first degree, and, in the second part, with being a persistent felony offender, brought to the Superior Court in the judicial

* Following oral argument, we stayed this appeal sua sponte, absent objection by the parties, pending our Supreme Court's decision in *State* v. *Francis*, 322 Conn. 247, 140 A.3d 927 (2016). The issue before the court in *Francis* was whether this court properly had determined that a trial court must follow procedures similar to those set forth in *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), before permitting counsel to withdraw from postconviction representation of a defendant in proceedings regarding a motion to correct an illegal sentence. On August 3, 2016, following the official release of the Supreme Court's decision in *Francis*, we lifted our stay and provided the parties with an opportunity to submit simultaneous supplemental briefs addressing the effect, if any, of the *Francis* decision on the claims raised in this appeal.

district of Waterbury, where the defendant was presented to the court, *Damiani*, *J.*, on pleas of guilty; judgments of guilty in accordance with the pleas; thereafter, the court, *Fasano*, *J.*, granted the motion to withdraw from representation filed by the defendant's appointed counsel; subsequently, the court, *Fasano*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

John Yates, self-represented, the appellant (defendant).

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, John Yates, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. The defendant claims on appeal that the court improperly (1) permitted appointed counsel to withdraw without first requiring him to articulate the reasoning behind his determination that there was no sound basis for the motion to correct an illegal sentence, and (2) concluded that his sentence had not been imposed in an illegal manner. We conclude that only the form of the judgment is improper, and, accordingly, we reverse the judgment dismissing the defendant's motion to correct an illegal sentence and remand the case to the trial court with direction to render judgment denying the defendant's motion.

The record reveals the following relevant facts and procedural history. The defendant was arrested and charged in connection with an April 10, 2010 armed robbery of a liquor store. On October 4, 2010, pursuant to a plea agreement reached in accordance with *State*

v. *Garvin*, 242 Conn. 296, 699 A.2d 921 (1997),[1] the defendant entered guilty pleas to one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2) and, on a part B information, to being a persistent dangerous felony offender in violation of General Statutes § 53a-40.[2] In accordance with the *Garvin* agreement, the court, *Damiani*, *J.*, agreed to sentence the defendant to eighteen years of incarceration, suspended after fourteen years, with the right to argue down to a sentence of eighteen years, suspended after twelve years. The court, however, also advised the defendant that he remained exposed to a possible sentence of up to forty-two and one-half years, of which ten years was mandatory, and/or a fine of $15,000 if he violated the terms of the *Garvin* agreement either by failing to appear at the sentencing hearing, which was scheduled for December 7, 2010, or by being arrested with probable cause on any new charges prior to his sentencing. The defendant acknowledged that he understood the terms of the plea agreement.[3]

Nevertheless, the defendant did not appear for his sentencing hearing on December 7, 2010. Furthermore, three new arrest warrants were issued for the defendant regarding three robberies that he allegedly committed on November 2, 2010, after entering his plea.

[1] "A *Garvin* agreement is a conditional plea agreement that has two possible binding outcomes, one that results from the defendant's compliance with the conditions of the plea agreement and one that is triggered by his violation of a condition of the agreement." (Internal quotation marks omitted.) *State* v. *Stevens*, 278 Conn. 1, 7, 895 A.2d 771 (2006).

[2] The defendant also admitted to a violation of probation. The defendant previously was convicted in 2003 of robbery in the first degree for which he received a sentence of four years suspended after eighteen months, followed by thirty months of probation.

[3] The court explained the terms as follows: "If you're not here on that date or if you pick up a new arrest, I read the police report, there's probable cause for the arrest, you're exposed to forty-two and one-half years, of which ten is mandatory. Understand that?" To which, the defendant responded: "Yes, Your Honor." The court reiterated: "Make sure you're here and no new arrests."

The defendant eventually was apprehended, and the court sentenced him on the original robbery and persistent offender charges at a hearing on February 9, 2011. At that hearing, the court concluded that the defendant had violated both conditions of his *Garvin* agreement. First, the court found that the defendant had failed to appear at the originally scheduled December 7, 2010 sentencing hearing. Second, after the defendant waived his right to a *Stevens* hearing,[4] the court found on the basis of its review of the three arrest warrants and their affidavits that there was probable cause to support the warrants.[5] On the basis of the defendant's failure to comply with the terms of his plea agreement, the court opted to impose a flat sentence of twenty-two years of incarceration, which, as a result, required the defendant to serve eight years more of unsuspended jail time than the originally agreed upon sentence under the *Garvin* agreement.

On March 18, 2011, the defendant was arraigned on three counts of robbery in the first degree arising from the three new arrest warrants. At that hearing, the following colloquy occurred between Judge Damiani and the defendant:

"The Court: [J]ust to make the record clear today, you were before me some time ago after you failed to appear for sentencing on a robbery of a liquor store, I believe, and the indicated sentence was something after—twenty after fourteen, I believe, and you had a

[4] In *State* v. *Stevens*, 278 Conn. 1, 11–13, 895 A.2d 771 (2006), our Supreme Court held that an enhanced sentence that is imposed on the basis of a defendant's arrest on new charges prior to sentencing in violation of a *Garvin* agreement does not violate due process provided that the defendant is given an opportunity to contest whether any such subsequent arrest was supported by probable cause. See also *Council* v. *Commissioner of Correction*, 286 Conn. 477, 483–84 n.9, 944 A.2d 340 (2008).

[5] At that time, the three arrest warrants had not been served; however, the state later executed the warrants and charged the defendant with three counts of first degree robbery in violation of § 53a-134 (a) (4).

right to argue down to twenty after twelve and you failed to show up in court, and then when they did apprehend you, they had these three new robbery warrants against you, and when I sentenced you, I read the affidavits.[6] There was probable cause found by the judge who issued the warrants and I gave you twenty-two years on the old file and your lawyer explained to you, you could have had what they call a *Stevens* hearing to force the state to bring in people to show there was probable cause for your new arrest. Remember that?

"The Defendant: Yes.

"The Court: And you don't want that hearing, right?

"The Defendant: No.

"The Court: Okay. And then I gave you the twenty-two years for the violation of the *Garvin* canvass, one for failing to appear in court—I'm going to the same place I told you, so don't be—be worried—and for the—the new arrests. Do you understand that?

"The Defendant: Yes.

"The Court: Okay. So, now I asked the state—there was no sense in bringing these charges, but they bring the charges. The warrants were served against you on the three new robbery cases. The state has—we'll put on the record, they made contact with the victims. I'm going to put you to plea on each of these three robberies and I'm going to be giving you a year in jail on each robbery to run concurrent with each other for one year to serve on these three files—

"The Defendant: Yeah.

[6] We note that Judge Damiani incorrectly recalled the precise terms of the *Garvin* agreement, which had an upper limit of eighteen years, not twenty. The court's failure to recall the precise terms, however, was inconsequential to the proceedings then before the court, and the error has not been raised by the parties in the present appeal.

"The Court: —to be concurrent with the twenty-two years that I've—*I've already given you the time for these three robberies when I upped you from fourteen to twenty-two. Understood?*

"The Defendant: Yes." (Emphasis added; footnote added.)

The defendant then entered *Alford* pleas to each of the three robbery charges,[7] and the court rendered sentences in accordance with the preceding canvass. The defendant expressed his appreciation to the court for its fairness in sentencing.

Nevertheless, on December 14, 2012, the defendant filed a self-represented motion to correct what he now asserts is an illegal sentence. According to the defendant, his February 9, 2011 sentence was illegal because the court improperly considered as a sentencing factor the three pending arrest warrants and effectively sentenced him for the robberies alleged in those warrants, despite the fact that, at that time, he had not yet been arrested, charged, or arraigned on those alleged robberies.

The court, *Fasano*, *J.*, appointed a special public defender for the limited purpose of reviewing the defendant's motion to correct and determining if a sound basis for such a motion existed in accordance with *State* v. *Casiano*, 282 Conn. 614, 922 A.2d 1065 (2007).[8]

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

[8] Pursuant to our Supreme Court's decision in *Casiano*, "[a]lthough the [federal constitutional] right to appointed counsel extends to the first appeal [as] of right, and no further . . . in Connecticut, a defendant who wishes to file a motion to correct an illegal sentence has a [statutory] right [under § 51-296 (a)] to the appointment of counsel for the purpose of determining whether . . . [there exists] a sound basis for doing so. If appointed counsel determines that such a basis exists, the defendant also has the right to the assistance of such counsel for the purpose of preparing and filing such a motion and, thereafter, for the purpose of any direct appeal from the denial of that motion." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Francis*, 322 Conn. 247, 260, 140 A.3d 927 (2016).

On January 30, 2013, the defendant's appointed attorney, Joseph Yamin, reported back to the court. At that time, he indicated to the court that he had reviewed the defendant's motion and researched all the issues raised by the defendant therein. He then stated to the court that he did "not find a sound basis for going forward." The court asked if counsel had already spoken with the defendant, and Yamin responded in the affirmative, indicating that he had spoken with the defendant the day before. The court granted Yamin permission to withdraw his appearance at that time. The court instructed the defendant that he could proceed with the motion to correct by himself, and the defendant elected to continue to prosecute his motion as a self-represented party.[9]

[9] The January 30, 2013 colloquy between the court and the parties was as follows:

"Attorney Yamin: Good morning, Joseph Yamin for Mr. Yates . . . . As Your Honor, as discussed in chambers, I was appointed pursuant to *State* v. *Casiano* to review Mr. Yates' motion to correct an illegal sentence. I have done so. I researched the issues brought up in that motion. At this point in time, I do not find a sound basis for going forward.

"The Court: So, Attorney [Yamin], have you already talked to the [defendant]?

"Attorney Yamin: I have, Your Honor. I spoke with him yesterday.

"The Court: All right. Mr. Yates, that doesn't foreclose you from going forward at some point. If you want to continue for the purposes of a hearing, but Attorney [Yamin] has found there's no merit under the guidelines with respect to the motion [to correct an] illegal sentence.

"The first issue is always whether or not this court even has jurisdiction. At this juncture Attorney [Yamin], after a *Casiano* review, finds there's no merit. So the motion, if this is by way [of] a motion to withdraw, that would be granted.

"Attorney Yamin: He wants me to make clear, Your Honor, that I'm finding there's no sound basis for me to go forward as his attorney.

"The Defendant: There could be merit but there's not foundation.

"The Court: What's that?

"The Defendant: There could be merit but not a sound basis.

"The Court: After his review he found that there's no merit to the claim, I'm assuming that's what you're saying.

"Attorney Yamin: Pursuant to *Casiano*, Your Honor, I'm finding no reason for me to go forward, that's correct.

"The Court: All right. So, Mr. Yates, I'm going to put this down for a hearing, if you wanted to go forward.

The court held a hearing on the merits of the motion to correct an illegal sentence on March 13, 2013. One week later, the court issued a memorandum of decision in which it rejected the defendant's arguments that his sentence was imposed in an illegal manner, and concluded that the sentencing court's consideration of the pending arrest warrants fell well within the scope of information that could be considered by the court at sentencing, citing *State* v. *Huey*, 199 Conn. 121, 127, 505 A.2d 1242 (1986). The court found that the sentencing court properly had increased the defendant's sentence by eight years more than the original plea agreement because the defendant had "fail[ed] to appear for sentencing, a *Garvin* violation, and his picking up three new arrest warrants for which the court found probable cause; arguably, a *Stevens* violation." The court further explained: "Though, technically, the three arrest warrants had not been served at the time of the sentencing in question, and, therefore, were not new *arrests* as per *Stevens*, all parties were aware of the existence of the warrants (alleged street robberies to which the defendant had confessed) at the time of the sentencing; probable cause clearly existed for the arrests as was confirmed by the court, and the defense waived any hearing rights to question the existence of probable cause. To find, under these circumstances,

"The Defendant: Yes, Your Honor. I would want to go forward with this. I will ask for a two month continuance.

"The Court: Well, it's going to be longer than that.

"The Defendant: Longer than that. I need time to prepare to go for the case law to find everything on illegal sentence.

"The Court: Not a problem.

"The Defendant: And adequate time.

"The Court: I'm going to put you down for March 13 at 2 p.m.

"The Defendant: All right. Thank you very much."

Although the court gave the defendant a six week continuance after indicating that the continuance was "going to be longer" than the two months requested, the defendant does not raise this as a claim of error on appeal or suggest that he needed additional time to prepare.

that the technical difference between having three warrants pending and actually being arrested on the warrants places this case outside the parameters of *Stevens*, would be to exalt form over substance." (Emphasis in original.) Although Judge Fasano did not squarely address the defendant's suggestion that Judge Damiani, in effect, had sentenced him for the three robberies at that time, the court implicitly rejected that argument by noting that the defendant later pleaded guilty to the three robberies, for which he subsequently received concurrent sentences. Despite having addressed the merits of the defendant's motion to correct an illegal sentence, the court indicated that it was dismissing, rather than denying, the motion. This appeal followed.

I

The defendant first claims that the court improperly granted his appointed counsel's motion to withdraw his appearance without requiring him to articulate the reasoning behind his determination that there was no sound basis to pursue the defendant's motion to correct an illegal sentence. In his initial appellate brief, the defendant asked us to establish a new procedural right that would require an appointed counsel seeking to withdraw from representing a defendant regarding a motion to correct an illegal sentence to file a written memorandum with the court that outlines the claims raised by the defendant, the efforts counsel undertook to investigate the factual and legal bases for those claims, and the factual and legal bases for counsel's conclusion that the motion is frivolous. In response to our requests for supplemental briefing in light of our Supreme Court's recent decision in *State* v. *Francis*, 322 Conn. 247, 140 A.3d 927 (2016), however, the defendant modified his claim on appeal, stating in his supplemental brief that the court should not have allowed appointed counsel to withdraw because he failed to inform the defendant or the court, either in writing or

orally, of the "reasoning" underlying his conclusion that there was no sound basis for the motion to correct an illegal sentence. Under the circumstances, we are not persuaded.

We begin our discussion with *Casiano*, in which our Supreme Court first established that an indigent defendant has a limited right to postconviction assistance of counsel in connection with a motion to correct an illegal sentence. *State* v. *Casiano*, supra, 282 Conn. 627–28. Specifically, according to *Casiano*, "a defendant has a right to the appointment of counsel for the purpose of determining whether a defendant who wishes to file [a motion to correct an illegal sentence under Practice Book § 43-22] has a sound basis for doing so. If appointed counsel determines that such a basis exists, the defendant also has the right to the assistance of such counsel for the purpose of preparing and filing such a motion and, thereafter, for the purpose of any direct appeal from the denial of that motion." Id. There is no discussion in *Casiano*, however, about what particular procedure should be followed by counsel, or by the trial court, if counsel appointed pursuant to *Casiano* determines that there is no sound basis for a motion to correct an illegal sentence, including how such a determination should be communicated to counsel's client and to the court.

Recently, however, in *State* v. *Francis*, supra, 322 Conn. 247, our Supreme Court clarified the procedures that should be followed before a court may allow counsel appointed pursuant to *Casiano* to withdraw from representation. Our Supreme Court first rejected the opinion of this court, as set forth in *State* v. *Francis*, 148 Conn. App. 565, 569, 86 A.3d 1059 (2014), rev'd, 322 Conn. 247, 140 A.3d 927 (2016), that courts and appointed counsel should be required to follow *Anders*-like procedures before counsel can be permitted to

withdraw.[10] *State* v. *Francis*, supra, 322 Conn. 251; see also *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) (establishing procedures for withdrawal of indigent defendant's appointed counsel in direct criminal appeals). Such procedures arguably could have included the requirements that counsel file a so-called "*Anders* brief," in which counsel would refer to anything in the record that might arguably support the defendant's position, and that the trial court make its own evaluation, independent of counsel's, regarding the merits of the defendant's claim that his sentence either is illegal or was imposed in an illegal manner.

Our Supreme Court in *Francis* held, however, that "the *Anders* procedure is not strictly required to safeguard the defendant's statutory right to counsel in the context of a motion to correct an illegal sentence." *State* v. *Francis*, supra, 322 Conn. 251. The court reasoned that *Anders* procedures were established to protect a criminal defendant's constitutional right to counsel on a first appeal, and that a defendant's right to appointed counsel in proceedings on a motion to

[10] Although our Supreme Court reversed the decision of this court, it nevertheless also determined that the trial court had failed to comply properly with *Casiano* in the first instance by not appointing counsel to review the defendant's motion to correct an illegal sentence to determine whether there was a sound basis for bringing the motion. *State* v. *Francis*, supra, 322 Conn. 259. Counsel in *Francis* was "advised of the defendant's motion by the [court clerk] prior to the case being called, and he reviewed the motion and certain other, unspecified files in his office, never describing in detail to the court the substance of any discussions with the defendant about the claims he wished to make in his motion." (Internal quotation marks omitted.) Id., 268. The Supreme Court determined that the trial court's error was not harmless because the defendant may have been entitled to assistance in preparing the motion, and because such assistance might have aided the defendant in identifying a meritorious claim. Id., 269. The court remanded the case to this court with direction to remand the case to the trial court so that counsel could be appointed to represent the defendant in connection with his motion to correct an illegal sentence. Id., 270.

correct an illegal sentence is not constitutional but statutory in nature, and, thus, does not warrant the same level of protection. Id., 262–63; see also *Pennsylvania* v. *Finley*, 481 U.S. 551, 559, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) (explaining that "full panoply of procedural protections that the [c]onstitution requires . . . at trial and on first appeal" are not needed when state elects to provide legal assistance to indigent defendants in postconviction proceedings). The court in *Francis* reasoned, in part, that unlike the varied and often complex issues that arise in direct criminal appeals, the issues that can be raised in a motion to correct an illegal sentence are far more limited and straightforward in nature,[11] and "the potential merits of such a motion frequently will be apparent to the court and appointed counsel from a simple review of the sentencing record." *State* v. *Francis*, supra, 265.

As to the appropriate procedure to be followed, the Supreme Court in *Francis* stated as follows: "[If] an indigent defendant requests that counsel be appointed to represent him in connection with the filing of a motion to correct an illegal sentence, the trial court must grant that request for the purpose of determining whether a sound basis exists for the motion. See *State* v. *Casiano*, supra, 282 Conn. 627. If, after consulting with the defendant and examining the record and relevant law, counsel determines that no sound basis exists

[11] "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. . . . Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way which violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Parker*, 295 Conn. 825, 839, 992 A.2d 1103 (2010).

for the defendant to file such a motion, he or she must inform the court and the defendant of the reasons for that conclusion, which can be done either in writing or orally. If the court is persuaded by counsel's reasoning, it should permit counsel to withdraw and advise the defendant of the option of proceeding as a self-represented party." (Footnote omitted.) *State* v. *Francis*, supra, 322 Conn. 267–68.

In the present case, unlike in *Francis*, the court properly appointed counsel in accordance with *Casiano* to review the motion after the defendant filed it with the court and prior to any hearing on the merits of the motion. Counsel subsequently indicated to the court orally on the record that he had reviewed the motion, had researched all issues raised by the defendant, and had spoken with the defendant about the motion prior to reporting back to the court regarding his *Casiano* review.[12] There is no indication that counsel failed to acted within the bounds of professional responsibility in both evaluating the motion as filed by the defendant and identifying any meritorious claim not raised in that motion. See *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 810, 40 A.3d 796 (counsel strongly presumed to have exercised reasonable professional judgment in making all significant decisions), cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). Counsel indicated that, on the basis of this review, he had determined that there was no sound basis for pursuing the defendant's motion to correct an illegal sentence.

It is true that counsel did not provide to the court a detailed discussion or legal analysis of the soundness of the defendant's claims. Nevertheless, in light of the

[12] The record indicates that there was also some discussion between the parties and the court in chambers, but no details of that discussion were set forth on the record, and, thus, the record is unclear whether the merits of the motion or the rationale for counsel's sound basis determination were discussed at that time.

generally limited scope of a motion to correct as recognized in *Francis*, we are not persuaded that this lacuna constitutes reversible error under the unique circumstances of this case. As discussed more fully in part II of this opinion, a review of the motion and the attached relevant sentencing transcripts reveals that, on its face, the defendant's motion lacks a sound basis to proceed because, among other things, it fails to recognize or challenge the fact that the defendant violated his *Garvin* agreement by failing to appear for his original sentencing hearing, which violation, in and of itself, exposed him to the sentence imposed by the court. The court had a copy of the defendant's motion before it and had an opportunity to review it, along with its attachments, which include transcripts of the proceedings before Judge Damiani, and the court file of the underlying sentencing record. As the court in *Francis* predicted, the potential merits of a motion to correct an illegal sentence often will be readily apparent from a simple review of the record. See *State* v. *Francis*, supra, 322 Conn. 265. Here, the court was in a position to evaluate independently the nature of the claims raised in the motion and, if necessary, to question counsel regarding the reasoning underlying his no sound basis determination. On the basis of the unique record presented here, we are persuaded that counsel's reasoning for his no sound basis determination, although not fully articulated, was readily apparent to all from the face of the record, and it would elevate form over substance to conclude that a remand is necessary to vindicate the newly envisioned procedure set forth in *Francis*.[13] Accordingly, we conclude that the trial court

[13] It is important to note that counsel and trial courts should heed the importance of ensuring that the record contains more than a conclusory statement that there is no sound basis for a motion to correct an illegal sentence before permitting counsel to withdraw. As our Supreme Court stated in *Francis*, counsel should provide the reasons for such a conclusion both to the court and to the client.

properly accepted counsel's determination that there was no sound basis for the defendant's motion and permitted him to withdraw from further representation of the defendant.

II

Turning to the merits of the defendant's motion to correct an illegal sentence, the defendant also claims on appeal that the court improperly determined that his sentence had not been imposed in an illegal manner and, thus, improperly dismissed his motion. The defendant asserts that the court mistakenly relied upon *State* v. *Huey*, supra, 199 Conn. 121, which the defendant maintains is irrelevant to his claim that his sentence was imposed in an illegal manner. Specifically, the defendant contends that rather than merely considering the three pending arrest warrants as factors in crafting an appropriate sentence, the court, in essence, sentenced him for the robberies alleged in those warrants. The state counters that the court properly relied on *Huey* in determining that the sentencing court had not imposed the defendant's sentence in an illegal manner in that the court properly considered the defendant's subsequent criminal conduct as a factor in increasing his sentence, along with his failure to appear for sentencing. The state further contends that the defendant's argument that he was sentenced on the unexecuted arrest warrants at that time simply is belied by the record. We agree with the state.

We begin with general legal principles, including our standard of review. "[T]he jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . Practice Book § 43-22, which provides the trial court with such authority, 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. An illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . [A] defendant may challenge his or her criminal sentence on the ground that it is illegal by raising the issue on direct appeal or by filing a motion pursuant to § 43-22 with the judicial authority, namely, the trial court." (Citations omitted; internal quotation marks omitted.) *State* v. *Tabone*, 279 Conn. 527, 533–34, 902 A.2d 1058 (2006). "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." Id., 534.

In *State* v. *Huey*, supra, 199 Conn. 126–27, our Supreme Court described the broad discretion that a sentencing court has in crafting a sentence and discussed the type of information that a sentencing court properly may consider in imposing a sentence within statutory limits. The court stated in part: "[I]f a sentence is within statutory limits it is not generally subject to modification by a reviewing court. . . . A sentencing judge has very broad discretion in imposing any sentence within the statutory limits and in exercising that discretion he may and should consider matters that would not be admissible at trial. . . . To arrive at a just sentence, a sentencing judge may consider information that would be inadmissible for the purpose of determining guilt . . . evidence of crimes for which the defendant was indicted but neither tried nor convicted . . . evidence bearing on charges for which the defendant was acquitted . . . and evidence of counts of an indictment which has been dismissed by the government." (Citations omitted; internal quotation marks omitted.)

Id., 126. A trial court's discretion is not completely unfettered; however, "[a]s long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion." Id., 127.

Turning to the facts of the present case, the defendant originally entered into a *Garvin* agreement in which he agreed to plead guilty in exchange for a relatively favorable sentence that, assuming he complied with the terms of the agreement, imposed, at most, fourteen years of unsuspended prison time. That plea was specifically conditioned upon his promises both to appear for sentencing and to not be arrested with probable cause for any additional criminal conduct. The defendant does not claim on appeal that he failed to understand the terms of his *Garvin* agreement, and he does not challenge the court's factual findings at sentencing that he violated *both* conditions of that agreement. As the sentencing court correctly explained at the time it took the defendant's plea, his potential exposure if he violated the terms of the *Garvin* agreement amounted to forty-two and one-half years of incarceration, of which ten were mandatory. Thus, the court's sentence of a flat twenty-two years of incarceration fell well within the legal statutory limits and the defendant's *Garvin* agreement.

The defendant nevertheless argues that the court unlawfully sentenced him because it considered and utilized the three unserved arrest warrants in determining his sentence and suggests that, for all intents and purposes, the court sentenced him for the robberies alleged in those warrants despite the fact that, at the time, he had not been arrested on any new charges. The defendant's arguments lack merit for several reasons.

First, even if we were to conclude that, because the three pending warrants had not yet been served, the

defendant technically had not breached the "no new arrests" provision of the *Garvin* agreement, it is undisputed that the defendant also had failed to comply with the *Garvin* agreement by failing to appear for the originally scheduled sentencing hearing. On the basis of that independent breach alone, the defendant forfeited his right to be sentenced under the *Garvin* agreement to no more than fourteen years of unsuspended prison time. Having clearly violated at least one aspect of the *Garvin* agreement, the defendant was now exposed to a possible sentence that included up to forty-two and one-half years of incarceration. Any sentence imposed by Judge Damiani up to that amount based on the defendant's failure to appear for sentencing was expressly permitted by the *Garvin* agreement and, thus, the sentence of twenty-two years was not imposed in an illegal manner.

Second, the defendant makes much of the fact that the three arrest warrants had not yet been served on him at the time of sentencing. The defendant, however, does not challenge Judge Fasano's findings that he was fully aware of the warrants and the allegations that he had committed three additional robberies. It is undisputed that the defendant understood that, pursuant to the *Garvin* agreement, he was obligated to avoid an arrest on any additional offense for which there was probable cause. In essence, the defendant understood that if he wanted to secure the favorable benefits of the *Garvin* agreement, he could not engage in any additional criminal conduct prior to sentencing. The defendant elected not to challenge whether the three warrants were supported by probable cause; see *State* v. *Stevens*, supra, 278 Conn. 1; and the sentencing court affirmed that they were. We agree with Judge Fasano's assessment that it would elevate form over substance, for purposes of determining whether the defendant had

violated the terms of his *Garvin* agreement, to recognize any significance between having three valid warrants pending and actually having been arrested on those warrants.

Third, as the trial court properly concluded in rejecting the motion to correct an illegal sentence, it was entirely appropriate under the broad discretion afforded to sentencing courts, as set forth in *State* v. *Huey*, supra, 199 Conn. 126–27, for the sentencing judge to have considered the pending arrest warrants and affidavits in deciding what sentence to impose in light of the defendant's failure to comply with the terms of the *Garvin* agreement. The defendant waived his right at the sentencing hearing to challenge whether those warrants were supported by probable cause, and he did not raise any challenge at sentencing concerning the authenticity or reliability of the three warrants. The defendant advanced no argument that the arrest warrants fell outside of the information properly considered by the sentencing court. Accordingly, there is nothing in the record before us to suggest that the warrants lacked the requisite minimal indicium of reliability necessary to be considered at sentencing.

Finally, on the basis of our thorough review of the record, including the transcripts provided, we are satisfied that the court did not, as asserted by the defendant, render de facto sentences on the robbery charges associated with the new arrest warrants. It only considered the three additional robbery warrants in deciding to increase the defendant's sentence on his conviction of the original robbery and persistent offender charges. The defendant was sentenced on those additional robbery charges only after he formally was arrested and had voluntarily entered *Alford* pleas.

In arguing otherwise, the defendant relies on certain statements made by the sentencing judge at his arraignment and sentencing on the three robbery charges. In

particular, the defendant references the court's statement that it had "already given [him] the time for these three robberies when [it] upped [him] from fourteen to twenty-two." Although we are aware that the colloquial language used by the court, read in isolation, could be misunderstood, we disagree with the defendant's interpretation that the eight year increase in his sentence on the original robbery and persistent offender charges included additional time directly associated with the three subsequent robberies. In context, the court merely was attempting to explain the basis for its decision to render relatively short and concurrent sentences for those later robberies following the defendant's *Alford* pleas. Because the court already had factored in the defendant's additional criminal conduct at the time it imposed the earlier sentence, it exercised its discretion to limit the additional sentences accordingly. There is simply no merit to the defendant's claim that the court sentenced him for the robberies prior to taking his plea on those charges.

We note that the trial court, having properly rejected the arguments raised in the defendant's motion on their merits, technically should have denied rather than dismissed the motion to correct. Only if a defendant fails to state a claim that brings a motion within the purview of Practice Book § 43-22 should a court dismiss the motion for lack of jurisdiction. Here, the court never made a determination that the motion was jurisdictionally defective. Moreover, the defendant's motion did not merely raise a collateral attack on the judgment of conviction, but, on its face, attacked the legality of the sentence and/or the manner in which his sentence was imposed. Accordingly, the motion properly invoked the court's jurisdiction, and, thus, the form of the judgment is incorrect. See *State* v. *McClean*, 167 Conn. App. 781, 785, 144 A.3d 490 (2016).

The form of the judgment is improper, the judgment dismissing the defendant's motion to correct an illegal sentence is reversed and the case is remanded with direction to render judgment denying the defendant's motion.

In this opinion the other judges concurred.

WAYNE J. JONES, SR. *v.* COMMISSIONER OF CORRECTION (AC 37685)

Lavine, Beach and Bishop, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his counsel in a prior habeas corpus proceeding had rendered ineffective assistance. The focus of the petitioner's claim was on the DNA evidence that was presented at his criminal trial. The habeas court rendered judgment denying the petition and, thereafter, granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly denied the petition for a writ of habeas corpus, and that court having fully addressed the arguments raised in this appeal, this court adopted the habeas court's well reasoned memorandum of decision as a proper statement of the facts and the applicable law on those issues.

Argued October 17—officially released November 22, 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.*

Craig A. Sullivan, assigned counsel, for the appellant (petitioner).

Emily D. Trudeau, assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Wayne J. Jones, Sr., appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly concluded that counsel who represented him on a prior petition for a writ of habeas provided ineffective assistance. We affirm the judgment of the habeas court.

The petitioner was convicted of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), burglary in the first degree in violation of General Statutes (Rev. to 2005) § 53a-101 (a) (2) and kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B) for crimes committed on August 24, 2005. *State* v. *Jones*, 115 Conn. App. 581, 583, 974 A.2d 72, cert. denied, 293 Conn. 916, 979 A.2d 492 (2009). The petitioner was sentenced to thirty-five years in prison, execution suspended after twenty-five years, and thirty-five years of probation. This court affirmed the petitioner's conviction. Id., 603. Thereafter, the petitioner filed a petition for a writ of habeas corpus, which was denied by the habeas court (*T. Santos, J.*). This court dismissed the petitioner's appeal from the denial of his first habeas corpus petition. *Jones* v. *Commissioner of Correction*, 134 Conn. App. 903, 38 A.3d 1253 (2012).

The petitioner subsequently filed the present petition for a writ of habeas corpus in which he alleged that his prior habeas counsel rendered ineffective assistance. The focus of the petitioner's claim of ineffective assistance is on the DNA evidence presented at his criminal trial. Following a trial held on October 16, 2014, the habeas court, *Oliver, J.*, denied the petition for a

writ of habeas corpus. Judge Oliver subsequently granted the petition for certification to appeal.

Our examination of the record on appeal and the briefs and arguments of the parties persuades us that the judgment of the habeas court should be affirmed. The habeas court's decision fully addresses the arguments raised in the present appeal, and we adopt its concise and well reasoned decision as a proper statement of the relevant facts and the applicable law on the issues. *Jones* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-12-4004724 (November 21, 2014) (reprinted at 169 Conn. App. 407, 150 A.3d 758). It serves no useful purpose for us to repeat the discussion contained therein. *Furka* v. *Commissioner of Correction*, 21 Conn. App. 298, 299, 573 A.2d 358, cert. denied, 215 Conn. 810, 576 A.2d 539 (1990).

The judgment is affirmed.

APPENDIX

WAYNE J. JONES, SR. *v.* COMMISSIONER OF CORRECTION*

Superior Court, Judicial District of Tolland
File No. CV-12-4004724
Memorandum filed November 21, 2014

Proceedings

Memorandum of decision on petitioner's petition for writ of habeas corpus. *Petition denied.*

Dante R. Gallucci, for the petitioner.

Craig P. Nowak, senior assistant state's attorney, for the respondent.

* Affirmed. *Jones* v. *Commissioner of Correction*, 169 Conn. App. 405, 150 A.3d 757 (2016).

OLIVER, J. The petitioner, Wayne Jones, initiated this petition for a writ of habeas corpus, claiming that his prior habeas counsel provided him ineffective legal representation during his previous habeas trial. He seeks an order of this court vacating his conviction and returning the matter to the criminal court for further proceedings. The court finds the issues for the respondent, the Commissioner of Correction, and denies the petition.

I

PROCEDURAL HISTORY

The petitioner was convicted after trial of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1); burglary in the first degree in violation of General Statutes (Rev. to 2005) § 53a-101 (a) (2); and kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B). Attorney Barry Butler represented the petitioner in the criminal matter. On December 16, 2005, the trial court (*Rodriguez*, *J.*) imposed a total effective sentence of thirty-five years imprisonment, execution suspended after twenty-five years to serve, followed by thirty-five years of probation.

The petitioner appealed from the judgment of conviction, which was affirmed by the Appellate Court. *State* v. *Jones*, 115 Conn. App. 581, 974 A.2d 72, cert. denied, 293 Conn. 916, 979 A.2d 492 (2009).

The petitioner filed his first habeas corpus petition, Docket No. CV-07-4001687, in which he was represented by Attorney Joseph Visone. On October 25, 2010, after trial, the court (*T. Santos*, *J.*) denied the habeas petition. A subsequent appeal of the habeas court's decision was dismissed by the Appellate Court on March 27, 2012.

See *Jones* v. *Commissioner of Correction*, 134 Conn. App. 903, 38 A.3d 1253 (2012). This petition followed.

On April 11, 2012, the petitioner brought this petition. In his one count amended petition dated April 30, 2014, the petitioner asserts that his prior habeas counsel was ineffective in failing to establish Attorney Butler's deficient performance in that Attorney Butler:

1. Failed to adequately discuss with the petitioner the state's evidence and to advise him on the applicable law so as to allow him to make a knowing, intelligent and voluntary decision to try his case before a jury;

2. Failed to adequately investigate the case, potential witnesses and potential defenses to the state's DNA evidence;

3. Failed to seek an independent evaluation of the DNA evidence obtained by the state, to determine whether exculpatory evidence could be obtained;

4. Failed to prepare and present pretrial motions directed to obtain and preserve potentially exculpatory DNA evidence;

5. Failed to properly prepare and argue a motion to suppress the state's DNA evidence; and

6. Failed to adequately prepare for trial, including cross-examination of witnesses, rebutting the state's DNA evidence and arguing third party culpability as to the petitioner's cousin.

The petitioner argues that these several claimed deficiencies are of such magnitude as to render his representation by Attorney Butler constitutionally deficient. For the following reasons, the several claims fail, and the court denies the petition.

The entirety of the petition surrounds the DNA evidence presented to the court during the motion to suppress and to the jury during the underlying criminal

trial. Accordingly, the court's focus will be on facts found by this court relative to recovered DNA evidence.

On October 19, 2006, at a hearing on the petitioner's motion to suppress before the trial court (*Rodriguez*, *J.*), Dr. Michael Bourke, lead criminalist at the Connecticut State Forensic Science Laboratory, testified to the proper procedures for the acceptance of potential DNA evidence from an outside agency, as well as the proper procedures for the preservation, testing, analysis and comparison of DNA samples in his facility. The doctor also testified to state and federal regulations and protocols designed to maintain the integrity of both the nationwide computerized DNA database, known as "CODIS" (Combining DNA Index) in general and the State Laboratory in particular. Comparing the testimony provided by Dr. Bourke to the subsequent trial testimony of State Laboratory employees, this court finds nothing in the evidence to suggest that there were any improprieties in the processing and analysis of the DNA evidence submitted to the State Laboratory in the petitioner's underlying criminal trial.

Karen Lamy, a criminalist at the Connecticut State Forensic Science Laboratory's forensic biology section, testified at the petitioner's criminal trial. Ms. Lamy testified to the submission of the sexual assault evidence collection kit to the laboratory, her examination of vaginal smears collected from the victim by medical personnel, and her identification of spermatozoa and red blood cells on the smear. The evidence collected from the smear was submitted by Ms. Lamy for DNA analysis. Ms. Lamy later received buccal swabs from the petitioner and the victim's boyfriend that were submitted for DNA analysis.

Christine Roy, a forensic science examiner for the Connecticut State Forensic Science Laboratory, testified at the petitioner's criminal trial. Ms. Roy examined

the results of the vaginal smear and buccal swabs submitted to her section by Ms. Lamy for the presence of physiological fluids and DNA testing. Ms. Roy obtained DNA profiles from the vaginal smear. Ms. Roy also examined known DNA profiles of the petitioner and the victim's boyfriend from buccal swabs submitted by law enforcement, as well as a known DNA profile of the victim from the sexual assault evidence collection kit. Ms. Lamy testified that after a DNA extraction process and subsequent analysis, all of the petitioner's DNA profile was identified as being present in the DNA mixture of spermatozoa obtained from the vaginal swab contained in the sexual assault collection kit taken from the victim of the sexual assault for which the petitioner stood trial. Ms. Lamy further testified that the expected frequency of individuals who could be a contributor to the DNA profile from the sperm-rich fraction of the vaginal smear is approximately one in six hundred fifty thousand in the African-American population. The affidavit in support of the search and seizure warrant that authorized the taking of a buccal swab DNA sample from the petitioner identifies him as "Black."

Ms. Lamy further testified that Dwayne White, the petitioner's cousin, was eliminated as a contributor to the DNA profile of spermatozoa taken from the vaginal smear contained in the sexual assault collection kit obtained from the victim after the sexual assault for which the petitioner stood trial.

At the petitioner's trial on his previous habeas petition, much the same evidence was presented to the trial court. Attorney Visone's examination of the several witnesses called was thorough and well within the range of competent representation.

During the instant habeas trial, the petitioner submitted a number of exhibits as well the testimony of himself

and criminal trial counsel. The petitioner and respondent submitted into evidence portions of the trial transcript from the underlying criminal trial and motion to suppress. The respondent also submitted into evidence the 2010 habeas trial transcript and memorandum of decision.

Attorney Butler testified to his representation of the petitioner at the underlying criminal trial in 2006. He further testified to his experience as a criminal defense attorney for the past twenty-eight years, including as a trial attorney in private practice, a part A public defender, and a public defender in the office's Capital Defense and Trial Services Unit (hereinafter capital unit). Attorney Butler testified to extensive experience in the trial of serious felony offenses, including sexual assault and murder. Prior to representing the petitioner in the underlying trial, Attorney Butler represented approximately forty other clients accused of similar crimes. During the course of his experience as a criminal defense attorney, Attorney Butler became very familiar with the use of DNA evidence in criminal prosecutions, including its collection, preservation and analysis. In addition to formal training, Attorney Butler, using the resources of the capital unit, availed himself of the increased access to experts and emerging technologies in the area of DNA forensics.

Regarding his representation of the petitioner, Attorney Butler testified credibly that he familiarized himself with the entirety of the state's case against the petitioner, including the potential introduction of DNA evidence implicating his client. He testified to meeting several times with the petitioner during the course of the prosecution, reviewing the allegations and the anticipated evidence to be introduced against him at trial, including DNA evidence. The court finds, based on his testimony, that Attorney Butler took great pains to make the petitioner aware of the strength of the state's

evidence against him, especially as it related to any potential defense strategies. The court finds that, despite compelling evidence identifying the petitioner as a contributor to DNA contained within a sample of biological material collected in relation to the sexual assault, the petitioner insisted on a defense strategy of mistaken identity, i.e., that the victim misidentified the petitioner as the perpetrator of the sexual assault.

The court further credits Attorney Butler's testimony of his extensive preparation for the trial of the underlying criminal matter, including the filing and litigation of a motion to suppress the results of a DNA sample taken from the petitioner based on a lack of probable cause to seize the buccal sample, the pretrial investigation and interview of the state's expert witness, and the exploration of third party culpability as a potential defense. As testified to at the habeas trial, a third party culpability defense directed to the petitioner's cousin would have been unavailing, as the cousin was excluded as a contributor of DNA to the sample of biological material connected to the sexual assault.

Attorney Butler testified to his strategic reasoning in not seeking an independent evaluation of the DNA analysis performed by the employees at the State Police Forensic Science Laboratory. Based on his training and specific experience and familiarity with the state's potential trial witnesses, a decision was made to interview and cross-examine these witnesses at trial, rather than to create additional evidence potentially damaging to the defense by hiring an outside consultant. There is no evidence to support a contention that an outside DNA evaluation would have successfully challenged the conclusions of the state's expert witnesses. The trial record makes clear that the petitioner, through Attorney Butler, did indeed mount a defense, though unsuccessful, to contest the inculpatory effect of the state's DNA evidence.

The petitioner testified that the sole basis of the current petition is his belief that Attorney Visone's representation was ineffective in that he failed to establish the several claimed deficiencies in Attorney Butler's representation only as it relates to issues surrounding DNA evidence at the criminal trial. Contrary to the assertions in the petition, the petitioner testified on redirect examination that, after meeting with Attorney Visone, he was in agreement with the claims presented in the amended petition filed by counsel in the prior habeas matter.

The petitioner's testimony at the habeas trial was loose, equivocal, contradictory and unconvincing. He testified alternatively that he never discussed the state's potential DNA evidence with Attorney Butler, but that he was made aware "through [his] attorneys" that the state intended to offer DNA evidence against him at trial. He further testified that he "only saw [his attorney] once" prior to trial, that Attorney Butler "never came to see [him] in jail," and that he met with Attorney Butler three to four times. It is clear from the petitioner's testimony that Attorney Butler did indeed discuss with him at prison visits the nature and elements of the offenses against him, the anticipated evidence to be presented, including DNA, potential defenses to the charges, the motion to suppress, and whether the petitioner would decide to take the case to trial. It is also clear that the petitioner did not like what he was hearing when he "ended the conversation and . . . left." The petitioner testified that he unequivocally told Attorney Butler that he wanted a trial and wanted his defense strategy to be that of mistaken identity, as he "told [Attorney Butler], I didn't do this," and that he was "not at the crime scene." It is evident from the entire record that the petitioner refuses to accept, despite the best efforts of counsel, the scientific conclusion that being identified as a contributor of DNA to a biological sample

collected at a sexual assault crime scene, even in a mixture with other contributors as in the underlying criminal matter, is compelling evidence of identity and of being present at the crime scene.

II

DISCUSSION

"A criminal defendant's right to the effective assistance of counsel . . . is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . 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)." (Citations omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712, 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). The petitioner has the burden to establish 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." (Emphasis in original.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 575, 941 A.2d 248 (2008), citing *Strickland* v. *Washington*, supra, 694.

"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." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006), quoting *Strickland* v. *Washington*, supra, 466 U.S. 687. It is not enough for

the petitioner to simply prove the underlying facts that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial. *Harris* v. *Commissioner of Correction*, 107 Conn. App. 833, 845–46, 947 A.2d 7, cert. denied, 288 Conn. 908, 953 A.2d 652 (2008).

Under the second prong of the test, the prejudice prong, the petitioner must show that "counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 101, 52 A.3d 655 (2012).

When assessing trial counsel's performance, the habeas court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland* v. *Washington*, supra, 466 U.S. 689. The United States Supreme Court explained:

"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. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a

particular client in the same way." (Citation omitted; internal quotation marks omitted.) Id.

Ultimately, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., 686.

III

ATTORNEY BUTLER

A

Pretrial Investigation

The petitioner claims that the pretrial investigation by his attorney was deficient in that he failed to properly investigate, evaluate and challenge the state's proffered DNA evidence. Had counsel done so, the petitioner claims, he would have discovered exculpatory DNA evidence showing that it was a third party, perhaps even the petitioner's cousin, who committed the sexual assault. As previously stated in this decision, based on this court's review of the relevant portions of both the criminal and habeas trial transcripts, all available evidence contradicts the possibility of third party culpability. The court finds that the petitioner has failed to prove this claim.

"The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it. . . . The burden to demonstrate what benefit additional investigation would have revealed is on the petitioner." (Citations omitted; internal quotation marks omitted.) *Norton* v. *Commissioner of Correction*, 132 Conn. App. 850, 858–59, 33 A.3d 819, cert. denied, 303 Conn. 936, 36 A.3d 695 (2012).

B

Evidence and Examination of Witnesses

The petitioner next claims that his trial attorney performed deficiently during the course of the trial by failing to adequately cross-examine witnesses from the State Laboratory and present evidence in the petitioner's defense. "An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy." (Internal quotation marks omitted.) *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 172, 987 A.2d 1031, cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010). Similarly, "the presentation of testimonial evidence is a matter of trial strategy . . . ." (Citation omitted; internal quotation marks omitted.) *Bowens* v. *Commissioner of Correction*, 104 Conn. App. 738, 744, 936 A.2d 653 (2007), cert. denied, 286 Conn. 905, 944 A.2d 978 (2008).

"[C]ross-examination is a sharp two-edged sword and more criminal cases are won by not cross-examining adverse witnesses, or by a very selective and limited cross-examination of such witnesses, than are ever won by demolishing a witness on cross-examination." (Internal quotation marks omitted.) *State* v. *Clark*, 170 Conn. 273, 287–88, 365 A.2d 1167, cert. denied, 425 U.S. 962, 96 S. Ct. 1748, 48 L. Ed. 2d 208 (1976). "The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance." *Velasco* v. *Commissioner of Correction*, supra, 119 Conn. App. 172.

Based on the whole record, the court finds that as to both the motion to suppress and the criminal trial, Attorney Butler did properly investigate and pursue all reasonable avenues in an effort to challenge the integrity of the state's evidence implicating the petitioner in

the underlying sexual assault. There is no evidence of the existence of any DNA evidence that would have been exculpatory of the petitioner in the commission of the crimes of which he was convicted.

Additionally, based on a review of the transcript of the motion to suppress, this court is not persuaded of the probability that an examination of Dr. Bourke on law enforcement forensic evidence collection methods before the jury would have yielded a different verdict. There is not sufficient evidence in the record to suggest that there existed any testimony available from any known witness, including Dr. Bourke, that would have been helpful in establishing the petitioner's asserted defense. See *Nieves* v. *Commissioner of Correction*, 51 Conn. App. 615, 624, 724 A.2d 508, cert. denied, 248 Conn. 905, 731 A.2d 309 (1999).

IV

ATTORNEY VISONE

The petitioner alleged that his habeas counsel in a prior proceeding was ineffective for failing to raise a claim of ineffective assistance of trial counsel on the ground that trial counsel failed to sufficiently challenge the state's expected DNA evidence.

For assessing claims of ineffective assistance based on the performance of prior habeas counsel, the *Strickland* standard is as follows: "[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that . . . prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would

have found that he was entitled to reversal of the conviction and a new trial . . . . Therefore, as explained by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [appellate] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective." (Citations omitted; internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 113 Conn. App. 378, 394, 966 A.2d 780 (2009).

Therefore, in order to set forth a prima facie case of ineffective assistance of habeas counsel on the ground of ineffective assistance of trial counsel, the petitioner must set forth a prima facie case of ineffective assistance of trial counsel. In the instant matter, because the petitioner failed to set forth a prima facie case regarding the ineffective assistance of his trial counsel, he has not set forth a prima facie case of ineffective assistance of his habeas counsel. Additionally, a full review of the habeas trial transcript as well as the habeas trial court's memorandum of decision reveals no deficiencies in Attorney Visone's representation at the trial on the previous habeas corpus petition.

V

CONCLUSION

For all of the foregoing reasons, the petition is denied. Judgment shall enter for the respondent.

SIDNEY PARKER *v.* COMMISSIONER OF CORRECTION (AC 37796)

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

Syllabus

The petitioner, who had been convicted on a plea of guilty to sexual assault in the first degree, sought a writ of habeas corpus. He claimed that his trial counsel had rendered ineffective assistance by advising him to plead guilty. The habeas court rendered judgment denying the petition and, thereafter, 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 from the judgment denying the petition for a writ of habeas corpus, and because the court fully addressed the arguments raised in this appeal, this court adopted the habeas court's thoughtful memorandum of decision as a proper statement of the facts and the applicable law on those issues.

Argued October 19—officially released November 22, 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, *Bright, J.*; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Kelly A. Masi* and *Angela R. Macchiarulo*, senior assistant state's attorneys, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Sidney Parker, 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 habeas court (1) abused its discretion by denying certification to appeal from the judgment denying his petition for a writ of habeas corpus and (2) improperly concluded that his criminal counsel had not rendered ineffective assistance by advising him to plead guilty. We dismiss the appeal.

On August 9, 2010, in the judicial district of Litchfield, the petitioner pleaded guilty pursuant to the *Alford* doctrine[1] to one count of sexual assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-70 for crimes he committed in Torrington on December 20, 2009.[2] On September 3, 2010, the petitioner was sentenced to eight years of incarceration followed by seven years of special parole. On September 7, 2012, the petitioner filed a petition for a writ of habeas corpus. He amended his petition on July 1, 2014, alleging that his trial counsel rendered ineffective assistance with respect to his *Alford* plea.[3] Following a trial held on September 10, 2014, the habeas court denied the petition for a writ of habeas corpus and subsequently denied the petition for certification to appeal.

We first set forth the standard of review we apply to a claim that the habeas court abused its discretion by denying certification to appeal from a judgment denying a petition for a writ of habeas corpus. "Faced with a

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

[2] At approximately the same time, a number of drug related charges and violation of probation charges were pending against the petitioner in the judicial district of Waterbury.

[3] The petitioner alleged a second count of ineffective assistance by different counsel with respect to charges to which he pleaded guilty in the judicial district of Waterbury. See footnote 2 of this opinion. The sentences on the Litchfield conviction and the Waterbury conviction are running concurrently. The petitioner withdrew the second count of his amended petition for a writ of habeas corpus prior to the habeas trial.

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 petition 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. . . . 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." (Citation omitted; internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 214–15, 145 A.3d 362 (2016).

We have examined the record and the briefs, considered the arguments of the parties, and are persuaded that the habeas court properly denied certification to appeal. The habeas court's thoughtful memorandum of decision fully addresses the arguments raised in this appeal, and we adopt it as a proper statement of the facts and the applicable law on those issues. See *Parker* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-12-4004958 (February 19, 2015) (reprinted at 169 Conn. App. 424, 151 A.3d 434). "It would serve no useful purpose for us to repeat the

discussion contained therein." (Internal quotation marks omitted.) *Torrice* v. *Commissioner of Correction*, 55 Conn. App. 1, 2, 739 A.2d 270 (1999).

The appeal is dismissed.

APPENDIX

SIDNEY PARKER *v.* COMMISSIONER OF CORRECTION*

Superior Court, Judicial District of Tolland
File No. CV-12-4004958
Memorandum filed February 19, 2015

Proceedings

Memorandum of decision on petitioner's petition for writ of habeas corpus. *Petition denied.*

Cheryl A. Juniewic, for the petitioner.

Kelly A. Masi, senior assistant state's attorney, for the respondent.

Opinion

BRIGHT, J.

I

INTRODUCTION

The petitioner, Sidney Parker, brings this petition for a writ of habeas corpus, claiming that his trial counsel's legal representation and advice regarding his decision to plead guilty under the *Alford* doctrine was ineffective.[1] By way of relief, the petitioner seeks an order vacating his conviction and allowing him to withdraw his plea.

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* Affirmed. *Parker* v. *Commissioner of Correction*, 169 Conn. App. 421, 151 A.3d 430 (2016).

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

In count one of his amended petition, the petitioner claims that his trial counsel, Attorney Michael Dolan, was ineffective in that he: (1) failed to adequately advise the petitioner of the elements of the charges to which he was pleading guilty; (2) failed to adequately advise the petitioner as to any defenses and/or mitigating circumstances, including intoxication; (3) failed to advise the petitioner of the evidence and witnesses the state would likely rely upon; (4) failed to adequately investigate the petitioner's case; (5) failed to adequately consult with the petitioner regarding plea negotiations and/or exercised undue influence over the petitioner during those negotiations; and (6) failed to negotiate a better plea deal for the petitioner.[2]

This court held a trial on the merits of the petition on September 10, 2014. The petitioner produced three witnesses, himself, Attorney Dolan, and Dr. Kelly Johnson-Arbor, who testified as to how the petitioner's mental state was affected by smoking PCP prior to the events that led to his conviction. The respondent, the Commissioner of Correction, called two witnesses, Eric Brown, who testified that the petitioner made incriminating statements to him, and Attorney Terri L. Sonnemann, the assistant state's attorney who prosecuted the petitioner and negotiated his plea agreement with Attorney Dolan. The court also received as exhibits the transcripts from the petitioner's court appearances, including when he entered his plea and was sentenced, the court record regarding the petitioner's criminal case, and correspondence from the petitioner and Brown. The petitioner also filed a posttrial brief.

II

FINDINGS OF FACTS

Based on the evidence presented, the court finds the following facts. On December 20, 2009, the petitioner

[2] The amended petition also includes a count two, which alleges ineffective assistance of counsel against a second attorney, Thomas Nalband. That count was withdrawn by the petitioner at the beginning of his trial.

was arrested and charged in the judicial district of Litchfield with nine crimes arising from his alleged actions on the night of December 19 into the early morning hours of December 20 in Torrington. The charges included attempted sexual assault in the first degree, unlawful restraint the first degree, strangulation in the third degree, assault in the third degree, interfering with an officer, and four different drug charges.

On August 10, 2010, with his case on the firm jury list, the petitioner pleaded guilty under the *Alford* doctrine to one count of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-70. As set forth by Attorney Sonnemann, had the case gone to trial, the state was prepared to prove the following facts. "This event occurred on or about [December 20, 2009] in the town of Torrington at about 1:40 in the morning when Torrington police did receive a 911 call from the complainant's sister. . . . And the 911 call contains the complainant's sister screaming that the [petitioner] is trying to rape her sister.

"The complainant did give a statement to the police, indicated that [the petitioner] had gone to her apartment, they were watching a movie upstairs because the cable box was broken downstairs. While they were upstairs, [the petitioner] began to tell the complainant that he loved her, that she was his soulmate, his Oreo. He then held her on the bed by her neck and was trying to remove her pants. There was a struggle. The complainant's sister at this point jumps on the [petitioner] to try and get him off of her. She manages to do that. The complainant flees into a hallway. There is another struggle at that point involving the complainant's sister trying to protect the complainant. [The petitioner] manages to get the complainant's sister off of him, grabs the complainant's panties, rips them off, he

strikes the complainant's sister and pursues the complainant. [The complainant] goes to the neighbor's. . . .

"The [petitioner] has, at this point, grabbed the complainant again, has her outside against a wall, tries to rip her shirt and bra off. He strikes the complainant's sister again. Finally, the complainant is pleading with the [petitioner] that he doesn't need to rape her, please calm down. He does that. The complainant flees into an apartment and calls 911 again. Police arrive and the [petitioner] is taken into custody." Respondent's Exh. B, August 10, 2010 transcript, pp. 3–4.

After reciting these facts, Attorney Sonnemann noted that "[t]here is some evidence that the [petitioner] was high on PCP at the time of the alleged offense, but, nonetheless, the state believes it could have proven this beyond a reasonable doubt. And the attempted sex, one, Judge, is a general intent crime." Id., at p. 4.

The court then canvassed the petitioner. During that canvass, the petitioner acknowledged that: (1) he had enough time to talk to Attorney Dolan about his decision to plead guilty; (2) he was satisfied with Attorney Dolan's representation; (3) he went over with Attorney Dolan all of the evidence that could be used against the petitioner at trial; (4) he went over with Attorney Dolan the elements of the offense, as well as the maximum and mandatory minimum sentences for the offense. Id., at pp. 4–5. The petitioner also acknowledged that he would have to register for life as a sex offender. Id., at p. 5. The petitioner also acknowledged that his guilty plea was not the product of any threats or promises. Id., at p. 8.

While the court acknowledged the parties' agreement to a sentence of eight years of incarceration, followed by seven years of special parole, the matter was continued so that the petitioner could coordinate the running of his sentence with a four year sentence he was going

to receive out of Waterbury on a drug charge and a violation of probation. By agreement, the sentences on both cases would run concurrently. Consequently, on September 3, 2010, the petitioner returned to court to be sentenced on the sexual assault charge, to which he had pleaded guilty. Prior to the court's imposing sentence, Attorney Sonnemann disclosed to the court that on the Friday before the petitioner pleaded guilty, the complainant had been arrested on "a matter which could be used by defense counsel for purposes of cross-examination had the matter proceeded to trial." Id., September 3, 2010 transcript, p. 3. While the record reflects that the petitioner may have known of the arrest prior to entering his guilty plea, Attorney Sonnemann did not learn of it until after the petitioner pleaded guilty. In any event, the petitioner was notified on the record of his right to file a motion to vacate his guilty plea. He chose instead to be sentenced so that the sentence in this case and his Waterbury case could begin running at the same time.[3] Pursuant to the parties' agreement, the trial court sentenced the petitioner to eight years of incarceration, followed by seven years of special parole. The state entered nolles on the other eight counts with which the petitioner was charged.

The petitioner's plea agreement was the product of protracted negotiations between Attorney Dolan and Attorney Sonnemann. The petitioner retained Attorney Dolan shortly after he was arrested. Attorney Dolan had previously represented the petitioner on a sexual assault charge in the judicial district of Waterbury. After

[3] Although not mentioned explicitly in the transcript, the court infers, partly from the petitioner's testimony in this matter, that the petitioner was concerned, at least in part, with how his pretrial jail credit would be applied if he was not sentenced out of both courts on the same day. Had he only been sentenced on the Waterbury matter he likely would have lost the benefit of any pretrial confinement credits on the Litchfield matter. At the time of his plea, the petitioner had been held in lieu of bond on both matters for approximately six months. Respondent's Exh. A.

a trial to a jury in that matter, the petitioner was found not guilty.

After being arrested and before retaining Attorney Dolan, the petitioner was briefly held on a $250,000 bond. During that time, the petitioner shared a cell with Brown, who was facing charges in the judicial district of Waterbury. In late December/early January, Brown sent a letter to "Michael—Chris," claiming that the petitioner had made incriminating statements to Brown about the events in Torrington. Petitioner's Exh. 3.[4] In particular, the letter stated that the petitioner "told [Brown] how [the petitioner] attacked the two girls at the house and what happened." Id. In the letter, Brown offered his full cooperation if someone would "put a word to the prosecutor about getting me the help I need." Id. Brown testified credibly in this matter about what the petitioner told him while they were incarcerated together. The petitioner told Brown that he was with two sisters. The petitioner said that he attacked one of the sisters and that the other jumped on the petitioner's back to try to help her sister. In the process, one of the sisters had a tooth knocked out. The petitioner told Brown that he attacked the one sister because he thought one of them had taken some money or drugs from him. The petitioner also told Brown that it was snowy and icy the night he was arrested, that he ran outside with half his clothes, and that the police tased him. The petitioner also told Brown that he owned a barber shop and that he owned dogs. There was no evidence that Brown could have received any of the

[4] The court received no evidence as to who the intended or actual recipients of the letter were. Although Brown testified about his conversations with the petitioner, he was asked no questions about the letter. The petitioner, though, was able to identify the handwriting on the letter as Brown's. And it is clear that the letter was actually sent, as the testimony established that the state ultimately produced a copy of the letter to Attorney Dolan and he showed it to the petitioner.

foregoing information from anyone other than the petitioner. Furthermore, other evidence established that the petitioner and Brown discussed their cases with each other while incarcerated together. The petitioner acknowledged that he recommended Attorney Dolan to Brown. He told Brown that Attorney Dolan had previously represented him on the earlier sexual assault charge on which the petitioner was found not guilty. Consequently, Brown retained Dolan to represent him on his pending criminal charges in Waterbury.

The petitioner did eventually post the $250,000 bond and was released. However, shortly thereafter, the petitioner was incarcerated on the drug and violation of probation charges out of Waterbury and did not post bail. On March 16, 2010, the petitioner's bond was increased by $100 on his Litchfield case, so that he could earn pretrial jail credit on that matter.

The evidence established that by May 25, 2010, Attorney Dolan was representing both the petitioner and Brown. On that date, the state gave Attorney Dolan a copy of Brown's letter. Brown showed the petitioner the letter during a court appearance that day. Concerned that one of his clients was offering to provide evidence against another client, Attorney Dolan discussed the potential conflict of interest with the petitioner. The petitioner was steadfast in his decision to keep Attorney Dolan as his counsel for the Litchfield case. To make that clear, the petitioner executed a handwritten waiver that Attorney Dolan drafted. Petitioner's Exh. 2. That waiver, dated May 25, 2010, reads as follows. "I am aware of the letter Eric Brown wrote. I understand this could create a conflict. At this time, I am waiving the potential conflict. I understand I can consult a lawyer regarding this issue." Id.

At the time that Attorney Dolan and the petitioner became aware of Brown's letter, Attorney Dolan and

Attorney Sonnemann had already been involved in plea negotiations. The state's first offer was a sentence of fifteen years, execution suspended after eight years of incarceration, followed by twenty years of probation. The most troubling part of the offer to the petitioner was the twenty years of probation. Consequently, after further negotiations with Attorney Sonnemann, Attorney Dolan was able to secure a second offer of eight years of incarceration, followed by seven years of special parole. By substituting special parole for probation, the petitioner would only be exposed to incarceration beyond his initial eight year term for no more than seven years. In addition, every day of special parole the petitioner successfully completed would reduce his exposure to future incarceration by one day. The same would not be true on probation, where the petitioner would still be exposed to seven years of incarceration if he violated his probation any time during the twenty year probationary period.

At a hearing on June 8, 2010, with the petitioner present, Attorney Sonnemann informed the court that the parties had been involved in plea negotiations, an offer and counteroffer had been made, and that the state had made a final offer. Respondent's Exh. B, June 8, 2010 transcript, p. 2. While the transcript from the hearing does not describe the offer, the recollections of Attorney Dolan, the petitioner and Attorney Sonnemann were consistent that the state's final offer was eight years, followed by seven years of special parole. Attorney Sonnemann reported that the petitioner wanted time to consider the offer, and the matter was continued to July 7 for the petitioner to accept or reject the offer.

At that hearing, counsel also discussed with the court the potential conflict Attorney Dolan faced because he represented both the petitioner and Brown. The trial court expressed its concerns that if the petitioner's

matter went to trial Attorney Dolan would have a difficult time cross-examining his other client, Brown. The court further informed the petitioner that if the case went to trial, Attorney Dolan would likely have to withdraw from representing him. The petitioner told the court that he understood the conflict, but wanted to waive the conflict to allow Attorney Dolan to continue to represent him through the plea bargaining process. Attorney Dolan also informed the court that he was going to immediately withdraw as Brown's attorney in his Waterbury case, which he did the next day.

At his next court appearance on July 7, the petitioner requested additional time to consider the state's offer. The state and the court agreed, and the matter was continued until July 20. The court informed Attorney Dolan and the petitioner: "If [the petitioner's] not going to accept [the offer], it's going to be withdrawn. And then if he has to get a new lawyer, I will give him time. But that new lawyer is not going to be able to come in and renegotiate the case. Just so that's clear." Id., July 7, 2010 transcript, p. 4. The petitioner nodded his understanding. Id.

The petitioner next appeared in Litchfield Superior Court on July 20. After discussing the matter with the petitioner, Attorney Dolan asked for another continuance to do further investigation. In particular, the petitioner informed Attorney Dolan of a potential exculpatory witness and that the complaining witness may have been arrested. Id., July 20, 2010 transcript, p. 2. The state opposed any continuance to consider the offer and asked that the matter be placed on the firm jury list. The court agreed and noted that all offers were withdrawn. Id., at pp. 2–3. The petitioner then changed his mind, and decided to accept the state's offer. After the petitioner entered a guilty plea under the *Alford* doctrine to attempted sexual assault in the

first degree, the court vacated the plea when the petitioner stated during the court's canvass that he was not satisfied with Attorney Dolan. Id., at p. 7. The court placed the case on the firm jury list for September 3. The petitioner then immediately tried to again plead guilty, but the court refused to let him do so. Id., at p. 8.

Evidently, the state and the trial court reconsidered their positions as the petitioner was returned to Litchfield Superior Court on August 10, where he accepted the state's offer and entered his plea as set forth in greater detail previously.[5] The petitioner was then sentenced, consistent with the plea agreement, on September 3.

Throughout the plea negotiations, one issue that was a point of contention was the petitioner's state of mind on the night of the incident. Attorney Dolan argued to Attorney Sonnemann that the petitioner was intoxicated and under the effects of PCP, thereby negating any intent to commit a sexual assault. Attorney Sonnemann was not persuaded because the evidence showed that the petitioner had made advances toward the complaining witness and efforts to get together with her in the days leading up to the assault. In addition, the petitioner faced a number of other charges, including four drug charges, as to which his intoxication or PCP use would not be a defense. Attorney Sonnemann also knew that the petitioner had twelve prior convictions between 1993 and 2009, including three for the sale of narcotics. As a result, on the drug charges alone in Litchfield, the petitioner faced decades of incarceration as a subsequent offender. For all of the reasons, the state was not willing to consider any proposed plea

[5] The petitioner testified that after the state made its final offer, he asked Attorney Dolan to make one last effort to get the state to reduce its offer to six years of incarceration. Attorney Dolan refused because it would have been fruitless in light of the state's position that its offer was, in fact, final.

agreement less severe than the final offer the petitioner accepted.

Additional facts will be discussed as necessary.

III

DISCUSSION

It is now well established that "[a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution." *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 153, 662 A.2d 718 (1995). The United States Supreme Court has recently held that pretrial negotiations implicating the decision whether to plead guilty is a critical stage in criminal proceedings for purposes of the sixth amendment right to the effective assistance of counsel. See *Missouri* v. *Frye*, 566 U.S. 134, 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); *Lafler* v. *Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Padilla* v. *Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). "In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri* v. *Frye*, supra, 144. Similarly, "[o]ur Supreme Court has recognized that pretrial negotiations implicating the decision of whether to plead guilty is a critical stage, and, therefore, a defendant is entitled to adequate and effective assistance of counsel at this juncture of the criminal proceedings. *Copas* v. *Commissioner of Correction*, [supra, 153]." *Ebron* v. *Commissioner of Correction*, 120 Conn. App. 560, 567, 992 A.2d 1200 (2010), rev'd in part on other grounds, 307 Conn. 342, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v.

Ebron, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). The decision to plead guilty is "ordinarily the most important single decision in any criminal case." (Internal quotation marks omitted.) Id., 572. "During plea negotiations defendants are entitled to the effective assistance of competent counsel." (Internal quotation marks omitted.) *Lafler* v. *Cooper*, supra, 162. "Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." (Internal quotation marks omitted.) *Missouri* v. *Frye*, supra, 144. "Although this decision [whether to plead guilty] is ultimately made by the defendant, the defendant's attorney must make an informed evaluation of the options and determine which alternative will offer the defendant the most favorable outcome. A defendant relies heavily upon counsel's independent evaluation of the charges and defenses, applicable law, the evidence and the risks and probable outcome of a trial. The right to effective assistance of counsel includes an adequate investigation of the case to determine facts relevant to the merits or to the punishment in the event of conviction." *Copas* v. *Commissioner of Correction*, supra, 154.

To establish his claim of ineffective assistance, the petitioner has the burden to show 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." (Emphasis in original.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 575, 941 A.2d 248 (2008). "The first prong requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment." (Internal quotation marks omitted.) Id., 576, quoting *Strickland* v. *Washington*,

supra, 466 U.S. 687. With respect to the prejudice prong for claims of ineffective assistance when the conviction resulted from a guilty plea, the petitioner must demonstrate "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 576, quoting *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Carraway* v. *Commissioner of Correction*, 144 Conn. App. 461, 476, 72 A.3d 426 (2013), cert. granted on other grounds, 312 Conn. 925, 95 A.3d 521 (2014).[6]

When assessing trial counsel's performance, the habeas court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland* v. *Washington*, supra, 466 U.S. 689. The United States Supreme Court explained:

"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. . . . There are countless ways to

[6] The Supreme Court granted certification to appeal from the Appellate Court's decision, "limited to the following issue: 'Did the Appellate Court properly determine that the trial court applied the wrong legal standard in assessing the petitioner's claims?' " The legal standard at issue in *Carraway* is the prejudice prong determination when there is a claim of ineffective assistance of counsel arising from guilty plea cases.

provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Citation omitted; internal quotation marks omitted.) Id.

Applying the *Strickland-Hill* test here, the court finds that the petitioner has failed to meet his burden under either prong of the test as to any of his claims.

The petitioner's first claim is that Attorney Dolan failed to adequately advise him of the elements of the crime to which he pleaded guilty. This claim is without merit. Attorney Dolan testified credibly that he discussed with the petitioner what the state would have to prove on each of the charges he faced. In particular, although he could not remember exactly when, Attorney Dolan discussed the concept of specific and general intent. In fact, Attorney Dolan had discussed that very topic with the petitioner in connection with the earlier sexual assault trial at which Attorney Dolan represented the petitioner. Furthermore, when the petitioner entered his guilty plea on August 10, both he and Attorney Dolan acknowledged to the court that they had discussed the elements of the offense. Given the petitioner's extensive experience with the criminal justice process, both with guilty pleas and trials, his claim now that Attorney Dolan never discussed with him the elements of the crimes with which he was charged is just not credible.

The petitioner's second claim is that Attorney Dolan failed to advise the petitioner as to any defenses or mitigating circumstances. In particular, the petitioner claims that Attorney Dolan failed to advise the petitioner that his intoxication could have negated the requisite intent required for attempted sexual assault in the first degree. In support of this argument, the petitioner presented the testimony of Dr. Johnson-Arbor. Dr. Johnson-Arbor has taught, practiced and written in the field

of toxicology. Based on her conversation with the petitioner and a review of his medical records, as well as police reports and witness statements relating to the incident, Dr. Johnson-Arbor opined that at the time he assaulted the sisters, the petitioner had both cocaine and PCP in his system. She further testified that PCP intoxication can cause a person to be dissociated, meaning that his mind does not realize the actions his body is taking. She further opined that the petitioner was in such a dissociative state on the night of the assault and, more likely than not, did not know what he was doing around the time of the assault.

On cross-examination, Dr. Johnson-Arbor acknowledged that she could not say when the dissociative state began. She also acknowledged that periods of lucidity can occur during such a state. Finally, she acknowledged that a person in a dissociative state would not think to provide water as a substitute for urine to avoid testing positive for drugs or alcohol. There was evidence that the petitioner did just that after being arrested.

The petitioner argues that Attorney Dolan was deficient in his performance because he did not retain someone like Dr. Johnson-Arbor. He further argues that had Attorney Dolan done so, the petitioner would not have pleaded guilty to attempted sexual assault in the first degree.

The petitioner has failed to prove either contention. First, given the posture of the case when the petitioner entered his guilty plea, the court cannot say that Attorney Dolan was deficient for not retaining a toxicology expert. The evidence is clear that Attorney Dolan had discussed with the petitioner a possible intoxication defense. That defense also played a prominent role in Attorney Dolan's negotiations with Attorney Sonnemann. In fact, Attorney Sonnemann made specific reference to the defense when the petitioner entered his

guilty plea. Consequently, the petitioner was fully aware that he could have raised such a defense when he pleaded guilty.

The petitioner also knew that it was very unlikely that Attorney Dolan would be his counsel at trial, where such an expert might be needed. The trial court made it clear to the petitioner two months before he entered his guilty plea that Attorney Dolan would likely have to withdraw from the case due to the conflict between the petitioner and Brown. The trial court also told the petitioner that he would be given time to work with a new attorney to prepare for trial. The court cannot say that it was unreasonable for Attorney Dolan not to retain a toxicology expert when he knew he most likely would not be trying the case and another attorney would be.

Second, the court is not persuaded that the lack of a toxicology expert prejudiced the petitioner. Even if he had such an expert, the petitioner knew that the case against him was strong. As Attorney Sonnemann noted, the state had evidence to show that the petitioner had made advances toward the complaining witness. He also knew that Brown was prepared to testify against him and recount details Brown learned from the petitioner. Such evidence would be inconsistent with a defense that the petitioner was so intoxicated that he could not appreciate what he was doing. So would the evidence that the petitioner attempted to provide a false sample for the purpose of a drug test following his arrest. And, as noted previously, Dr. Johnson-Arbor made certain concessions during cross-examination that made her opinion far from definitive. Furthermore, the petitioner knew that he faced four drug charges, as to which the defense of intoxication would provide him no help. In fact, there does not appear to be any defense to those charges.

The evidence also established that the petitioner was highly motivated to plead guilty when he did, and to dispose of his case with his Waterbury case. By resolving both cases at the same time, the petitioner was able to run his sentences concurrently and to maximize the benefit of his pretrial jail credits. Consequently, the petitioner chose to plead guilty in Litchfield despite knowing that he would have to plead guilty to attempted sexual assault in the first degree and register as a sex offender for life. He chose to plead guilty even though the trial court told him that the court would give him time to consult with a new attorney if he chose to go to trial. He did so despite knowing that the complaining witness had recently been arrested and that the arrest could be used to impeach her at trial. Even when offered the option of filing a motion to set aside his guilty plea because of this new information, the petitioner chose to be sentenced to assure the benefits of his coordinated pleas in Litchfield and Waterbury.

Based on all of the foregoing, the court concludes that there is no reasonable possibility that the petitioner would have made a different decision had Attorney Dolan retained a toxicology expert like Dr. Johnson-Arbor.

The petitioner's third claim is that Attorney Dolan failed to advise him of the evidence the state had to present against him. In particular, the petitioner testified that Attorney Dolan did not provide him copies of all the police reports and witness statements related to his case. The petitioner also argues that Attorney Dolan failed to review with him the physical evidence seized from the scene.

This claim requires little discussion. The petitioner presented none of this material to the court during the trial of this matter. Thus, the court is in no position to determine whether Attorney Dolan's performance was

deficient or whether the petitioner was in any way prejudiced. It was the petitioner's burden to prove this claim, and he failed to do so.

The petitioner similarly argues that Attorney Dolan was deficient in not advising him of the witnesses the state would present at trial. There is no evidence to support this claim. Attorney Dolan testified that he told the petitioner that the complainant, her sister and police officers would be witnesses at the criminal trial. The court found Attorney Dolan's testimony to be credible. Furthermore, the petitioner was told by both Attorney Dolan and the trial court that Brown could testify against the petitioner. The petitioner has failed to identify any particular potential witness he was unaware of. Nor has he presented any evidence as to how the knowledge of any particular witness would have affected his decision to plead guilty. The claim is without merit.

The petitioner next argues that Attorney Dolan failed to adequately investigate a defense. This is a rehashing of the petitioner's argument regarding Attorney Dolan's failure to hire a toxicology expert. The court has already addressed this claim. For the reasons previously stated, the petitioner has failed to prove either deficient performance or prejudice.

The petitioner also makes several arguments relating to the manner in which Attorney Dolan advised him regarding his guilty plea. First, he claims that Attorney Dolan advised the petitioner that if he pleaded guilty under the *Alford* doctrine, he could later reopen his case and retry it. The petitioner's testimony was just not credible. Attorney Dolan is an experienced criminal defense attorney. If Attorney Dolan advised the petitioner as claimed, then he purposely deceived him. Yet Attorney Dolan had no motivation to do so. There was no evidence that Attorney Dolan bore any animus

toward the petitioner. To the contrary, the petitioner was a repeat client. Nor was Attorney Dolan concerned with trying to avoid a trial. He knew that if the case went to trial, he would almost certainly have to withdraw from the case.

The petitioner's claim is further undermined by the transcript of his plea canvass. Twice during that canvass, the petitioner acknowledged that once he pleaded guilty, there would not be a trial. Respondent's Exh. B, August 10, 2010 transcript, p. 8. He also acknowledged that there would be no appeal from the conviction. Id. The petitioner also acknowledged to the court that he could not come back to court and ask that his plea be vacated. Id. At no point did he ask the court about the advice he claims Attorney Dolan provided. He did not, despite the fact that both his aborted and final plea canvasses show that the petitioner was not reticent about raising any concerns he might have.

Similarly unpersuasive is the petitioner's claim that Attorney Dolan misled him regarding the charge the petitioner would have to plead guilty to. The petitioner claims that he thought the charge he would plead guilty to was assault, not a sexual assault. The petitioner was clearly told on July 20, 2010, that he was being asked to plead guilty to attempted sexual assault in the first degree. When the court vacated his plea after the petitioner said that he was not satisfied with Attorney Dolan, the petitioner made repeated attempts to reinstate his guilty plea to that charge. He then had three weeks to consider his options before returning to court and again pleading guilty to attempted sexual assault in the first degree. There is no question that the petitioner was fully advised and understood the charge he was pleading guilty to.

The petitioner also claims that Attorney Dolan exercised undue influence upon him to plead guilty. In particular, he claims that the potential conflict with Brown

was used to coerce the petitioner to plead guilty. The evidence does not support this claim. The evidence showed that Attorney Dolan reviewed Brown's letter with the petitioner when he became aware of it. The evidence was also clear that the petitioner wanted Attorney Dolan to stay on his case despite the conflict. The petitioner signed a waiver confirming that fact and told the court the same thing when he was canvassed on June 8, 2010. The transcript from the hearing that day shows that the petitioner was in no way coerced. He was simply informed by the court of the issues created by the conflict and asked if he wished to waive the conflict for plea negotiations. One month later, on July 7, the court told the petitioner that if he wanted to go to trial, the court would give him time to get a new lawyer. It is hard to imagine what more Attorney Dolan or the court could have done for the petitioner under the circumstances.

The petitioner's final claim is that Attorney Dolan was deficient in not negotiating a better plea deal by using a toxicology expert to buttress his intoxication defense. Again, there is no evidence to support the petitioner's claim. It is pure speculation that the state would have made a better offer if Attorney Dolan had retained a toxicology expert. To the contrary, Attorney Sonnemann and Attorney Dolan both testified credibly that much of their negotiations centered on such a defense, but that the state gave it little credence. This fact was confirmed by Attorney Sonnemann's comments when the petitioner entered his guilty plea. In the end, the final offer the petitioner accepted was the product of protracted and contentious negotiations, and there was no evidence to suggest that there was any possibility that the petitioner was going to do any better. In fact, Attorney Dolan was able to negotiate away the twenty years of probation to which the petitioner

objected and get the incarcerated portion of the sentence close to the six years the petitioner was aiming for. The petitioner has failed to prove either deficient performance or prejudice.

IV

CONCLUSION

For the foregoing reasons, the petition is denied.

MARLIK MOURNING *v.* COMMISSIONER OF CORRECTION
(AC 37601)

Lavine, Mullins and Mihalakos, Js.

Syllabus

The petitioner, who had been convicted of manslaughter in the first degree with a firearm for a shooting he carried out with another individual, sought a writ of habeas corpus on the ground of ineffective assistance of trial counsel. At the petitioner's criminal trial, the state's ballistics expert, R, testified that the bullet that had killed the victim was fired from the revolver that the petitioner used in the shooting. Following his conviction, the petitioner filed a petition for a writ of habeas corpus claiming that his trial counsel had rendered ineffective assistance by failing to move to exclude R's testimony on the ground that it was not grounded in science and therefore would not have been admissible if challenged under *State* v. *Porter* (241 Conn. 57). At the habeas trial, the petitioner called a statistician expert, C, who testified that ballistics identification techniques may be unreliable. The habeas court did not credit C's testimony and denied the habeas petition. The habeas court concluded, inter alia, that the petitioner did not suffer any prejudice because the verdict would not have been different had trial counsel moved to exclude R's testimony. Following the habeas court's denial of the petition for certification to appeal, the petitioner appealed to this court. *Held* that the petitioner failed to demonstrate that the habeas court abused its discretion in denying his petition for certification to appeal, the petitioner having failed to show that the issues he raised were debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions raised deserved encouragement to proceed further: the petitioner failed to demonstrate that he was prejudiced by trial counsel's allegedly deficient performance, as he did not show that, had trial counsel moved to exclude R's testimony,

there was a reasonable probability that the result of his criminal trial would have been different; furthermore, because the habeas court rejected the petitioner's prejudice claim on the basis of its determination that C's testimony was not credible, and this court deferred to the habeas court's credibility determination, C's testimony did not sufficiently demonstrate that trial counsel's challenge to R's testimony would have been successful.

Argued September 7—officially released November 29, 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.*

Peter G. Billings, assigned counsel, with whom, on the brief, was *Sean P. Barrett*, assigned counsel, for the appellant (petitioner).

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. Following the habeas court's denial of his amended petition for a writ of habeas corpus, the petitioner, Marlik Mourning, appeals from the habeas court's denial of his petition for certification to appeal. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because the record established that his criminal trial counsel rendered ineffective assistance by failing to move to exclude the testimony of the state's ballistics expert. We conclude that the court did not abuse its discretion in denying the petition for certification to appeal. Accordingly, we dismiss the appeal.

As previously set forth by this court on direct appeal, the jury reasonably could have found the following facts. "In the late evening of July 8, 2003, Lamar Daniels, Deshon Thomas and the [petitioner] gathered in front of an establishment named Cobra's Place in what is known as the Sugar Bowl area of Waterbury, where the [petitioner] and Daniels often sold drugs. There they engaged in an argument with Desmond Williams and the victim, Trevor Salley, who recently had completed a sale in the area. After the argument ended, the individuals dispersed, and Daniels called his cousin, Sherita Norman, requesting that she pick him up. Several minutes later, Norman and her sister, Sharon Norman, arrived and drove Daniels and the [petitioner] away from the Sugar Bowl and back to Sherita Norman's apartment. Daniels entered the apartment and retrieved a silver .38 caliber revolver and an AK-47 assault rifle from a bedroom closet. At some point, Daniels handed the .38 caliber revolver to the [petitioner]. Sherita Norman then drove the [petitioner] and Daniels back to the Sugar Bowl and parked in a lot, enclosed by a fence, located behind Cobra's Place. As the [petitioner] and Daniels approached the fence, they saw the victim and Williams. Daniels called out to them and displayed the rifle, at which point the victim and Williams ran in the opposite direction. Daniels discharged the AK-47 assault rifle several times. The [petitioner] then fired the .38 caliber silver revolver. The gunshot that killed the victim came from the .38 caliber silver revolver fired at the scene.

"The [petitioner] subsequently was charged by information with murder, conspiracy to commit murder and criminal possession of a pistol or revolver. After a jury trial, the [petitioner] was found guilty of manslaughter in the first degree with a firearm, conspiracy to commit murder and criminal possession of a pistol or revolver." *State* v. *Mourning*, 104 Conn. App. 262, 265–66, 934

A.2d 263, cert. denied, 285 Conn. 903, 938 A.2d 594 (2007). The petitioner was sentenced to a total effective sentence of forty years incarceration, five years of which were mandatory. This court affirmed the petitioner's convictions on appeal. Id., 288.

On September 19, 2012, the petitioner filed a petition for a writ of habeas corpus, which he amended on October 2, 2014. In his amended petition, the petitioner alleged that his trial counsel, David Channing, had rendered ineffective assistance in numerous ways. The only claim relevant to this appeal, however, is the petitioner's claim that his trial counsel had rendered ineffective assistance by failing to move to exclude the testimony of the state's ballistics expert.[1] On December 17, 2014, the habeas court held an evidentiary hearing on the amended petition. In a memorandum of decision

[1] Initially, the petitioner's amended petition contained ten counts. Prior to trial, the petitioner withdrew five counts. Additionally, the habeas court "summarily dismissed" two of the petitioner's remaining five counts because he abandoned those claims by failing to prosecute them at trial. As a result, only three counts were before the habeas court at trial. Those counts were the following: "Count Three–Ineffective Assistance of Trial Counsel: Failure to Challenge the State's Firearms Identification Expert"; "Count Four–Violation of Due Process of Law: Failure to Challenge State's Firearms Identification Expert"; and "Count Five–Ineffective Assistance of Trial Counsel: Failure to Support Defense." (Internal quotation marks omitted.)

On appeal, the petitioner has not raised any of the seven counts that he withdrew or abandoned. With respect to the remaining three counts that were before the habeas court, the petitioner in this appeal has challenged only the habeas court's resolution of the count alleging that his trial counsel rendered ineffective assistance by not "challeng[ing] the state's firearms identification expert." (Internal quotation marks omitted.) Within that count, the petitioner had alleged in his amended petition that trial counsel's performance was constitutionally deficient in seventeen different ways. In this appeal, however, the petitioner has raised only one of those seventeen grounds, namely, that his trial counsel performed deficiently by failing to "seek to suppress or exclude [the testimony of the state's ballistics expert] pursuant to . . . *State* v. *Porter*, 241 Conn. 57, 67, 73–74, 77–81, 84–90 [698 A.2d 739] (1997) [cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)] . . . ." Accordingly, we address only this specific claim, and not the other grounds that the petitioner had raised in his amended petition.

filed on January 2, 2015, the court denied the petitioner's amended petition. The petitioner then filed a petition for certification to appeal, which the habeas court denied. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because the record established that his trial counsel rendered ineffective assistance by failing to move to exclude the testimony of the state's ballistics expert. We are not persuaded.

We first set forth our 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. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"[As it relates to the petitioner's substantive claims] [o]ur 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." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Roger B.* v. *Commissioner of Correction*, 157 Conn. App. 265, 269–70, 116 A.3d 343 (2015).

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], 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. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet 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. . . .

"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 [petitioner] 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." (Internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 128 Conn. App. 425, 430, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011).

In determining whether the habeas court abused its discretion in denying the petition for certification to appeal, we must consider the merits of the petitioner's underlying claims. Accordingly, we now turn to the merits of the petitioner's claim.

The petitioner's sole claim on appeal is that trial counsel rendered ineffective assistance by failing to move to exclude the testimony of the state's ballistics expert. Specifically, the petitioner argues that trial counsel's performance was deficient because the conclusions of the ballistics expert "were not grounded in science at all and his expert testimony would not have withstood the admissibility requirements of [*State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)] had they been challenged." Moreover, the petitioner claims that trial counsel's failure to exclude that testimony prejudiced him because, if the testimony had been excluded, there is a reasonable probability that the outcome of the trial would have been different.

The respondent, the Commissioner of Correction, asserts that trial counsel did not render ineffective assistance.[2] Specifically, the respondent argues that trial

[2] The respondent also asserts that the petitioner's claim is unreviewable because the habeas court made findings only with respect to the claim that

counsel's performance was not deficient, and, even if it were, the petitioner has failed to demonstrate that he suffered prejudice as a result of the alleged deficient performance. We agree with the respondent that even if we were to assume, without deciding, that trial counsel performed deficiently, the petitioner has failed to demonstrate that he was prejudiced by trial counsel's alleged deficient performance.[3]

The following additional facts are relevant to our review of the petitioner's claim. At the criminal trial,

trial counsel performed deficiently by failing to call an expert to rebut the testimony of the ballistics expert, and not to the specific claim that the petitioner has raised on appeal. Indeed, the habeas court framed the issue before it as whether trial counsel performed deficiently by "failing to utilize an expert . . . to undermine the testimony of [the ballistics expert]," and it stated that the petitioner's claims "all pertain to the . . . failure to call an expert witness . . . ."

In his amended petition, however, the petitioner alleged broadly that trial counsel performed deficiently by not "challeng[ing]" the ballistics expert. Within that allegation, the petitioner listed seventeen distinct ways in which trial counsel should have challenged the testimony of the ballistics expert. See footnote 1 of this opinion. Both calling a rebuttal witness and moving to exclude the testimony of the ballistics expert were included in this list. In concluding that the petitioner was not prejudiced by trial counsel's allegedly deficient performance, the habeas court stated that regarding "the specific deficiencies alleged in the [petition] . . . there is no merit to *any* of the points raised by the petitioner." (Emphasis added.) Moreover, at the habeas trial, the petitioner presented the testimony of a criminal defense attorney who opined that trial counsel performed deficiently by not filing a pretrial motion to limit or exclude the testimony of the ballistics expert. Accordingly, after reviewing the record, we conclude that the petitioner's claim was rejected by the habeas court and properly is before this court.

[3] "Because both [*Strickland*] prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Hunnicutt* v. *Commissioner of Correction*, 83 Conn. App. 199, 206, 848 A.2d 1229, cert. denied, 270 Conn. 914, 853 A.2d 527 (2004). "[A] reviewing court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 271. "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." *Griffin* v. *Commissioner of Correction*, 98 Conn. App. 361, 366, 909 A.2d 60 (2006). In light of the foregoing,

the state's ballistics expert was Marshall Robinson, a firearms examiner employed by the city of Waterbury. Robinson first testified as to the principles underlying the field of ballistics and the techniques he uses in identifying the firearm from which a particular bullet was fired. Regarding the petitioner's case, Robinson testified that, after examining the bullet that caused the victim's death, he concluded that it was fired from the .38 caliber revolver that the petitioner had used in the commission of this shooting. He also testified that the .38 caliber bullet that killed the victim could not have been fired from the AK-47 that Daniels, the codefendant, fired at the scene of the crime.

Trial counsel did not object to the court recognizing Robinson as an expert in firearms identification. Furthermore, trial counsel did not move to suppress or limit Robinson's testimony, nor did he request a hearing pursuant to *State* v. *Porter*, supra, 241 Conn. 57.[4]

At the habeas trial, the petitioner called three witnesses: (1) Robinson, (2) Frank Riccio, a criminal defense attorney, and (3) Alicia Carriquiry, a statistician

we decline to express any opinion on whether trial counsel's performance was deficient in this case.

[4] "Beyond [the] general requirements regarding the admissibility of expert testimony, [t]here is a further hurdle to the admissibility of expert testimony when that testimony is based on . . . scientific [evidence]. In those situations, the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability. . . . In *Porter*, this court followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that scientific evidence should be subjected to a flexible test, with differing factors that are applied on a case-by-case basis, to determine the reliability of the scientific evidence. . . . Following . . . *Porter* . . . scientific evidence, and expert testimony based thereon, usually is to be evaluated under a threshold admissibility standard assessing the reliability of the methodology underlying the evidence and whether the evidence at issue is, in fact, derived from and based upon that methodology . . . ." (Citations omitted; internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 342–43, 907 A.2d 1204 (2006), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 280 (2007).

who researches firearm identification techniques. The respondent did not call any witnesses.

Robinson mainly reiterated the testimony he gave at the criminal trial, providing an overview of the methodologies he employs in conducting ballistics analysis. Furthermore, he again opined that the .38 caliber bullet that killed the victim was fired from the revolver that the petitioner used in the shooting and that the bullet could not have been fired from the Daniels' AK-47. The petitioner's habeas counsel also inquired into Robinson's education, training, and professional experience.

Riccio testified as to the types of pretrial motions criminal defense counsel might consider filing to controvert ballistics evidence.[5]

Carriquiry offered lengthy testimony indicating that she believed, as a result of her research, that ballistics identification techniques may be unreliable. Specifically, she claimed that the field of ballistics lacks scientific validity because (1) practitioners do not use a uniform standard of objective criteria in matching a bullet to a gun, (2) there is insufficient statistical evidence supporting the fundamental assumptions that every gun leaves unique markings and that every gun can reproduce the same markings over time, and (3) there is insufficient data with respect to how often practitioners make erroneous matches and how often coincidental matches occur. On the basis of the foregoing, Carriquiry opined that there was no "scientific basis" for Robinson's conclusions regarding the ballistics evidence in the petitioner's case. On cross-examination, Carriquiry acknowledged that she has never

[5] In particular, Riccio opined that trial counsel should have challenged the ballistics evidence by filing either a motion to suppress or a motion in limine. He did not, however, specifically suggest that trial counsel should have requested a *Porter* hearing.

worked in the field of ballistics, that she has never examined a bullet, and that she does not have any training in ballistics.

The habeas court denied the amended petition for a writ of habeas corpus on the grounds that trial counsel's performance was not deficient and that the petitioner did not suffer any prejudice even if trial counsel performed deficiently. With respect to prejudice, the habeas court concluded that because "there was sufficient evidence to justify the jury's verdict," there was "almost no likelihood" that the verdict would have been different absent trial counsel's allegedly deficient performance. In particular, the habeas court found that Robinson's testimony "at the trial level and . . . habeas case" was "clear, coherent, and believable," but that Carriquiry's testimony was not credible.

We agree with the habeas court and conclude that the petitioner has failed to demonstrate that he was prejudiced by trial counsel's allegedly deficient performance. Accordingly, the petitioner has not shown that there is a reasonable probability that, but for counsel's failure to move to exclude the testimony of Robinson, the ballistics expert, the result of the criminal trial would have been different.

The habeas court rejected the petitioner's prejudice claim on the basis of a credibility determination. In short, it discredited Carriquiry's testimony at the habeas trial, and it credited Robinson's testimony at both the criminal trial and habeas trial. As a result, the habeas court concluded that the impact of Carriquiry's testimony on the "believability of [Robinson's] testimony and conclusion" was "minimal at best," and, therefore, such testimony did not sufficiently demonstrate that trial counsel's challenge to Robinson's testimony at the criminal trial would have been successful. Accordingly, because Carriquiry's testimony was the only evidence

supporting the petitioner's claim that the result of his criminal trial would have been different had trial counsel moved to exclude Robinson's testimony, this claim must necessarily fail.

"It is well settled that the credibility of an expert witness is a matter to be determined by the trier of fact." *Hayes* v. *Manchester Memorial Hospital*, 38 Conn. App. 471, 474, 661 A.2d 123, cert. denied, 235 Conn. 922, 666 A.2d 1185 (1995). "The credibility of expert witnesses and the weight to be given to their testimony . . . is determined by the trier of fact." (Internal quotation marks omitted.) *State* v. *James*, 120 Conn. App. 382, 390, 991 A.2d 700, cert. denied, 297 Conn. 911, 995 A.2d 639 (2010). "[T]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . 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.) *Fine* v. *Commissioner of Correction*, 163 Conn. App. 77, 82–83, 134 A.3d 682, cert. denied, 320 Conn. 925, 133 A.3d 879 (2016).

As a result, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal. The petitioner has not demonstrated that the issues he raises on appeal are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions raised deserve encouragement to proceed further.

The appeal is dismissed.

In this opinion the other judges concurred.

GERALD W.* *v.* COMMISSIONER OF CORRECTION (AC 37576)

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

Syllabus

The petitioner, who had been convicted of the crimes of sexual assault in fist degree and risk of injury to a child, sought a second petition for a writ of habeas corpus. In his first habeas petition, the petitioner alleged that his trial counsel had provided ineffective assistance in a number of ways. The habeas court denied the first habeas petition and the petitioner's petition for certification to appeal. The petitioner subsequently appealed to this court, which dismissed the appeal, and our Supreme Court denied certification to appeal. Thereafter, the petitioner filed his second habeas petition. The first count of the petition alleged thirteen specific ways in which trial counsel had provided ineffective assistance, the majority of which were not raised in the first habeas petition. The second count alleged that the petitioner's counsel at the first habeas trial had provided ineffective assistance by failing to adequately raise the specifications of trial counsel's ineffective assistance set forth in count one of the petition. The habeas court dismissed the first count of the habeas petition and, after a hearing, denied the second habeas petition, concluding that the petitioner had failed to prove by a preponderance of the evidence any allegation of ineffective assistance on the part of his first habeas counsel. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held* that the petitioner could not prevail on his claim that the second habeas court improperly rejected his claim that he received ineffective assistance from his first habeas counsel, the petitioner having failed to meet his burden of demonstrating that his first habeas counsel's performance fell outside of the wide range of reasonable professional assistance and that but for habeas counsel's performance there was a reasonable probability that the habeas court would have found in his favor and granted a new trial: there was no merit to the petitioner's claim regarding the sole issue on appeal that his first habeas counsel provided ineffective assistance by failing to raise and litigate a claim that trial counsel rendered ineffective assistance by failing to consult with and to offer the testimony of a child sexual abuse expert, the habeas court having determined that the petitioner had failed to demonstrate that he had been

* 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 identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

prejudiced by trial counsel's performance with respect to the consultation with and presentation of such an expert, and, therefore, the failure of the petitioner's first habeas counsel to raise a related claim was not professionally deficient performance.

Argued September 16—officially released November 29, 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, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

James E. Mortimer, with whom, on the brief, was *Michael D. Day*, for the appellant (petitioner).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Craig P. Nowak*, senior assistant state's attorney, and *Susann E. Gill*, former supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Gerald W., appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court improperly rejected his claim that he received ineffective assistance from his prior habeas counsel. We affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. The petitioner was convicted following a jury trial of three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of attempt to commit sexual assault in

[1] The habeas court granted certification to appeal from the judgment.

the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (2). The relevant facts underlying the judgment of conviction were set forth in this court's opinion affirming that judgment. "From the evidence adduced at trial, the jury reasonably could have found the following facts. The victims are three minor children, S, the [petitioner's] daughter; P, the [petitioner's] cousin; and T, the cousin of the [petitioner's] girlfriend. At the time of trial, the three victims were age fourteen, fifteen and sixteen, respectively. The victims often would visit the [petitioner] at his apartment, where he lived with his girlfriend. When S was approximately six years old, she began visiting the [petitioner] on a weekly basis. Sometime in December, 2001, when she was eleven years old, the [petitioner] engaged in what would become a pattern of sexual abuse of S, which continued until sometime in early 2003. During some of these visits, the [petitioner] would touch her chest and vaginal area with his penis, finger or hand. On one evening during 2001, when P was eleven, the [petitioner] pulled down her pants and attempted to engage in sexual intercourse. When T was nine years old, she began to visit the [petitioner] and her cousin. During the ensuing five year period, the [petitioner] inappropriately touched both her chest and vaginal area approximately ten times.

"After the [petitioner's] conduct was disclosed to the police, the [petitioner] was arrested and charged in a substitute information dated May 5, 2005, with three counts of risk of injury to a child and one count of attempt to commit sexual assault in the first degree. Following a jury trial, the [petitioner] was convicted on all counts and sentenced to a total effective term of forty years imprisonment." *State* v. *Gerald W.*, 103 Conn. App. 784, 786–87, 931 A.2d 383, cert. denied, 284 Conn. 933, 935 A.2d 152 (2007).

As previously indicated, the petitioner appealed from the judgment of conviction. He claimed on appeal that the trial court improperly had instructed the jury regarding the presumption of innocence and had construed the rape shield statute improperly in excluding evidence of T's allegations of prior sexual abuse by her biological father. Id., 786. This court affirmed the judgment of the trial court on September 18, 2007, and our Supreme Court later denied certification to appeal. Id.

In April, 2007, the petitioner filed his first petition for a writ of habeas corpus. Throughout that first habeas action, the petitioner was represented by Attorney Jodi Zils Gagne. He alleged in his first petition that his trial counsel, Jonathan Demirjian, had provided ineffective assistance in a number of ways. In particular, the operative petition provided that Demirjian was ineffective because he had failed (1) to move for separate trials as to each of the three victims; (2) to compel the prosecutor to specify the precise dates of the offenses; (3) to investigate alibi witnesses adequately; (4) to advise the petitioner about the maximum jail time he faced if unsuccessful at trial; (5) to submit into evidence videotaped forensic interviews of the victims; (6) to explain to the petitioner the state's evidence against him; (7) to prevent the admission of improper evidence offered by the state, including evidence of uncharged misconduct; (8) to subpoena testimony from the Department of Children and Families (department) about its investigation; and (9) to correct allegedly confusing information provided to the jury regarding the existence of a police report. Zils Gagne eventually withdrew the specifications of ineffective assistance that related to the videotaped interviews of the victims and to Demirjian's failure to call witnesses about the department's investigation. Following a trial, the habeas court denied the first petition and subsequently denied a petition for certification to appeal. The petitioner appealed from

the habeas court's decision. This court dismissed the appeal by a memorandum decision dated January 24, 2012, and our Supreme Court subsequently denied certification to appeal. *Gerald W.* v. *Commissioner of Correction*, 133 Conn. App. 901, 33 A.3d 898, cert. denied, 304 Conn. 901, 38 A.3d 113 (2012).

On February 21, 2012, the petitioner filed a second habeas petition—the petition underlying the present appeal. An amended petition was filed on April 1, 2014, and contained two counts. The first count reasserted that trial counsel had provided ineffective assistance. Although the petitioner acknowledged in the petition that he previously had raised this claim in his first habeas petition, he asserted that he had not received a full and fair hearing of the claim. The petitioner listed thirteen specifications of ineffective assistance by trial counsel, the majority of which were not raised in the first habeas petition.[2]

[2] Paragraph 28 of the amended habeas petition provided as follows: "The petitioner's trial counsel's performance was deficient because:

(A) he failed to retain, consult with, and present the testimony of, a forensic psychologist, forensic psychiatrist, or other mental health professional, with an expertise in investigating and evaluating child sexual abuse allegations;

(B) he failed to adequately seek production and disclosure of educational records, psychological records, medical records, [department] records, police records, and other records related to the forensic investigation and evaluation of the complainants' allegations;

(C) he failed to adequately present alternative innocent explanations for the child sexual abuse allegations made against petitioner, and he failed to adequately present testimony that contradicts, refutes, and otherwise challenges the complainants' allegations;

(D) he failed to adequately challenge the prosecuting authority's failure to investigate and rule out alternative innocent explanations for the child sexual abuse allegations made against the petitioner;

(E) he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of the complainants;

(F) he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of Cynthia Williams;

(G) he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of Victoria Hester;

(H) he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of Juanita W.;

The second count of the petition asserted that the petitioner received ineffective assistance from his prior habeas counsel, Zils Gagne. The sole ground alleged in the count was that Zils Gagne's "performance was deficient because she failed to adequately raise the [specifications of ineffective assistance of trial counsel] identified in [count] one of this amended petition for a writ of habeas corpus."

In his response to the habeas petition, the respondent, the Commissioner of Correction, pleaded by way of a special defense that the first count directed at trial counsel's performance had been raised previously and unsuccessfully litigated in the petitioner's first habeas action, and, therefore, it was barred by the doctrines of successive petition, res judicata and/or collateral estoppel.

The habeas court, *Sferrazza*, *J.*, conducted a trial on the second habeas petition over four days in August and September, 2014. The petitioner presented testimony from a number of witnesses including Demirjian, Zils Gagne, and Michael Blanchard, a criminal defense attorney with experience in child sexual abuse cases. At the close of evidence, the habeas court, with the consent of counsel, dismissed the first count of the petition, noting on the record that it was "really just part of the proof of the second count," and that "there was already a habeas [court judgment] which addressed trial counsel." The parties each submitted posttrial

(I) he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of Officer Jessica Tillson;

(J) he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of Officer Sandra Gonzalez;

(K) he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of Lisa Bush;

(L) he failed to adequately challenge the misapplication of the Connecticut rape shield statute to charges of risk of injury to a minor; and

(M) he failed to object to improper appeals to the jurors as parents made during the prosecuting authority's closing arguments."

briefs. On December 15, 2014, the court issued a memorandum of decision denying the remainder of the habeas petition.

The court first noted that although the petitioner had presented expert testimony from Blanchard in support of his claim that prior habeas counsel was ineffective, Blanchard testified extensively only about the performance of trial counsel, and "expressed no opinion concerning habeas counsel's performance in the first habeas action. Nor did he voice any opinion regarding whether the purported deficiencies of [trial counsel] affected the outcome of the earlier habeas case or the criminal trial. In short, the petitioner produced no expert witness who maintained that [habeas counsel] rendered unprofessional legal assistance for the first habeas trial nor as to the prejudice prong of the *Strickland* standard with respect to either level of litigation." (Emphasis omitted.) See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (establishing standard that to prevail on claim of ineffective assistance of counsel, petitioner bears burden of establishing both that counsel's performance was deficient and that petitioner suffered actual prejudice as result of that performance).

The court next proceeded to evaluate whether the petitioner had satisfied his burden of demonstrating that Zils Gagne's decision not to raise the specifications of deficient performance by trial counsel as set forth in the second habeas petition amounted to ineffective assistance. The court rejected the arguments offered by the petitioner. In particular, the court found that Zils Gagne was "an experienced criminal defense attorney," and that she had prepared by reviewing the criminal file, the trial transcripts, and the evidence admitted at trial, and by discussing with the petitioner his complaints about trial counsel. She reviewed the forensic interviews of the victims several times, including once

with the petitioner present. She sought to establish whether there may have been alternative, innocent explanations for the actions of the petitioner toward the victims, although the petitioner either denied the acts outright or claimed that he could not remember because he consumed alcohol during the time period when the assaults occurred. The court further found that Zils Gagne pursued seven specifications of ineffective assistance of trial counsel in the first habeas petition and indicated that she strategically and reasonably had chosen not to pursue several claims that she believed would have been unsuccessful.

Ultimately, the habeas court concluded: "[T]he petitioner has failed to satisfy his burden of proving, by a preponderance of the evidence, any allegation of ineffective assistance on the part of Attorney Zils Gagne under the *Strickland* standard." The habeas court denied the petition but later granted the petition for certification to appeal. This appeal followed.

We begin our analysis with the law governing the petitioner's claim as well as our standard of review. "The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition." (Footnote omitted; internal quotation marks omitted.) *Sinchak* v. *Commissioner of Correction*, 126 Conn. App. 684, 686–87, 14 A.3d 343, cert. denied, 301 Conn. 901, 17 A.2d 1045 (2011). In *Lozada*, the court explained that "[t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both

(1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective." *Lozada* v. *Warden*, supra, 842. As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 687. "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 adversary process that renders the result unreliable." (Internal quotation marks omitted.) *Lozada* v. *Warden*, supra, 842–43. In other words, "a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . ." *Lapointe* v. *Commissioner of Correction*, 113 Conn. App. 378, 394, 966 A.2d 780 (2009).

"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 and courts 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. . . . [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." (Citation omitted; internal quotation marks omitted.) *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 167–68, 143 A.3d 1106, cert. denied, 323 Conn.

924, 149 A.3d 982 (2016). With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is "a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . ." (Internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 117, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011).

It is well settled that in reviewing the denial of a habeas petition alleging the ineffective assistance of counsel, "[t]his 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." (Internal quotation marks omitted.) *Robinson* v. *Commissioner of Correction*, 167 Conn. App. 809, 817, 144 A.3d 493 (2016).

The petitioner's sole claim on appeal is that the habeas court improperly determined that he had failed to prove that his prior habeas counsel provided ineffective assistance. Having thoroughly reviewed the record presented, we conclude that the habeas court properly denied the petition for a writ of habeas corpus.

We first clarify that our review of the petitioner's ineffective assistance claim is limited to those specifications of deficient performance properly raised before and considered by the habeas court. Although the petitioner alleged in the underlying habeas petition that his trial counsel was ineffective in a variety of ways, his allegations regarding habeas counsel were much more limited.[3]

[3] "It is well settled that [t]he 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. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . [Although] the habeas court has considerable discretion to frame a remedy that is

Our review of the operative amended habeas petition, the transcripts of the habeas trial, and the petitioner's posttrial brief reveals that the only argument properly before the habeas court regarding the alleged deficient performance by Zils Gagne was that she had failed to raise in the first habeas action those specifications of ineffective assistance of trial counsel that the petitioner set forth in the second habeas petition. The petitioner argues in his appellate brief that Zils Gagne also was ineffective because, like trial counsel, she failed to consult with a forensic psychologist or some other party with sufficient expertise in evaluating child sexual abuse allegations. He did not, however, include that particular specification in his habeas petition or raise the argument at the habeas trial or in his posttrial brief. In fact, in the petitioner's posttrial brief, the analysis was limited almost entirely to a discussion of his trial counsel's performance without any independent discussion of Zils Gagne's performance, including whether she should have consulted with an expert.[4]

commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . The purpose of the [petition] is to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 678, 142 A.3d 1095 (2016).

[4] Although we do not reach the issue, the record does not appear to support the notion that Zils Gagne's failure to consult with a mental health expert rendered her unprepared to litigate the habeas action. As the habeas court found, at the time Zils Gagne represented the petitioner, she was an experienced criminal defense lawyer. She had tried approximately twenty other habeas actions. In addition, her uncontested testimony during the habeas trial was that she had handled direct criminal appeals that involved child sexual abuse and, thus, was familiar with how such cases were defended. The habeas court's findings also establish that Zils Gagne thoroughly researched the facts and the law at issue in the case. She obtained and reviewed the petitioner's defense file, discussed the case with the petitioner at length, including his expectations and his complaints concerning his trial attorney, and reviewed the transcripts and the evidence from the

Accordingly, the only issue is whether the petitioner proved before the habeas court that Zils Gagne provided ineffective assistance by failing to raise and prosecute the claims of ineffective assistance of trial counsel set forth in count one of the habeas petition. See footnote 2 of this opinion. In his reply brief, the petitioner has defined his claim on appeal in even narrower terms, describing the singular issue before this court as whether "habeas counsel rendered ineffective assistance in her failure to raise and litigate a claim that trial counsel rendered ineffective assistance by his failure to retain, consult with and offer the testimony of a forensic psychiatrist, psychologist or other mental health professional with expertise in investigating and evaluating child sexual abuse allegations." In so doing, the petitioner has abandoned many unrelated issues.

The habeas court, however, determined that the petitioner had failed to demonstrate that he was prejudiced by trial counsel's performance with respect to the consultation with and presentation of a child sexual abuse expert. It follows that Zils Gagne's failure to raise a related claim in the prior habeas action was not professionally deficient performance. In its memorandum of decision, the habeas court stated as follows: "Regarding the petitioner's specification of ineffectiveness premised on [trial counsel's] failure to consult with and present the testimony of a sexual abuse expert for the defense, the court finds that the petitioner has failed to prove, by a preponderance of the evidence, the prejudice component of the *Strickland* test. [Blanchard]

criminal trial. She reviewed on more than one occasion the forensic interviews conducted of the victims, including one time in the presence of the petitioner. On the basis of her review, she found the victims' statements in those interviews credible and, despite some inconsistencies, likely to have been believed by a jury if admitted at trial. Given the petitioner's inability to provide her with any innocent explanation for the allegation made by the three victims, she ultimately reached the conclusion that it would have been highly detrimental to the defendant's case if the forensic interviews had been admitted into evidence and viewed by the jury.

identified in his testimony those areas that such an expert *might* have assisted defense counsel, but no credible evidence was produced which persuades the court that there exists a reasonable likelihood that, but for the absence of such consultation, the outcome of the criminal trial would have differed.

"A major difficulty for the petitioner to overcome was that, not one, but three preteen girls all swore that the petitioner sexually molested them. No persuasive evidence of any conspiracy to fabricate allegations against the petitioner or mutuality of motive to lie about his behavior was adduced at his criminal trial, his first habeas trial, or [in] the present case. The three girls were not very young children as their ages ranged from nine to thirteen when the assaults occurred.

"The petitioner contends, therefore, that it was incumbent upon [trial] counsel to point to the girls' 'aunt,' Juanita W., to account for why they would wrongfully implicate him. He argues that [trial counsel] needed to probe into Juanita's past and psyche to establish that she was hypervigilant to the possibility of preteen molestation because she had endured such abuse. Also, Juanita W.'s sister was the petitioner's wife when the petitioner left her to cohabit with his wife's daughter, a teenager.

"As to the latter circumstance, the evidence unquestionably showed that Juanita W. felt that the petitioner had brought shame and scandal to her extended family by consorting with his stepdaughter. The petitioner complains that [trial counsel] ought to have explored the topic of this family dynamic more extensively to convince the jury that Juanita W. somehow coaxed the three victims to concoct false accusations of sexual abuse by him. The court concludes that this tactical approach would have been self-defeating and unlikely to accomplish the goal proposed.

"First, it would emphasize that the petitioner had a penchant for sexual relations with teenagers. Second, and, more significantly, the petitioner's [trial counsel] would necessarily have to have argued that the collusion was a response for having incurred shame for the family by accusing the petitioner of committing even more reprehensible acts and bringing greater shame down upon the family.

"Besides the absurdity of that argument for why the three girls all falsely reported abuse by the petitioner while under the vengeful spell of Juanita W., this court had the benefit of having Juanita W. testify at the habeas trial. She came across as an honest, caring woman, who learned of the [sexual] abuse complaints in a straight forward manner. She made a genuine effort to take appropriate steps to help the three girls. The court determines that the jury would have reacted likewise to her testimony."

The habeas court, which heard testimony from a defense expert at the habeas trial, further rejected the petitioner's argument that a defense expert would have been useful in countering the testimony of the state's sexual abuse expert, Lisa Melillo, finding that the experts' opinions were "essentially consistent on the primary feature revealed by [Melillo], namely, delayed disclosure." Finally, the court rejected any notion that consultation with an expert would have aided counsel with the cross-examination of the victims and other prosecution witnesses, concluding that "the petitioner's specifications of ineffective assistance on these grounds is meritless." The habeas court found that trial counsel handled their cross-examinations "delicately, deftly, and thoroughly" and that, accordingly, "Zils Gagne quite properly declined to raise any claims of deficient performance in this regard." The petitioner has not shown that the habeas court made any factual findings that are clearly erroneous, and we agree with

the habeas court's analysis regarding lack of prejudice and Zils Gagne's performance.

Having thoroughly reviewed the record presented, we conclude that the petitioner has failed to meet his burden of demonstrating that his previous habeas counsel's performance fell outside of the wide range of reasonable professional assistance, and, in particular, has failed to demonstrate that but for habeas counsel's performance there is a reasonable probability that the habeas court would have found in favor of the petitioner and granted a new trial. Accordingly, the habeas court properly denied the amended petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DARNELL MOORE (AC 38624)

Beach, Keller and Norcott, Js.

Syllabus

The defendant, who had been convicted of murder, appealed, claiming that the trial court improperly denied his motions to suppress certain identification evidence and to strike the venire panel from which the jury was selected. The defendant shot the victim after an argument, and three bystanders who witnessed the shooting identified him as the shooter from photographic arrays that were shown to them by the police. The defendant, an African-American, alleged that his sixth amendment and equal protection rights were violated because the venire pool for his trial did not reflect a fair cross section of potential jurors in the New London judicial district as a result of the absence of African-American men from the venire pool. During jury selection, the court conducted a hearing on the defendant's motion to strike the venire panel. The defendant did not claim that there was a systemic effort to exclude African-Americans from the venire pool but, rather, that there apparently was a disparate impact in the manner in which juries were selected in New London County. During the hearing, he relied on census data and the confidential questionnaires that the prospective jurors had filled out prior to the start of voir dire. The questionnaires stated that prospective

jurors had the option of providing information as to their race, but that they need not do so if they found it objectionable. The defendant also presented testimony from six witnesses about how venire pools were selected throughout the state. None of the witnesses testified that they or the state entities where they were employed compiled or maintained data as to the racial or ethnic composition of venire panels in New London Country or throughout the state. The defendant thus claimed that the Judicial Branch had seemingly demonstrated wilful blindness in regard to the statutory (§ 51-232 [c]) requirement that it assure that venire panels are nondiscriminatory. He also asserted that the state's failure to take action with regard to jurors who do not report for duty led to underrepresentation of certain groups. The court ruled, inter alia, that the defendant had presented no evidence that African-Americans were underrepresented on the venire panels in this case, or that the state was required to maintain information about how jurors identified themselves racially. The court also ruled that the defendant did not prove that the state's failure to take action against delinquent jurors led to underrepresentation of distinctive groups because there was no evidence of the racial makeup of delinquent jurors. Finally, the court denied the defendant's equal protection claim because he produced no evidence of discriminatory intent by the state to exclude African-Americans from the jury selection system. Thereafter, in denying the defendant's motion to suppress the witness identifications of him, the court determined that there was no evidence that the three witnesses had contact or had attempted to have contact with each other concerning their identifications of him, or that the police had attempted to influence the witnesses. The defendant had claimed, inter alia, that the identification procedures that the police used were impermissibly suggestive because his photograph appeared in the same position in each of the arrays that were shown to the witnesses, and that law enforcement made no effort to ensure that the witnesses did not have contact or attempt to have contact with each other concerning their identifications of him. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motion to strike the venire panel in violation of his constitutional rights, or that this court should exercise its supervisory authority over the administration of justice to require the state to collect demographic data in accord with the directive of § 51-232 (c) to prevent discrimination in jury selection:

   a. The court did not violate the defendant's sixth amendment right that the venire pool reflect a fair cross section of the community, as he did not present evidence that the representation of African-American males in venires from which juries were selected was not fair and reasonable in relation to the number of such persons eligible to serve as jurors in the community, he did not provide evidence of the racial and ethnic characteristics of all the prospective jurors in this case, he did not

provide evidence as to the racial and ethnic composition of the entire New London jury pool, and the census data on which he relied was not probative as to the percentage of African-American males who were eligible for jury service.

b. The court correctly rejected the defendant's equal protection claim, as he failed to present evidence of discriminatory intent, he stated that he lacked any basis on which to suggest that a systemic effort existed to exclude potential jurors from jury arrays, and he did not demonstrate that substantial underrepresentation of African-American males had occurred over a significant period of time; moreover, the evidence reflected that Judicial Branch officials were unaware of the racial and ethnic characteristics of persons summoned for jury duty, and that such information provided in the confidential juror questionnaires was not retained or recorded.

c. This court declined to exercise its supervisory authority over the administration of justice to require the collection of certain demographic data so as to permit analysis of the diversity of jury panels in the state, as the defendant's claims about the composition of the jury panels at issue were unproven, and § 51-232 (c) does not require that prospective jurors provide information as to their race and ethnicity.

2. This court found unavailing the defendant's claim that the trial court improperly denied his motion to suppress certain identifications of him because the police allegedly used impermissibly suggestive procedures in their presentation of photographic arrays to the three witnesses to the shooting: the testimony of one of the witnesses did not support the inference that her identification of the defendant's photograph was influenced by conversations she had with the other two witnesses after they had identified him from the photographic arrays, and, although the defendant claimed that the photographic arrays shown to each witness were impermissibly suggestive because the same array with his photograph in the same position was shown to each witness, he did not claim that the arrays themselves were inherently suggestive; moreover, there was no evidence that the witnesses had contacted or attempted to contact each other concerning their identifications of the defendant, that the police attempted to influence the witnesses, or that the identification made by any witness had been influenced by another witness.

Argued September 20—officially released November 29, 2016

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London, where the court, *Jongbloed, J.*, denied the defendant's motions to strike

the jury panel and to suppress certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Allison M. Near, for the appellant (defendant).

David J. Smith, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Darnell Moore, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a. The defendant claims that the trial court improperly (1) denied his motion to strike the jury panel and (2) denied his motion to suppress evidence. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found that during the evening of August 26, 2010, in the vicinity of Lake Street in Norwich, the defendant and the victim, Namdi Smart,[1] became embroiled in an argument over liquor. The defendant, known as "Boo" or "Boo-Boo," was accompanied during this initial altercation by his friend, Tjamel Hendrickson, known as "Soda Pop." During the course of the loud, verbal dispute, the victim ripped the defendant's T-shirt. As the defendant walked away from the scene, he was observed pointing to the victim, and was overheard uttering an expletive and stating that he would return to "get" the victim.

Shortly thereafter, Hendrickson called Samuel Gomez on the telephone. He requested that Gomez come to Norwich with a firearm. Gomez drove to

[1] There was evidence that the victim also was known as "Big Man."

Spaulding Street in Norwich, where he met with Hendrickson and the defendant. Gomez handed a .45 caliber handgun to the defendant. Gomez drove the defendant and another man, Jordan Brown, to the vicinity of Lake Street so that the defendant could search for the victim. After the defendant identified the victim, the three men returned to Spaulding Street for a period of time. Thereafter, Gomez drove the defendant and Brown to yet another location, where Gomez parked his automobile. The defendant exited the automobile and, within a few minutes, he shot the victim on Lake Street, causing his death. The shooting was witnessed by three bystanders who lived near the scene of the shooting: Kimberly Harris, Roslyn Hill, and Laryssa Reeves. The defendant, who was dressed in a black hooded sweatshirt, a black hat, a black mask, and jeans, returned to the automobile still in possession of the gun that Gomez had delivered to him. The defendant gave possession of the gun to Brown, who later exited the automobile with it. Gomez drove the defendant to his mother's residence before returning to New London.

Subsequent to these events, the police arrested the defendant on a murder charge. Following a trial before a jury, the defendant was found guilty, and the court sentenced him to serve a fifty-three year term of incarceration. This appeal followed. Additional facts related to the claims raised in this appeal will be set forth as necessary.

I

The defendant's first claim is that the trial court improperly denied his motion to strike the voir dire panel. He argues (1) that the trial court improperly rejected his argument that the voir dire panel did not reflect a fair cross section of the judicial district from which it was drawn, in violation of the sixth amendment to the United States constitution; (2) that the trial court

improperly rejected his argument that the jury selection procedure violated his right to equal protection guaranteed by the United States constitution; and (3) that this court should exercise its supervisory authority "to mandate that the jury administrator collect demographic data so that it is able to follow the statutory directive to prevent [discrimination] in jury selection." (Internal quotation marks omitted.) We disagree.

The following additional facts are relevant to this claim. Jury selection in the defendant's case commenced on November 14, 2012. At that time, defense counsel noted for the record that the defendant was an African-American and that, of the twenty venirepersons brought to the courtroom that day, there were no African-Americans. Defense counsel stated: "I have no basis to claim that there was any systemic effort to exclude people of color I noted. So, it's available for other purposes and on the record."

As jury selection progressed, on November 16, 2012, defense counsel stated for the record that, of sixty-eight venirepersons in the case to that point, "we've not had one African-American male and, to my knowledge, there's been one woman of color, who we did select as juror number five . . . ." Defense counsel stated, in relevant part: "I don't think there's a systemic effort on the part of the state to suppress African-American jury participation, but there certainly is an inadequate effort made to assure it." After observing that the defendant was entitled to a jury composed of his peers, defense counsel stated that he was "now on the cusp of raising this as an issue."

On November 27, 2012, defense counsel made further observations with respect to the nature of the venirepersons. He stated that out of four venire panels in the case to that point in time, consisting of ninety-nine venirepersons, there were only two "people of color,

both women. We've not had one black male." Defense counsel stated his belief that 14 percent of the population in Connecticut was African-American and that "the venire that we're getting day by day is not representative of a fair cross section of the community." Stating his belief that the racial composition of the venire panels was possibly accidental, but not intentional, defense counsel stated that "there is a disparate impact in the manner in which juries are being selected, apparently, at this time in this county because I'm not seeing any of my client's peers." Responding to the observations made by defense counsel, the prosecutor stated that, although the venirepersons generally did not appear to be racial peers of the defendant, he did not have enough information about such venirepersons to address the issue of their race. The court stated that it would address the issue if requested to do so by the defense.

On November 28, 2012, the defense filed a written objection to the composition of the venire panels and a request for an evidentiary hearing "whereby the jury administrator [in New London County] may testify as to how the jury venires are [assembled] to determine whether the defendant's sixth and fourteenth amendment rights to a fair and impartial jury are being infringed." The defendant argued that, of approximately 100 venirepersons, there were two African-American women and, to his belief, one male "who appeared to have African-American features," but referred to himself in his jury questionnaire as both Hispanic and Latin American. In his memorandum of law, defense counsel argued that more information was necessary before the defense could set forth a prima facie case that the defendant's rights under the sixth amendment had been violated because the venire panels were not representative of a fair cross section of the community. Specifically, the defendant argued that "it needs to be determined how many potential jurors are in both the

state and in the county, and how those potential jurors are then organized into venires. Without this information, we cannot determine whether there is systemic exclusion that accounts for the underrepresentation of African-Americans in the defendant's jury venire in violation of his sixth and fourteenth amendment rights." Defense counsel and the prosecutor requested that the court mark the completed, confidential jury questionnaires in the present case as court exhibits, and the court did so. Attached as exhibits to the defendant's memorandum of law were demographic statistics compiled by the United States Census Bureau. The defendant cited to these exhibits to demonstrate that, in 2011, Connecticut's population was 11.1 percent African-American and that New London's population was 6.5 percent African-American. At the subsequent hearing on the defendant's motion, these exhibits were admitted into evidence absent objection. At the conclusion of the court proceeding on November 28, 2014, defense counsel observed that, once again, the venire panel brought to the courtroom that day did not include any African-American men.

On December 4, 2012, the court held an evidentiary hearing on the defendant's motion. At that time, defense counsel orally amended his motion to request that the court strike the venire panel. In addition to the confidential jury questionnaires that had been marked as a court exhibit, as well as the census data, the defense presented testimony from six witnesses: Sam Hannan, Esther Harris, Monica Endres, Robert Brothers, Louis Bucari, and Lynn Blackwell.

Hannan, the information technology manager for jury administration, testified with respect to the manner by which he compiles a master list of jurors for the Judicial Branch. He testified that, in compliance with state law,[2]

[2] See General Statutes § 51-222a.

he generates this master list by compiling information from "source list[s]" obtained from four sources: the Department of Revenue Services, the Department of Motor Vehicles, the Department of Labor, and the registrars of voters of each town. Hannan testified that nothing in the information at his disposal provides him with any information with respect to race or ethnicity. Moreover, he testified that he is unaware of any discussions within the jury administrator's office as to whether the master list is likely to produce an adequate and statistically representative cross section of the community as potential jurors. Hannan went on to testify that persons who fail to report for jury duty in compliance with their summonses to do so are automatically referred to the attorney general's office, but he was unable to provide any information with respect to the racial or ethnic characteristics of such persons. Hannan testified that, to his knowledge, there have never been any efforts by his office to systematically exclude members of a certain race from the jury pool.

Harris, the jury administrator for the Judicial Branch, testified that her duties included summoning jurors, selecting jurors, and utilizing jurors for the superior courts in the state. She stated that she does not collect statistics with respect to the racial characteristics of jurors because she is not required to collect such information. Harris acknowledged that the confidential jury questionnaire that is provided to jurors affords prospective jurors the option of providing information concerning their race, but that the form expressly states that jurors need not furnish such information if they find it objectionable to do so.[3] When asked if she was "aware

[3] The language on the questionnaire states: "Pursuant to [General Statutes § 51-232 (c)] information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection. The furnishing of this information is not a prerequisite to being qualified for jury service. This information need not be furnished if you find it objectionable to do so."

of any tool, any procedure, any policy in the Judicial Branch that assures that the list of potential jurors generated from each town reflects the racial composition of that town,'' Harris responded that she was not aware of any. Harris testified that, to her knowledge, neither she nor anyone in her office had systematically excluded persons from the jury selection process on the basis of their race.

Endres, the jury clerk for New London, testified that she collects questionnaires from those jurors who report for jury duty, but that she does not require them to provide information concerning their race and that she does not record such data. She testified that she has no way of knowing the race of persons who are summoned for jury duty. Endres testified that she does not systematically exclude anyone from being a potential juror on the basis of their race.

Brothers, the executive director of the Commission on Human Rights and Opportunities, testified that his office did not maintain any racial statistics with respect to persons who file income tax returns, persons who register motor vehicles, persons who file for unemployment compensation, or persons who register to vote. Bucari, the first assistant commissioner and general counsel for the Department of Revenue Services, testified that his office did not maintain any information with respect to the racial characteristics of persons who file income tax returns. Lynn Blackwell, an employee of the Department of Motor Vehicles, testified that the department did not collect any data with respect to racial characteristics.

The parties stipulated that the secretary of the state did not possess any data with respect to the racial characteristics of registered voters and that there was no way for the secretary of the state to determine the racial composition of the lists provided to the jury

administrator. Moreover, the parties stipulated that although the attorney general has the authority to bring enforcement actions against nonappearing jurors, the attorney general had not pursued a case of juror delinquency for at least three years. Finally, the parties stipulated that the Department of Labor did not maintain data with respect to the racial or gender characteristics of recipients of unemployment compensation.

At the conclusion of the hearing, defense counsel argued that, of approximately 120 prospective jurors in the present case, it appeared that there were three African-American women and no African-American men. Defense counsel stated that the defense did not intend to argue that there was "any systemic effort to exclude people of color" from the venire pool. Nonetheless, defense counsel argued, he believed that the defendant had a viable cross-section claim under the sixth amendment as well as an equal protection claim because of the lack of diversity in the venire pool and, particularly, the absence of any African-American men in the venire pool. Defense counsel, relying on the census data, argued that African-Americans generally were vastly underrepresented in the venire pool in light of state and New London County demographics, and stated that "the question is [whether] this is an isolated snapshot, does it reflect some larger systemic issue. I can't know that and there is no way, based on the evidence that is available to [the defendant], that he can know that, and the reason he can't know that is the state refuses to keep that data." Also, defense counsel argued that the Judicial Branch, bound by statute "to assure a nondiscriminatory [venire] panel," had seemingly demonstrated its "wilful blindness" with respect to the issue by not compiling or maintaining data with respect to the racial composition of venire panels. He went on to argue that there seemingly had been a lack

of any commitment to ensure "any people of color in this panel . . . ."

The prosecutor objected to the defendant's motion on the ground that, in light of the lack of racial and ethnic information for many of the venirepersons at issue, the defendant had failed to demonstrate that the state had substantially underrepresented a particular group of prospective jurors. Moreover, the prosecutor argued, the defendant had not demonstrated any wilful or systematic discrimination by way of the race-blind procedures employed in the present case.

By way of a thorough and well reasoned memorandum of decision, the court denied the defendant's motion to strike the venire panel. The court discussed in detail the evidence presented by the defendant at the hearing on the motion. Among its findings, the court stated: "A total of 117 potential jurors appeared in Norwich throughout the jury selection process . . . . On a number of occasions during jury selection, counsel for the defendant observed that there were no males who appeared to be African-American on the Norwich jury panels. Counsel observed that there were a total of three females who appeared to be African-American (one of whom was selected to serve on the jury) and one male who indicated on his questionnaire that he was Hispanic/Latino."

The court also found: "No jurors are systematically excluded on the basis of race. None of the witnesses who testified had any way of knowing the racial makeup of the jurors summoned for jury duty in this or any other case other than [from] the information provided voluntarily on the confidential juror questionnaire, which is available for use during voir dire of the particular individual and not retained or recorded."

In addressing the defendant's sixth amendment fair cross section claim, the court observed that, under

Duren v. *Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), the defendant bore the burden of proving that "(1) the group claimed to be excluded is distinctive in the community, (2) the representation of the group in the jury pool is not fair and reasonable in relation to the number of members of the group in the community, and (3) the underrepresentation is the result of systematic exclusion of the group in the jury selection process." (Internal quotation marks omitted.)

The court, assuming for purposes of its analysis that African-American males were distinctive in the community, stated that "the defendant has presented no evidence of any statistical analysis to support his claim and no evidence from which the court could conclude any degree of underrepresentation. He points to census data showing that black people represent 6.5 percent of the population of New London County and 11.1 percent of the state of Connecticut. . . . He observed that three jurors in the pool were females who appeared to be African-American or who represented themselves as such on the questionnaire. He concedes that he offered no other data as to the racial makeup of the panel or the percentage of the group in the pool, claiming the information was simply not available. The witnesses testified credibly that no information was maintained as to the racial or ethnic makeup of jurors reporting for jury duty in this judicial district. Although there is a section on the confidential jury questionnaire where jurors may enter that information voluntarily, they are not required to do so. The defendant argues that the action of the state in failing to record or require such information effectively precludes him from satisfying his burden. The defendant, however, provides no authority in support of his contention that the state is required to maintain information on how jurors identify themselves racially, and the court declines to find such a requirement. The defendant has therefore failed in

his proof, having offered insufficient evidence of the racial makeup of the jury pool or any statistical support for the claim that the group is underrepresented in the pool.

"Even if, however, the court were to find that the group was underrepresented or that the actions of the state in failing to maintain records concerning the racial composition of jury pools precluded the defendant from meeting his burden in this regard, his claim nevertheless fails because he specifically concedes that he has not shown systematic exclusion of any group in the jury selection process. Inasmuch as the defendant has failed to establish this third prong of the proof required . . . his challenge to the array on this ground fails.

"The defendant's claim that failure to take action with regard to delinquent jurors leads to underrepresentation of a distinctive group also fails since there is no evidence before the court as to the racial makeup of delinquent jurors or any evidence that the representation of jurors from a distinctive group would be affected by enforcement action." (Citation omitted.)

In addressing the equal protection aspect of the defendant's claim, the court observed that, under *Castaneda* v. *Partida*, 430 U.S. 482, 494, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977), the defendant could establish his claim by proof of "(1) underrepresentation of a recognizable group; (2) substantial underrepresentation over a significant period of time; and (3) a selection procedure susceptible to abuse or not racially neutral." (Internal quotation marks omitted.)

In rejecting the defendant's claim, the court stated: "This claim fails . . . because the third prong . . . requires proof of discriminatory intent. . . . The defendant has conceded that he has not shown discriminatory

intent. Here . . . the defendant has produced no evidence that Connecticut's jury selection system is capable of deliberately and systematically denying African-American males the opportunity to be selected for jury service by excluding them from jury arrays. . . . Thus, the failure to show discriminatory intent requires denial of the defendant's equal protection claim." (Citations omitted; internal quotation marks omitted.)

A

We first address the defendant's fair cross section claim. "Fair cross section claims are governed by a well established set of constitutional principles. In order to establish a violation of his federal constitutional right to a jury drawn from a fair cross section of the community, the defendant must demonstrate the following: (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of his group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. . . . [I]n a fair cross section claim, the defendant need not prove intent. [S]ystematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement." (Citations omitted; internal quotation marks omitted.) *State* v. *Gibbs*, 254 Conn. 578, 588, 758 A.2d 327 (2000).

"[W]e review the [trial] court's factual determinations relevant to the defendant's Sixth Amendment . . . challenge for clear error . . . but we review de novo the court's legal determination whether a prima facie violation of the fair cross section requirement has occurred." (Internal quotation marks omitted.) Id., 592.

The defendant has not undermined our confidence in the factual determinations reached by the trial court or in the correctness of its legal analysis of the claim. The defendant failed to present evidence to demonstrate that the representation of African-American males in venires from which juries are selected was not fair and reasonable in relation to the number of such persons eligible to serve as jurors in the community. It suffices to observe that defense counsel provided the court with his best guess with respect to the race and ethnicity of all of the prospective jurors at issue in the present case, but did not provide the court with competent evidence of the racial and ethnic characteristics of all of the prospective jurors.[4] Additionally, to the extent that the defendant argues that there is substantial underrepresentation in the entire New London jury pool, he did not even purport to provide the court with any evidence with respect to the racial and ethnic composition of that jury pool generally. Furthermore, the only evidence that arguably was relevant to demonstrating the proportion of African-American males who should have been part of venires that represented a fair cross section of the community, was the general census data on which the defense relied. Yet this census data provided information with respect to the percentage of *all* African-Americans in Connecticut and New London County. Thus, it was not probative with respect to the inquiry at issue, which necessarily focuses on the percentage of African-American males that are eligible for jury service. In light of the dearth of evidence with respect to the relevant factors at issue in the present claim, we conclude that the defendant has not demonstrated that the court erroneously rejected his fair cross-section claim.

[4] We observe that a great number of the confidential juror questionnaires that were marked as court exhibits do not reflect any information with respect to the race and ethnicity of the prospective jurors, and that the record does not otherwise furnish a basis upon which to ascertain the race and ethnicity of every prospective juror.

B

Next, we address the defendant's equal protection claim. "An equal protection violation in jury selection procedures may be established by proof of (1) underrepresentation of a recognizable group; (2) substantial underrepresentation over a significant period of time; and (3) a selection procedure susceptible to abuse or not racially neutral." (Internal quotation marks omitted.) Id., 594. "Although the equal protection test is similar to the cross section test, the critical difference is that in an equal protection claim the defendant must prove *discriminatory purpose*." (Emphasis added.) *State* v. *Castonguay*, 194 Conn. 416, 421, 481 A.2d 56 (1984).

As discussed in part I A of this opinion, the defendant failed to demonstrate that substantial underrepresentation of African-American males had occurred. Thus, it follows that he also failed to demonstrate that any underrepresentation had occurred over a significant period of time. Moreover, the court found, and we agree, that the defendant failed to present any evidence to demonstrate that the jury selection system was capable of abuse in the manner suggested. The undisputed evidence presented by the defendant reflected that Judicial Branch officials were unaware of the racial and ethnic characteristics of persons summoned for jury duty and that, to the extent that prospective jurors voluntarily provided information related to their race or ethnicity on their confidential juror questionnaire, such information was not retained or recorded. Finally, the defendant failed to present any evidence that discriminatory intent exists. In the course of argument defense counsel stated to the trial court that the defense lacked any basis upon which to suggest that there was a systemic effort to exclude any potential jurors from jury arrays. In light of the defendant's failure of proof, the court correctly rejected his equal protection claim.

C

Last, the defendant urges this court, in the exercise of its supervisory authority over the administration of justice, "to enforce the collection of demographic data to permit analysis of the diversity of jury panels in Connecticut."

"Supervisory authority is an extraordinary remedy that should be used sparingly . . . . Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle. . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are 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. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . Overall, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, we are more likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice . . . ." (Internal quotation marks omitted.) *State* v. *Fuller*, 158 Conn. App. 378, 392, 119 A.3d 589 (2015).

The defendant asserts that the requested remedy is necessary to ensure that the Judicial Branch is able to

follow its statutory mandate "to enforce nondiscrimination in jury selection . . . ." General Statutes § 51-232 (c).[5] The defendant argues that "[t]he need to acknowledge the defendant's right to a jury reflecting a fair cross section of the community, and to encourage the public trust in the jury process requires that action be taken to address the lack of diversity in jury panels such as the one here."

We decline to grant the defendant the extraordinary remedy that he seeks. As a preliminary matter, the defendant's request is supported by an unproven premise, namely, that the jury panels at issue in the present case reflected significant underrepresentation of a recognized group or were not representative of a fair cross section of the community. Moreover, it is difficult to discern how the relief sought by the defendant—the collection of information related to the race and ethnicity of *all* prospective jurors—would comport with the plain language of § 51-232 (c), which expressly states that prospective jurors need not provide such information.[6]

[5] General Statutes § 51-232 (c) provides: "The Jury Administrator shall send to a prospective juror a jury confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely *to enforce nondiscrimination in jury selection*, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record." (Emphasis added.)

[6] The defendant does not expressly argue that this court should direct the jury administrator to collect such information for *all* prospective jurors.

II

Next, the defendant claims that the court improperly denied his motion to suppress evidence relating to identifications of him that were made to the police by several witnesses. The defendant argued that the identifications were the result of the use of impermissibly suggestive photographic array procedures. We disagree.

The following facts are relevant to the present claim. Defense counsel raised the suppression motion orally, prior to trial. The court held a hearing related to the motion on November 30 and December 6, 2012. At the hearing, the court heard testimony from Sergeant Patrick Mickens, Sergeant Corey Poore, Detective James Curtis, and Officer Greg McDonald, all of the Norwich Police Department. In its thorough memorandum of decision related to the motion to suppress, the court explicitly stated that it had credited as true the testimony of these witnesses. The court made the following findings of fact: "Mickens responded to the scene of a shooting on Lake Street in Norwich in the late evening of August 26, 2010, having been notified by [Harris] . . . whom he knew as a confidential informant [and] with whom he had worked for at least a year. She was upset and crying, and stated that she had just seen someone shot in front of her. Sergeant Mickens took [Harris] in his unmarked car directly to the Norwich Police Department. She was placed in an interview room, [and] provided with something to drink and tissues. After she had composed herself, she was interviewed. She did not speak to anyone on the way to the police department. Mickens showed her two [photographic] arrays together with written witness

Yet, if this court were to direct the jury administrator to collect such information from only those jurors who voluntarily provide it, the resulting data, reflecting information concerning some but not all prospective jurors, would not provide an accurate basis on which to assess the racial and ethnic characteristics of prospective jurors as a whole.

instructions in the early morning hours of August 27, 2010. On one (Defendant's Exhibit A), she identified an individual she knew to be 'Boo' in photograph number 2. On the other (Defendant's Exhibit B), she identified an individual she knew to be 'Soda Pop' in photograph number 7. Harris signed and initialed both [photographic] arrays. . . .

"McDonald . . . testified that he was assigned to investigate the shooting on Lake Street on August 26, 2010. He stated that he maintained a database of street names and was assigned to meet with two witnesses who wished to meet at a location other than the Norwich Police Department. On August 27, 2010, McDonald met with two witnesses, Denise Djedje and [Hill], in a secluded area near a church parking lot. He separated the witnesses, that is, while he spoke with Djedje, Hill was standing farther away drinking coffee and having a cigarette. He had no concerns that his conversations with one were overheard by the other. He showed Djedje two [photographic] arrays together with the written witness instructions for [photographic] identification (Defendant's Exhibit D). In one, she identified the person in photograph number 2 as 'Boo,' and stated [that] she was '100 percent positive he did the shooting.' In the other, she identified the person in photograph number 7 as 'Soda Pop.' Djedje signed and initialed both arrays. Similarly, Hill was shown two [photographic] arrays with instructions (Defendant's Exhibit E). In one, she identified the person in photograph number 2 as 'Boo,' stating, '[t]hat's Boo. One hundred percent positive.' In the other, she identified the person in photograph number 7 as 'Soda Pop.' Hill signed and initialed both [photographic] arrays.

"Norwich Police Sergeant Corey Poore testified that he was assigned to the investigation into the shooting death on Lake Street in Norwich on August 27, 2010. As part of his assignment, he showed a [photographic]

array with written witness instructions to [Reeves] on August 31, 2010. He testified that Reeves came to the police department voluntarily to provide information. She identified the person in photograph number 2 as " 'Boo' and the person who I saw shoot 'Big Man.' " (Defendant's Exhibit F.) She signed and initialed the [photographic] array. Sergeant Poore testified that [Reeves] was fearful and she was placed into hiding.[7] Poore also showed a [photographic] array with written witness instructions to Tjamel Hendrickson. (Defendant's Exhibit G.) This array differed from the array reflected in defendant's exhibits A, D, E, F and I. On that [photographic] array, Hendrickson identified the person in photograph number 2 as 'S.A.' and stated under witness comments regarding identification: 'S.A. is the same person I saw walk down the street toward Lake Street just before the murder. S.A. came back a short time later by himself.' (Defendant's Exhibit G.) Hendrickson signed and initialed the array. . . .

"Norwich Police Detective James Curtis testified that he was assigned to the investigation into the shooting on August 26, 2010, and arrived at the crime scene shortly before midnight. In the early morning hours of August 27, 2010, he showed [photographic] arrays to two individuals at the Norwich Police Department, namely, Ms. Hutchinson and [Hendrickson], also known as 'Soda Pop.' These two arrived at the police department independently. Detective Curtis first interviewed Ms. Hutchinson, who then left.[8] Approximately ninety minutes later, Hendrickson was brought into the police

[7] At the suppression hearing, Poore testified that Reeves was "placed into hiding" for an indeterminate period of time because she feared for her physical safety. Poore did not explain in detail what "placed into hiding" entailed, except to state that "it wasn't anything that was provided by the city or the state. It was more just kind of a safe haven for [Reeves]."

[8] The court further stated in its memorandum of decision: "The state represented that it did not intend to offer evidence concerning Ms. Hutchinson's identification."

department by Officer Delmar Carter and Mickens. Hendrickson was shown a [photographic] array and pointed to the individual in photograph number 2. He answered affirmatively that the person in photograph number 2 was the person known to him as 'Boo-Boo.' (Defendant's Exhibit I.) He signed and initialed the array. . . .

"Each of the five individuals who made the identifications reflected in defendant's exhibits A, D, E, F and I, also placed their initials next to each line of the written witness instructions for [photographic] identifications. The instructions specifically stated that '[t]he person you saw *may or may not* be in these photographs.' Defendant's Exhibits A, D, E, F and I all reflect the same [photographic] array in which the defendant is depicted at position number 2." (Emphasis in original; footnotes altered.)

The court aptly summarized the argument advanced by the defendant in support of his motion to suppress the identification evidence, in which he essentially asserted that anything other than a "random presentation" in each of the photograph arrays rendered the identifications unreliable, as follows: "The defendant makes the sole claim that the identification procedures followed here were impermissibly suggestive because in each array shown to the witnesses in which he was identified, the defendant's photograph appeared in the same position, that is, position number 2. He argues that there was no effort on the part of law enforcement to ensure that the witnesses had no contact with each other and that the procedures followed created a risk that people will repeat what they have heard from others."

After setting forth relevant legal principles governing the claim, the court stated its reasoning as follows: "The court finds that there was no evidence that the [photograph] arrays or the procedure employed in

obtaining the identifications were unnecessarily suggestive. The actions of the law enforcement officers in obtaining the identifications were appropriate in all respects. The defendant's photograph was not prominently displayed or highlighted, and proper instructions were given to the witnesses, who were each interviewed individually. Specifically, each of the witnesses was advised of the procedure in writing, and placed their initials next to each of the instructions, including the instruction that the person they saw 'may or may not' be in the photographs. . . . There was no evidence that officers were anything other than neutral in administering the identification procedure, and the defendant makes no claim that the officers attempted to influence the witnesses in making their identifications. The officers in fact made efforts to separate the witnesses, and no identifications were made or even attempted in the presence of or within earshot of other witnesses. There was no evidence that the witnesses had contact with each other, or attempted to have contact with each other, concerning the identification. Indeed, the only claim made here is that the witnesses were shown arrays in which the defendant appeared in the same position, position number 2. There is no requirement under the circumstances presented here that the officers reconfigure [photograph] arrays shown to different witnesses." (Citation omitted.) Having concluded that there was no evidence that the identifications resulted from an unnecessarily suggestive procedure, the court denied the motion to suppress.

"[T]he standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] 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. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). In contrast, "[when] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the court's memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Mitchell*, 296 Conn. 449, 458, 996 A.2d 251 (2010).

"Due process requires that [eyewitness] identifications [may be admitted at trial] only if they are reliable and are not the product of unnecessarily suggestive police procedures. . . . Because reliability is the linchpin in determining the admissibility of identification testimony . . . a two part test has developed to make that determination. . . . In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances. . . .

"Therefore, [t]he critical question . . . is what makes a particular identification procedure suggestive enough to require the court to proceed to the second prong and to consider the overall reliability of the identification. . . . [T]he entire procedure, viewed in light of the factual circumstances of the individual case . . . must be examined to determine if a particular identification is tainted by unnecessary suggestiveness. The individual components of a procedure cannot be examined

piecemeal but must be placed in their broader context to ascertain whether the procedure is so suggestive that it requires the court to consider the reliability of the identification itself in order to determine whether it ultimately should be suppressed. . . . In making this determination, the court should focus on two factors. The first factor concerns the composition of the photographic array itself. In this regard, courts have analyzed whether the photographs used were selected or displayed in such a manner as to emphasize or highlight the individual whom the police believe is the suspect. . . . The second factor, which is related to the first but conceptually broader, requires the court to examine the actions of law enforcement personnel to determine whether the witness' attention was directed to a suspect because of police conduct. . . . In considering this [factor, the court should] look to the effects of the circumstances of the pretrial identification, not whether law enforcement officers intended to prejudice the defendant. . . . It stands to reason that police officers administering a photographic identification procedure have the potential to taint the process by drawing the witness' attention to a particular suspect. This could occur either through the construction of the array itself or through physical or verbal cues provided by an officer. . . . The failure of a police officer to provide an affirmative warning to witnesses that the perpetrator may or may not be among the choices in the identification procedure is one circumstance that may increase the likelihood of a mistaken identification. . . .

"[A] challenge to a trial court's conclusion regarding whether the pretrial identification procedure was unnecessarily suggestive presents a mixed question of law and fact. . . . [B]ecause [however] the issue of the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts

found are adequately supported by the evidence and whether the court's ultimate inference of reliability was reasonable. . . . [W]e will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Outing*, 298 Conn. 34, 47–50, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011).

Before this court, the defendant reiterates the claim that he raised before the trial court. His claim is based on the undisputed evidence that the same array, with his photograph in position number two, was shown to each of the witnesses at issue. In challenging the trial court's resolution of his motion to suppress, however, the defendant sets forth a discrete argument; he argues that the trial testimony of Reeves undermined the court's finding that the witnesses did not have contact with each other concerning their identification of the defendant by means of the photograph arrays.

As set forth previously, among the findings made by the court in support of its conclusion that the identifications were not the result of an identification procedure that, as the defendant claims, was unnecessarily suggestive because of the fact that the identical photograph array was shown to several witnesses who may have had contact with one another concerning the composition of the array, was that "[t]here was no evidence that the witnesses had contact with each other, or attempted to have contact with each other, concerning the identification." In accordance with the standard of review set forth previously in this opinion, we must scrupulously examine the entire record, including the trial testimony on which the defendant relies, to determine whether the court's finding is supported by substantial evidence.

The defendant does not challenge the court's detailed findings of fact related to the testimony of Mickens, McDonald, Poore, and Curtis with respect to the manner in which they administered the photograph arrays at issue. As set forth previously in this opinion, the court found that on August 27, 2010, the day following the shooting, McDonald met with Djedje and Hill in a church parking lot, where he showed photograph arrays to each witness separately, and neither was able to hear or observe how the other's identification procedure was being conducted. Each witness identified the defendant in position number two. The court found that, on August 31, 2010, Poore met with Reeves at the police department, where he showed her a photograph array. Reeves identified the defendant in position number two. There was no claim raised by the defendant that the photograph arrays themselves were inherently suggestive. Having reviewed the evidence presented at the suppression hearing, we agree with the court that there was no evidence that the police had attempted to influence the witnesses or that the police administered the arrays in such a manner that the identification of one witness could have influenced the identification of another witness. There was no evidence presented at the suppression hearing that the identification made by any witness had been influenced by another witness.

The defendant draws our attention to the trial testimony of Reeves and, because of our obligation to scrupulously examine the entire record to determine whether the trial court's findings are supported by substantial evidence, we will examine that testimony. By way of establishing her familiarity with the defendant, Reeves testified that, prior to the time of the shooting, she had been in the defendant's presence and that she had made "[s]mall talk" with him. She testified that she observed the defendant and the victim engaged in an

argument and, later that evening, she observed the defendant shoot the victim.

During cross-examination, Reeves testified that in the five days between the shooting and the time that she provided information to the police, she discussed the shooting incident with Hill and Djedje, with whom she was residing. The following colloquy between defense counsel and Reeves occurred:

"Q. . . . But you did get a chance in the five days that passed between the shooting to talk about this case with [Hill] and [Djedje], correct?

"A. Yes.

"Q. How often did you talk about it with them?

"A. I only said what I saw.

"Q. I didn't ask you that. How often did you talk with them about it?

"A. I only probably said it about once.

"Q. About once?

"A. Yes."

After defense counsel established that, following the shooting, Reeves had resided with Hill and Djedje, the following exchange occurred:

"Q. And this was a shocking event, correct?

"A. Yes.

"Q. An event that you certainly talked about more than once as you tried to process the horror of seeing a man die before your very eyes; isn't that right?

"A. I really did not mention it too much because of how scared I was.

"Q. Hmm?

"A. I did not come up with it too many times because of how scared I was. I used to keep a lot of things in.

"Q. Okay. Okay. Did they talk about it while you listened?

"A. Not too much, but they did with them alone. But I never added into the conversation.

"Q. So, you never heard anything?

"A. I heard things, but I just never really studied it to the point where I wanted to listen to it."

Although the defendant characterizes Reeves' testimony as evidence that her pretrial identification of the defendant was influenced by conversations that she had with Hill and Djedje, following their pretrial identifications of the defendant, a careful review of Reeves' testimony does not reasonably support such an inference. At no point did Reeves testify that Hill, Djedje, or anyone else had discussed their identifications of the defendant with her or with anyone else. There simply is no basis on which to presume that anyone discussed the photograph arrays that had been shown to Hill, Djedje or any other witness, or that any prior identification had influenced that made by Reeves. Not surprisingly, Reeves testified that the shooting itself had been a topic of conversation, at least in one instance, between herself, Hill, and Djedje. We reject the defendant's interpretation of this testimony as evidence that Reeves was exposed to any information with respect to the photograph arrays shown to other witnesses. Accordingly, the defendant is unable to demonstrate that the court's findings were not supported by substantial evidence or that the denial of his motion to suppress was erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LEVARR FRASIER (AC 38625)

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

Syllabus

Convicted of the crimes of manslaughter in the first degree with a firearm as a principal or an accessory as a lesser included offense to the charge of murder, assault in the first degree, and carrying a pistol or revolver without a permit, the defendant appealed. After the defendant's friend, J, engaged in a verbal altercation with two occupants of a vehicle, the defendant and J approached the vehicle and the defendant, at J's direction, pulled out a firearm and shot the occupants as they fled, killing one and wounding the other. On appeal, the defendant claimed that the trial court improperly instructed the jury on accessory liability, and that he was denied his right to a fair trial due to prosecutorial impropriety. *Held*:

1. The defendant's unpreserved claim that the trial court improperly instructed the jury as to the element of intent with respect to accessory liability failed under the third prong of *State* v. *Golding* (231 Conn. 233), as the alleged constitutional violation did not exist: the trial court's charge, viewed in its entirety, properly required the jury to find both that the defendant's conduct was intended to assist, help, or support the principal, and that the defendant had the requisite intent to accomplish the principal's intended crime; furthermore, the court's statements distinguishing between conduct that constitutes accessory liability and conduct that does not were neither inconsistent nor misleading; moreover, although the court gave a single instruction on accessory liability after charging the jury on the elements of the substantive offenses, rather than after each offense, the court's instructions were unambiguous and neither diluted the state's burden of proving the defendant's guilt nor misled the jury regarding the element of intent.
2. This court found unavailing the defendant's claim that the prosecutor engaged in impropriety during his closing and rebuttal argument to the jury by speculating as to what the defendant might argue in his closing argument and questioning the plausibility of those arguments, as those comments did not impermissibly shift the burden of proving any particular defense to the defendant; moreover, the prosecutor did not mischaracterize a witness' testimony when he stated that, hours after the shooting, the defendant told the witness that he had shot someone that night, as the prosecutor's statement was permissibly based on reasonable inferences from evidence introduced at trial.

Argued September 16—officially released November 29, 2016

Procedural History

Information charging the defendant with the crimes of murder, assault in the first degree and carrying a pistol or revolver without a permit, brought to the Superior Court in the judicial district of New Haven, where the matter was tried to a jury before *O'Keefe*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree with a firearm, and of assault in the first degree and carrying a pistol or revolver without a permit, from which the defendant appealed. *Affirmed.*

Emily Wagner, assistant public defender, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Michael Pepper*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Levarr Frasier, appeals from the judgment of conviction, rendered after a jury trial, of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a,[1] assault in the first degree in violation of General Statutes § 53a-59 (a) (5),[2] and carrying a pistol without a

[1] General Statutes § 53a-55a (a) provides in relevant part: "A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. . . ."

[2] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when . . . (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm."

permit in violation of General Statutes § 29-35.[3] On appeal, the defendant claims that (1) the court improperly instructed the jury on accessorial liability and (2) he was denied his right to a fair trial due to prosecutorial impropriety. We affirm the judgment of the court.

The jury reasonably could have found the following facts. Prior to the night in question, Adrian Redmond and Travis James had several altercations regarding the mother of Redmond's child. James and the child's mother were dating, and Redmond took offense to James "going around telling people about some [explicit] photos that she had sent [James]." In addition, James believed that Redmond and the child's mother still had an ongoing relationship. Redmond confronted James and requested that he stop publicizing the photographs. In response, James threatened Redmond, warning him that "I'll have you killed" and "just wait here and you'll see. I'll have you shot right now because I have somebody who wants you dead anyway."

William Brown, a longtime friend of Redmond, was often with Redmond during the disputes between James and him. In the late evening of January 11, 2011, Brown drove Redmond to the Crown Fried Chicken restaurant on Dixwell Avenue in New Haven to get something to eat. While Brown and Redmond were parked at a corner near the restaurant, James and the defendant exited the restaurant, and James approached the driver's side window of Brown's vehicle. In addition to his threats to Redmond, James had been leaving threatening voice messages on Brown's phone because James believed Brown was "playing both sides of the fence" in his dispute with Redmond. James and Brown then engaged

[3] 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 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. . . ."

in a heated argument, and Brown demanded that James stop leaving threatening voice messages on his phone.

At one point, James said that he was "at the end of his rope" and did not "care about life anymore." Redmond attempted to diffuse the argument and stated that "it's not that serious," and sought to settle their differences at another time. James remained furious and walked away from the vehicle toward the defendant. After a brief conversation, James and the defendant then returned to the driver's side of Brown's vehicle. James again mentioned that Brown was "playing both sides of the fence," and directed the defendant to kill both of them. The defendant then pulled out a firearm and opened fire.

Redmond was shot in the left elbow and managed to flee to a nearby alley. Brown also was able to flee the vehicle but was shot and collapsed on the street. Once the defendant stopped shooting, he and James fled. Police arrived at the scene shortly after the shooting and found Brown lying unconscious on the street. Brown was transported to the Hospital of St. Raphael where he spent a week on life support before he died from the gunshot wounds. Redmond was transported to Yale-New Haven Hospital and eventually recovered from his injuries.

At the hospital, Redmond spoke to Detective Wayne Bullock regarding the shooting. Redmond identified James and the defendant, by their street names, as those responsible for the attack and named the defendant as the shooter.[4] Bullock followed up on this information and learned that James and the defendant were known to associate with one another and were frequently in the neighborhood where the shooting occurred.

[4] Redmond testified that he knew the defendant as "Bolo" and James as "Tank."

The defendant was arrested three days after the shooting by Officer John Palmer. After voluntarily waiving his *Miranda* rights, the defendant made several statements to police indicating that he was with George White at White's home at the time of the shooting, where he remained until he walked home at 2 a.m. on January 12. Bullock followed up with White who provided a different story.[5] Bullock then confronted the defendant with White's account, but the defendant refused to change his story.

Bullock conducted a second interview with White approximately one month after the attack. During this interview, White provided a different account from his earlier one and explained that after he got out of work at 10 p.m. on January 11, he picked up the defendant, they purchased marijuana, and then went back to his home. White stated that the defendant "didn't seem himself" and that the defendant told White either "I think I shot somebody" or "I shot someone tonight." According to White, the defendant stayed at his home until the following morning.

The defendant subsequently was charged, solely as the principal, with murder, assault in the first degree, and carrying a pistol without a permit and was tried by a jury. The jury was unable to reach a verdict, and the court declared a mistrial. The defendant was tried again and charged, as a principal or an accessory, with murder, assault in the first degree, and carrying a pistol without a permit. The jury acquitted the defendant of murder and convicted him of the lesser included offense of manslaughter in the first degree with a firearm, assault in the first degree, and carrying a pistol without a permit. The court rendered judgment accordingly and

[5] Bullock had a conversation with White over the phone. White told Bullock that he saw the defendant on January 11, 2011, at a gas station near his home between 1 p.m. and 5 p.m., and "they just went on their separate ways after saying hello."

sentenced the defendant to forty years of incarceration. This appeal followed.

I

The defendant first claims that the court improperly instructed the jury on the doctrine of accessorial liability. He maintains that the court's instructions were improper in three ways, which we analyze in turn: (1) that the court's "intentionally aid" instruction was misleading; (2) that the court's instruction that it was "not necessary to prove that the defendant was actually present or actively participated" was misleading; and (3) that "the court erroneously merged all of the offenses into a single instruction." We disagree.[6]

As a preliminary matter, we note that the defendant neither filed a written request to charge nor objected to the court's instructions as given. "It is well established that [t]his court is not bound to review claims of error in jury instructions if the party raising the claim neither submitted a written request to charge nor excepted to the charge given by the trial court." (Internal quotation marks omitted.) *State* v. *Serrano*, 91 Conn. App. 227, 244, 880 A.2d 183, cert. denied, 276 Conn. 908, 884 A.2d 1029 (2005). The defendant now seeks review of his claim pursuant to *State* v. *Golding*,

[6] We note that the court provided the jury with copies of the model jury instructions from the Judicial Branch website that contained handwritten edits by the court incorporating the facts and charges of this case. "[T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it 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. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . [an appellate court] will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Davis*, 255 Conn. 782, 798, 772 A.2d 559 (2001). Although it may have been preferable that the court presented the charge in a more precise and lucid manner, the instructions provided here to the jury were, in our view, sufficient under the criteria discussed in *Davis*.

213 Conn. 233, 239–40, 567 A.2d 823 (1989).[7] "Under *Golding*, a defendant may prevail on an unpreserved claim 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." (Internal quotation marks omitted.) *State* v. *Tarver*, 166 Conn. App. 304, 321, 141 A.3d 940, cert. denied, 323 Conn. 908, 150 A.3d 683 (2016).

We will review the defendant's claim here because the record is adequate for review and the defendant's claim that the court improperly instructed the jury is of "constitutional dimension." *State* v. *Hines*, 89 Conn. App. 440, 455, 873 A.2d 1042 (claims of improper jury instructions "as to an element of a charged offense is of constitutional dimension"; thus *Golding* review is appropriate), cert. denied, 275 Conn. 904, 882 A.2d 678 (2005). We conclude however, that the defendant has failed to demonstrate the existence of a constitutional violation that deprived him of a fair trial.[8]

At the conclusion of the court's instruction on the elements of the charged offenses, the court stated that

[7] We note that the state has not claimed that the defendant implicitly waived a claim of instructional error pursuant to *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011).

[8] The defendant also claims that his conviction should be reversed under the plain error doctrine. See Practice Book § 60-5. "Review under the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Additionally, the claimed error must be both clear and harmful enough such that a failure to remedy the error would result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Aponte*, 66 Conn. App. 429, 439, 784 A.2d 991 (2001), cert. denied, 259 Conn. 907, 789 A.2d 995 (2002). In light of our resolution of the defendant's claims, that standard is not met.

"[a]ll the language that I've given you up to this point has been about being convicted as a principal, the shooter. . . . This is language which pertains to another theory of responsibility called accessory." The court defined an accessory as "[a] person acting with the mental state required for the commission of an offense, who solicits, requests, commands, importunes, or intentionally aids another person to engage in conduct which constitutes [an] offense shall be criminally liable for such conduct and may be prosecuted and punished . . . as if he were the principal offender."

The court then outlined the requirements under General Statutes § 53a-8 (a) constituting criminal liability as an accessory.[9] Throughout the court's accessory instruction, it defined intent generally and iterated that "[i]ntentionally aid . . . means to act in any manner, the conscious objective . . . of which is to assist, help, or support. If the defendant did any of these things . . . he is guilty of murder, assault in the first degree, or any lesser included offenses, depending on . . . what you determined, just as though he had directly committed it or participated in the commission of those crimes."

The court further instructed the jury that "[t]o establish the guilt of a defendant as an accessory for assisting in the criminal act of another, the State must prove criminality of intent and community of unlawful purpose. That is, for the defendant to be guilty as an accessory, it must be established that he acted with the mental state necessary to commit murder, any of the lesser included offenses, assault in the first degree or

[9] General Statutes § 53a-8 (a) provides: "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

any of the lesser included offenses, and that in furtherance of the crime, he solicited, requested, commanded, importuned, or intentionally aided the principal to commit murder, assault in the first degree, or any of the lesser included offenses. Evidence of mere presence as an inactive companion or passive acquiescence or the doing of innocent acts which in fact aid in the commission of a crime is insufficient to find the defendant guilty as an accessory under the statute. Nevertheless, it is not necessary to prove that the defendant was actually present or actively participated in the actual commission of the crime . . . . For you to find the defendant guilty of this charge . . . you must unanimously find that the State has proven all the elements of whatever crime you find proven beyond a reasonable doubt. If you conclude the defendant is guilty as a principal or as an accessory, you do not need to be unanimous regarding whether you believe he was a principal or accessory as long as all twelve jurors agree that at least one method, principal or accessory, has been proven beyond a reasonable doubt."

At the conclusion of its charge, the court advised the jury to send a note to the court if it had any questions. The court stated that "[i]f you send me a lot of notes, that's okay. If you don't send me any notes, that's fine too. . . . By explaining the note process, I'm not trying to encourage or discourage you from sending notes. If you have a question put it in a note. I'll read it [and] answer it if I can." The jury was also aware that its questions should "be as specific as possible."

During deliberations, the jury sent a note to the court requesting clarification on accessorial liability. The court answered the question by stating that "[a]ccessorial liability doesn't create a new count or a new crime. . . . The State is entitled to . . . put in . . . a different theory of liability [other than as principal]. . . . [T]hey are [also] entitled to say to the jury, we've

charged this defendant as the shooter, but we also want you to consider the theory . . . where . . . if he is not the shooter, he intentionally aided the shooter. . . . Keep in mind, that to be legally responsible as an accessory, you have to have the same intent as the principal, as the shooter."

In response to the jury's question, the court provided an example of accessorial liability. The court stated "[i]f you innocently give a ride to someone who is going to rob a bank, and they go in and rob a bank, and . . . you don't know what they're [going to do] . . . you are not guilty of bank robbery. If you're in with the bank robber and have the same intent to rob the bank and drive the car, you're as responsible as the . . . person who went inside. . . . The important part is that . . . [y]ou have to have the same intent as the . . . principal if you're the accessory. . . . Focus on the written instructions . . . that I gave you. Those include the elements, which of course have to be proven beyond a reasonable doubt."

As previously noted, we review the defendant's unpreserved claims of instructional error under *Golding*. "[I]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . The test is whether the charge as a whole presents the case to the jury so that no injustice will result. . . . We will reverse a conviction only if, in the context of the whole, there is a reasonable possibility that the jury was misled in reaching its verdict. . . . A jury instruction is constitutionally adequate if it provides the jurors with a clear understanding of the elements of the crime charged, and affords them proper guidance for their determination of whether those elements were present. . . . An instruction that fails to satisfy these requirements would violate the defendant's right to due process of

law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. . . . The test of a charge is whether it is correct in law, adapted to the issues and sufficient for the guidance of the jury. . . . The primary purpose of the charge is to assist the jury in applying the law correctly to the facts which they might find to be established. . . . The purpose of a charge is to call the attention of the members of the jury, unfamiliar with legal distinctions, to whatever is necessary and proper to guide them to a right decision in a particular case." (Internal quotation marks omitted.) *State* v. *Johnson*, 165 Conn. App. 255, 288–89, 138 A.3d 1108, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016). "As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) Id., 288.

A

The defendant first argues that the jury was misled by the court's "intentionally aid" instruction. Specifically, the defendant argues that the jury was permitted to convict the defendant "if he engaged in any conduct with the intent [necessary for the] offenses, rather than conduct that aids . . . ." This argument is perplexing. The court explicitly stated that, to convict the defendant as an accessory, "it must be established that he acted with the mental state necessary to commit . . . [the principal's intended crime] and that in furtherance of that crime, he solicited, requested, commanded, importuned, or intentionally aided the principal to commit" the crime. This language unequivocally refutes the defendant's argument. The court instructed the jury that the intent for accessorial liability was distinct from principal liability and that to convict the defendant as an accessory, both levels of intent must be found.

The defendant also contends that the court's instruction that "[i]ntentionally aid . . . means to act in any manner, [with] the conscious objective . . . to assist, help, or support," lowered the state's burden of proof and eliminated the requirement that the defendant actually assist in the commission of the crime. We disagree.

Immediately preceding the court's definition of "intentionally aid," the court informed the jury of a separate definition of intent that "[a] person acts intentionally with respect to a result when his conscious objective is to cause such result." The court sought to provide clarity among these distinct definitions and stated that "[t]o establish the guilt of a defendant as an accessory for assisting in the criminal act of another, the State must prove criminality of intent and *community* of unlawful purpose." (Emphasis added.) The court's charge, viewed in its entirety, did not permit the jury to convict the defendant as an accessory without finding both levels of intent.

The defendant also takes issue with the court's use of the phrase "to act in any manner" when defining "intentionally aid." The court's use of that phrase is not problematic. The court instructed that the defendant's conduct, to be guilty as an accessory, required the same intent as the principal to accomplish the intended crime, in addition to the intent to aid the principal. The court's later discussion of "intentionally aid" clarified that the jury's responsibility was to find that the defendant possessed two distinct levels of intent, not that the defendant could act in any general manner and still be culpable. The court's instruction of "any manner" was limited to the specific intent to "assist, help, or support," in the context of "intentionally aiding" as an accessory.

In our view, the court's instruction charged the jury to find the defendant guilty as an accessory if his conduct was intended to "assist, help, or support" the principal and that he also possessed the same intent as the

principal. In addition, the court read the statute aloud to the jury and provided copies of the instructions containing the elements and definitions of accessorial liability, and clarified the meaning of accessorial liability at the jury's request. We thus disagree that there is any reasonable possibility that the jury was misled.

B

Next, the defendant argues that, in light of the specific facts of this case, the jury was misled by the court's instruction to the jury that "it is not necessary to prove that the defendant was actually present or actively participated in the actual commission of the crime of murder, assault, or any of the lesser included offenses." Specifically, the defendant argues that two particular sentences within the court's accessorial instruction are "flatly inconsistent" and that the jury was misled by the statements. We disagree.

The challenged instruction provided that: "Evidence of mere presence as an inactive companion or passive acquiescence or the doing of innocent acts which in fact aid in the commission of a crime is insufficient to find the defendant guilty as an accessory under the statute. Nevertheless, it is not necessary to prove that the defendant was actually present or actively participated in the actual commission of the crime of murder, assault, or any of the lesser included offenses." The defendant argues that the first sentence of the preceding excerpt is inconsistent with the second sentence. Further, the defendant argues that the second sentence was misleading and confusing because, in this case, the state was required to prove that the defendant was present and actively participated in the commission of the crime.

The first challenged statement instructed the jury, in essence, that simply being present at the scene is insufficient to find the defendant guilty as an accessory.

The second challenged statement, in contrast, identified that accessorial liability does not require physical presence, so long as the accessory intentionally aided in the commission of the crime and simultaneously possessed the same intent as the principal. These statements, when viewed in context, provide a helpful and illustrative distinction between what constitutes accessorial liability and what does not. The court further clarified this concept when it provided the "bank robbery" example following the jury's questions.[10]

After examining the court's instructions in their entirety, the instructions were not misleading, but were designed to assist the jury in understanding the concept of accessorial liability. Before making the challenged statements, the court had instructed the jury that the defendant must have intentionally aided the principal in the commission of the underlying crime. The challenged statements then distinguished conduct that constitutes accessorial liability and conduct that does not. The defendant's argument takes the challenged statements out of context when in fact they appropriately described the range of conduct that constitutes accessorial liability. The challenged statements were intended to provide a comprehensive example to "the meaning of a complex legal concept"; *State* v. *Hines*, 187 Conn. 199, 210, 445 A.2d 314 (1982); and that example was not an "unfair statement of the law which it was offered to illustrate." Id., 212–13. Accordingly, we conclude that the challenged statements were neither inconsistent nor misleading.

C

Finally, the defendant argues that the court's accessorial liability instructions failed to properly "delineate

[10] As noted previously in this opinion, the court provided an example of accessorial liability following a question from the jury during its deliberations.

the intent and conduct" necessary to convict the defendant as an accessory with respect to each charge and as a result, reduced the state's burden of proof and erroneously merged the offenses. Specifically, the defendant argues that the court's singular accessorial instruction that followed the charge on the specific elements of the substantive offenses improperly permitted the jury to convict the defendant as an accessory with respect to a particular offense if it found he intentionally aided the principal, but possessed an unrelated intent regarding any of the underlying substantive crimes for which he was charged. We disagree.

The court first instructed the jury on the elements of each substantive offense and then gave the accessorial liability instruction. The court instructed the jury that to find the defendant guilty as an accessory "it must be established that [the defendant] acted with the mental state necessary to commit murder, any of the lesser included offenses, assault in the first degree or any of the lesser included offenses, and that in furtherance of that crime, he solicited, requested, commanded, importuned, or intentionally aided the principal to commit murder, assault in the first degree, or any of the lesser included offenses." The defendant argues that, for example, this instruction allowed the jury to find the defendant guilty of manslaughter if the jury found he possessed the intent to cause serious physical injury, but instead aided in the commission of assault.

Contrary to the defendant's argument, the court was clear throughout its instructions that it was necessary to find that the defendant possessed the same intent as the principal for each particular offense. The court instructed the jury to "[k]eep in mind, that to be legally responsible as an accessory, you have to have the *same* intent as the principal, the shooter." (Emphasis added.) In our view, the court's instructions were unambiguous and neither diluted the state's burden of proving the

defendant's guilt nor misled the jury. Instead, the jury was instructed that in order to convict the defendant, he must have possessed the same intent as the principal, in addition to the intent to intentionally aid the principal. The court also provided the jury with written copies of the instructions that accurately stated the law of the substantive charged offenses and accessorial liability. Additionally, the court's instruction to the jury that the defendant act in "furtherance" of the underlying crime exemplifies that it was necessary for the jury to find that the defendant possessed the same intent as to the principal's underlying crime and that the defendant acted with the intent to intentionally aid the principal in the commission of that offense.

When viewed in their entirety, the court's oral and written instructions sufficiently enabled the jury to consider each charged substantive offense because the court separately described the necessary elements that the state must prove beyond a reasonable doubt. The court's instructions did not merge all of the offenses into a single instruction. Accordingly, the court's instructions were not improper.

II

The defendant also claims that he was denied a fair trial due to prosecutorial impropriety. Specifically, he argues that during closing arguments, the prosecutor impermissibly (1) shifted the burden of proof to the defendant and (2) misstated the evidence. We conclude that there was no impropriety, and therefore do not address the defendant's claim that the alleged improprieties violated his federal and state due process right to a fair trial.

As a preliminary matter, we note that the defendant did not preserve his claim by objecting at trial to the challenged statements. However, "[o]nce prosecutorial impropriety has been alleged . . . it is unnecessary for

a defendant to seek to prevail under . . . Golding . . . and it is unnecessary for an appellate court to review the defendant's claim under *Golding*. . . . In analyzing claims of prosecutorial impropriety, we engage in 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Fasanelli*, 163 Conn. App. 170, 174, 133 A.3d 921 (2016).

A

The defendant first argues that the state "unfairly shifted" the burden of proof to the defendant during its closing and rebuttal argument. He asserts that the prosecutor's argument suggested to the jury that the defendant was required to "produce a compelling" defense theory, thereby shifting the burden from the state to the defendant. We disagree.

During his closing argument, the prosecutor stated to the jury that the state was "not sure what the theory of defense here is, and we're all going to hear that for the first time in a few minutes. I can guess, I can surmise, and maybe one of those theories is, that well the defendant . . . was not on Pond and Dixwell at 10:06 p.m. back on January 11, 2011. Another one may be, well [the defendant] was there, but the other guy did it. [James] is the shooter. I'm not sure . . . if either of those will pan out, but we'll hear that in a minute."

During rebuttal, the prosecutor stated: "I'm not exactly sure . . . what the theory of defense is. Is it that [the defendant] was there but he didn't do the shooting or he was playing with pit bulls for nine hours

at his friend's . . . house? I'm not sure about that." Throughout its closing and rebuttal arguments, the state identified evidence presented throughout the course of the trial that supported its case and consistently stated that the burden rested with the state.

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 . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 77, 43 A.3d 629 (2012). Furthermore, "[our Supreme Court] previously has acknowledged: [P]rosecutorial [impropriety] of constitutional magnitude can occur in the course of closing arguments. . . . In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [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. . . . [A] 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." (Internal quotation marks omitted.) Id., 76.

The defendant argues that the prosecutor's statements during closing and rebuttal argument "shifted its burden of proof" by suggesting that the defendant was required to produce evidence to prove his innocence. Further, the defendant asserts that the prosecutor's statements called for the defendant to produce a "successful theory of defense for the jury" and, in doing so, improperly shifted the burden.

The state counters that, when viewed in context, the prosecutor's statements are merely assumptions and that "it is clear that the prosecutor was not questioning

whether the theories of the defense would . . . be convincing—but whether defense counsel would, in his closing, actually would be making the arguments described by the prosecutor." Next, the state argues that the prosecutor was commenting on conflicting evidence, where the defendant was at the time of the shooting, that should be considered a "fair argument, as it was based on the evidence." Finally, the state claims that the prosecutor "never argued that the defendant had to successfully prove [his defense] to avoid conviction."

The defendant identifies two cases to support his claim. First, the defendant claims that *United States* v. *Simon*, 964 F.2d 1082 (11th Cir. 1992), cert. denied, 507 U.S. 1033, 113 S. Ct. 1854, 123 L. Ed. 2d 476 (1993), is analogous to the facts here. The prosecutor in *Simon* suggested that, based on common sense, if the defendant was innocent, he would have produced exculpatory evidence, thus implying the burden rested with the defendant. Id., 1086–87. In *Simon*, the United States Court of Appeals for the Eleventh Circuit observed that "[p]rosecutors must refrain from burden-shifting arguments which suggest that a defendant has an obligation to produce any evidence or to prove innocence." Id., 1086.

Second, in *State* v. *Williams*, 41 Conn. App. 180, 674 A.2d 1372, cert. denied, 237 Conn. 925, 677 A.2d 950 (1996), the defendant raised an alibi defense, and even though the burden rested with the state to disprove the defense, the prosecutor in that case improperly shifted the burden. Id., 185–86. We stated that "[d]espite the defendant's objections that he did not have the burden of proving his alibi defense and the trial court's rulings that the state was misrepresenting its burden of proof to the jury, the prosecutor repeatedly maintained that the defendant purposefully and selectively showed unclear surveillance photographs to the jury because

he had no better evidence in support of his alibi . . . .'' Id., 186–87. We held that the state's suggestion that the defendant had ''no better evidence,'' was improper because it tended to ''distort the state's burden of proof and . . . allocate[d] to the defendant the burden . . . .'' Id., 187.

After a review of the record, we conclude that the prosecutor's statements in the present case were not improper because it is unlikely the jury would have understood the argument in the manner claimed by the defendant. During closing and rebuttal argument, the prosecutor conveyed several times to the jury that the burden of proving the defendant's guilt rested with the state and identified relevant evidence that supported the state's case and would assist the jury in making its findings. Contrary to the defendant's argument, the state never shifted the burden to the defendant and did not suggest that the defendant was required to set forth a ''legitimate'' defense. Instead, the prosecutor speculated what the defendant might argue on his closing argument and questioned the plausibility of the defendant's arguments. These statements were fair and reasonably based upon the facts in evidence.

Additionally, the challenged statements here are not akin to those found improper in *Simon* or *Williams*. Here, the state speculated what the defendant might argue during his closing argument based on reasonable inferences drawn from the evidence and attempted to discredit it. The prosecutor presumably made these statements to ensure that the jury focuses on what the state deemed ''pertinent'' evidence. Again, the prosecutor's statements did not imply that the defendant was required to raise a defense. Instead, the challenged statements were reasonable observations based upon the evidence presented. Thus, we conclude that the state did not shift the burden of proof to the defendant.

B

Next, the defendant argues that during the state's closing argument "the prosecutor misstated George White's testimony in such a way as to make it more incriminating." We disagree.

During trial, White testified that he was good friends with the defendant and that he was with the defendant around 10:30 p.m. on January 11, 2011. White testified that he picked the defendant up approximately one block from the defendant's house; they went to purchase marijuana, and then returned to White's house to smoke and watch television. According to White, the defendant stayed overnight at his house and left the following morning.

The prosecutor asked White if "[a]t some point in time [on the] evening [of January 11, 2011] when [the defendant] was in your room, did he say something about [what] he did before you picked him up on the evening of January 11, 2011." White testified that the defendant told him that "I think I shot somebody." White did not ask any follow-up questions because White "did not want to get involved" in something that did not involve him. In addition to White's testimony, Bullock testified that he was told by White during an interview, that the defendant told White that "I shot someone *tonight*." (Emphasis added.)

During closing argument, the prosecutor stated in relevant part: "[The defendant] obviously, from the video, ran down Pond Street and probably got down to that wooded area of Arch Street, where he eventually hooked up with his good friend George White, whose testimony, I would submit, went unimpeached and virtually unchallenged. And Mr. White said he picked up the defendant in that location and that they went back to Mr. White's house up on Fitch Street, where the defendant then tells him that he shot somebody *that*

night." (Emphasis added.) Near the end of the state's rebuttal argument, the prosecutor again recounted White's contact with the defendant on January 11, and stated that the defendant told White that "I shot somebody."

The defendant argues that the prosecutor's use of the phrase "that night" when describing White's testimony was improper. Specifically, the defendant argues that the statement improperly portrayed White's testimony, and in doing so, made it "more incriminating" because White never testified that the defendant used that specific phrase. Further, the defendant claims that the prosecutor's omission of "I think" from the defendant's statement that "I think I shot somebody" constitutes impropriety.

The state counters by arguing that "the challenged arguments were based in the evidentiary record" and were not a "more incriminating version" of White's testimony, and thus the defendant's claims should be rejected. The state argues that the prosecutor did not "state that White testified" but instead argued that the defendant told White "that he shot somebody that night." The state also argues that the prosecutor's portrayal of White's testimony was a reasonable inference based on the evidence. Further the state urges this court to resist parsing the language used by the prosecutor during closing arguments.

It is well established that a prosecutor may not make "[a]n appeal to emotions that improperly diverts the jury's attention away from the facts and makes it more difficult for it to decide the case on the evidence in the record." (Internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 10, 124 A.3d 871 (2015). Further, "[w]e must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade [it] 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. *Chase*, 154 Conn. App. 337, 345, 107 A.3d 460 (2014), cert. denied, 315 Conn. 925, 109 A.3d 922 (2015).

Here, the prosecutor attempted to persuade the jury to infer that the defendant actually shot someone on January 11, 2011. The defendant stated to White that he thought he shot somebody hours after the shooting took place. It is not unreasonable to infer that the defendant indeed shot someone the same night because he divulged to his close friend that he thought he shot somebody within hours of the shooting. Additionally, White told Bullock that the defendant said "I shot someone tonight" when interviewed after the shooting.

The prosecutor's statements were not a mischaracterization of the evidence, but instead were permissibly based on reasonable inferences from evidence introduced at trial. See *State* v. *Warholic*, 278 Conn. 354, 367, 897 A.2d 569 (2006) ("the prosecutor may argue for the reasonable inferences that the jury may draw from the evidence adduced at trial, including the defendant's commission of the crime"). The prosecutor's argument that the defendant shot someone the night of January 11, 2011, is supported by reasonable inferences and the direct testimony of Bullock regarding his interview of White. Thus, the statements were not a mischaracterization of the evidence. Accordingly, we conclude that the prosecutor's comments were not improper.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LISA WHITNUM-BAKER (AC 38327)

Beach, Sheldon and Gruendel, Js.

Syllabus

Convicted, following a trial to the court, of the infraction of creating a public disturbance, the defendant appealed to this court. She claimed that the evidence was insufficient to support her conviction. *Held* that there was sufficient evidence to support the defendant's conviction of creating a public disturbance; the evidence showed that the defendant engaged in violent and threatening behavior toward a state marshal when she attempted to bite the marshal's arm as he escorted her out of a law library following a disturbance between the defendant and another library patron, and although the defendant claimed that the court erred in failing to credit her testimony over that of the marshal and others who had witnessed the incident, questions of whether to believe or to disbelieve a witness are beyond the review of this court.

Argued September 15—officially released November 29, 2016

Procedural History

Substitute information charging the defendant with the infraction of creating a public disturbance, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the court, *Wenzel*, *J.*; judgment of guilty; thereafter, the court denied the defendant's motion to reargue, and the defendant appealed to this court. *Affirmed*.

Lisa Whitnum-Baker, self-represented, the appellant (defendant).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Jacob L. McChesney*, former special deputy assistant state's attorney, and *John R. Whalen*, supervisory assistant state's attorney, for the appellee (state).

PER CURIAM. The defendant, Lisa Whitnum-Baker,[1] appeals from the judgment of conviction, rendered after a trial to the court, of creating a public disturbance in violation of General Statutes § 53a-181a. On appeal, the defendant claims that there was insufficient evidence to convict her of creating a public disturbance. We affirm the judgment of the trial court.

The court reasonably could have found the following facts. On April 24, 2014, the defendant entered the Stamford Courthouse Law Library. After an argument ensued between the defendant and another library patron, the librarian requested assistance from a state marshal, Patrick Valcourt, who was posted in the hallway immediately outside of the library. Valcourt entered the library, observed the defendant arguing loudly, and instructed her to stay away from the other patron. Because the defendant was uncooperative, Valcourt, with other marshals then present, began to escort her out of the library. While being escorted, the defendant began yelling loudly and attempted to bite Valcourt's arm. The supervising marshal who observed the attempted bite then ordered that the defendant be handcuffed and detained. Once the defendant was properly restrained, the marshals escorted her out of the library to the detention area, where she was held until she was arrested by state police on the charge of breach of the peace in the second degree in violation of General Statutes § 53a-181. The state later filed a substitute information charging the defendant with creating a public disturbance in violation of § 53a-181a.

On appeal, the defendant claims that there was insufficient evidence to support her conviction for creating a

[1] Although the police record and information identify the defendant as Whitnum, in her pleadings and brief on appeal, the defendant has referred to herself as Whitnum-Baker, which is the name we use for a consistent record.

public disturbance in violation of § 53a-181a (a) because the state failed to prove all essential elements of the crime beyond a reasonable doubt. Specifically, the defendant contends that the trial court erred by not crediting her testimony about the events leading up to her arrest, which, she asserts, disproves the state's evidence.[2] We disagree.

We first set forth our standard of review and the relevant law. "The appellate standard of review of sufficiency of the evidence claims is well established. 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. . . .

"The evidence must be construed in a light most favorable to sustaining the [court's] verdict. . . . Our review is a fact based inquiry limited to determining whether the inferences drawn by the [fact finder] are so unreasonable as to be unjustifiable. . . . [T]he inquiry into whether the record evidence would support a finding of guilt beyond a reasonable doubt does not require a court to ask itself whether it believes that the evidence . . . established guilt beyond a reasonable doubt. . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have

[2] Although the self-represented defendant did not explicitly state in her brief or at oral argument that she is appealing from her judgment of conviction on the basis of insufficiency of the evidence, the substance of her argument is that the court's verdict was not supported by sufficient evidence. Accordingly, our review of this appeal will focus solely on the issue of whether there was sufficient evidence in the record to convict the defendant.

found the essential elements of the crime beyond a reasonable doubt. . . .

"We do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. We have not had the [fact finder's] opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility. . . . We are content to rely on the [fact finder's] good sense and judgment." (Internal quotation marks omitted.) *State* v. *Serrano*, 91 Conn. App. 227, 241–42, 880 A.2d 183, cert. denied, 276 Conn. 908, 884 A.2d 1029 (2005).

Section 53a-181a (a) provides: "A person is guilty of creating a public disturbance when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he (1) engages in fighting or in violent, tumultuous or threatening behavior, or (2) annoys or interferes with another person by offensive conduct; or (3) makes unreasonable noise."

" 'Violent' is defined as 'characterized by extreme force' and 'furious or vehement to the point of being improper, unjust, or illegal.' . . . 'Threatening' is defined as a 'promise [of] punishment' or, 'to give signs of the approach of (something evil or unpleasant).' . . . When two or more words are grouped together, it is possible to ascertain the meaning of a particular word by reference to its relationship with other associated words and phrases under the doctrine of noscitur a sociis. . . . Placed within the context of the other words in the statute, the word 'threatening' takes on a more ominous tone. The statute proscribes 'engaging in fighting or in violent, tumultuous, or threatening behavior.' . . . [T]he language of subdivision (1) . . . 'violent, tumultuous or threatening behavior,' evinces a legislative intent to proscribe conduct which actually

involves physical violence or portends imminent physical violence." (Citations omitted.) *State* v. *Lo Sacco*, 12 Conn. App. 481, 490–91, 531 A.2d 184, cert. denied, 205 Conn. 814, 533 A.2d 568 (1987).

In the present case, our review of the record in the light most favorable to sustaining the verdict discloses that sufficient evidence was presented to support beyond a reasonable doubt the court's finding that the defendant created a public disturbance. Evidence in the record reveals that the defendant engaged in violent and threatening behavior toward Valcourt when she attempted to bite his arm. The evidence submitted by the defendant does not disprove that the defendant attempted to bite Valcourt's arm, but merely questions the timing of the events. In essence, the defendant argues that the court erred by failing to credit her testimony over that of the marshals who had witnessed the attempted biting. "Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.) *State* v. *Jagat*, 111 Conn. App. 173, 178, 958 A.2d 206 (2008). Because the state presented evidence that the defendant engaged in threatening and violent behavior by attempting to bite the arm of a court marshal, the findings made by the court were supported by evidence in the record. Accordingly, we affirm the judgment of the trial court.

The judgment is affirmed.

MEADOWBROOK CENTER, INC. *v.*
ROBERT BUCHMAN
(AC 37979)

Lavine, Mullins and Bishop, Js.

Syllabus

The plaintiff nursing care facility sought to recover damages from the defendant for, inter alia, breach of contract in connection with an admission

agreement regarding the care of his mother, under which he was listed as the responsible party. The agreement provided that the plaintiff could collect reasonable attorney's fees should it prevail in its collection efforts. The trial court rendered judgment for the plaintiff, but this court reversed that judgment and remanded the case with direction to render judgment for the defendant. Thirty-five days after the trial court rendered judgment for the defendant on remand, the defendant filed a motion seeking reasonable attorney's fees pursuant to the statute (§ 42-150bb) that allows a consumer to collect attorney's fees from a commercial party when he successfully defends an action based on a contract that provides for attorney's fees for the commercial party. The trial court denied the motion for attorney's fees, concluding that it was untimely pursuant to the rule of practice (§ 11-21) that requires motions for attorney's fees to be filed within thirty days following the date on which final judgment was rendered. The court then denied the defendant's motion for reconsideration, and the defendant appealed to this court. *Held* that the trial court improperly failed to exercise its discretion to determine whether strict adherence to the thirty day limitation in § 11-21 would work surprise and injustice on the plaintiff; the thirty day limitation in § 11-21 is a matter of procedure that was intended to secure order and dispatch in the timely disposition of a pending issue and was directory rather than mandatory, such that further proceedings by the trial court on the defendant's motion for attorney's fees were necessary.

Argued September 13—officially released December 6, 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 Hartford and tried to the court, *Hon. Robert J. Hale*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court, which reversed the judgment of the trial court and remanded the case with direction to render judgment for the defendant; thereafter, the court, *Robaina*, *J.*, rendered judgment for the defendant; subsequently, the court, *Wahla*, *J.*, denied the defendant's motion for attorney's fees and costs, and the defendant appealed to this court. *Reversed; further proceedings.*

Juri E. Taalman, with whom, on the brief, was *Timothy Brignole*, for the appellant (defendant).

Edward M. Rosenthal, for the appellee (plaintiff).

Opinion

BISHOP, J. This appeal requires us to assess the interplay between a legislative mandate based on a public policy and a procedural rule of practice. On appeal, the defendant, Robert Buchman, claims that the trial court incorrectly denied his postjudgment motion for attorney's fees, sought pursuant to General Statutes § 42-150bb, on the basis that his motion for attorney's fees was untimely, pursuant to Practice Book § 11-21.[1] We reverse the judgment of the trial court.

The following undisputed procedural and factual background is pertinent to our consideration of the issue on appeal. The plaintiff nursing home facility, Meadowbrook Center, Inc., brought an action against the defendant based on contract and promissory estoppel relating to its care of the defendant's mother. The admission agreement executed by the plaintiff and the defendant, as a responsible party, contained a clause providing for the responsible party to pay the cost of collection, including reasonable attorney's fees, in the event an overdue account is referred to an agency or attorney for collection. Following a trial to the court, *Hon. Robert J. Hale*, judge trial referee, judgment was rendered for the plaintiff in the sum of $47,561.15 with attorney's fees to be decided postjudgment.

On appeal, however, this court reversed the judgment and remanded the case to the trial court with direction

[1] In his brief, the defendant also repeats his argument, made at trial, that counsel fees are a component of damages under the pertinent statute, and, therefore, the rule regarding the filing of a postjudgment motion for attorney's fees does not apply. Because this argument was rejected by our Supreme Court in *Traystman, Coric & Kermamides, P.C.* v. *Daigle*, 282 Conn. 418, 429–31, 922 A.2d 1056 (2007), it does not warrant further discussion.

to render judgment in favor of the defendant. *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 212, 90 A.3d 219 (2014). The order from this court was dated April 8, 2014. Thereafter, on April 30, 2014, the court, *Robaina, J.*, rendered judgment for the defendant. The defendant then submitted a bill of costs on May 16, 2014, and, on June 4, 2014, the thirty-fifth day after judgment, the defendant filed a motion for attorney's fees and costs. On January 29, 2015, the court, *Wahla, J.*, conducted a hearing on the defendant's motion in which he claimed attorney's fees of $74,918.70 and costs of $1337.38. On April 7, 2015, the court issued its decision denying the defendant's motion for attorney's fees on the basis that the motion was not timely. Rejecting the defendant's argument that attorney's fees pursuant to § 42-150bb are a component of damages and, therefore, not subject to the time limits of Practice Book § 11-21, the court stated: "Because I conclude that attorney's fees were not a component of damages, the defendant's motion for attorney's fees and costs [is] not timely, hence I am constrained to agree with the plaintiff. The defendant's motion is hereby denied."

Following the court's ruling, the defendant filed a motion for reconsideration and reargument on April 17, 2015. In this motion, the defendant argued, inter alia, that the court incorrectly had failed to rule whether the time limit set forth in Practice Book § 11-21 is mandatory or directory. The defendant alleged that he had raised this issue in his memorandum of law in support of attorney's fees and at the hearing on his motion. In response, the plaintiff urged the court to not consider the defendant's motion as, "the defendant wants to rehash the same arguments that he already made which were unpersuasive." By order dated May 12, 2015, Judge Wahla denied the defendant's motion for reconsideration and reargument without comment. This appeal followed.

The defendant claims, in essence, that once the court determined that Practice Book § 11-21 governed the defendant's request for attorney's fees, the court should have determined that the time limitation contained in the rule was directory and, therefore, the court should have exercised its discretion to permit a filing that was five days late and, finally, that the court should have awarded attorney's fees in light of the mandate of § 42-150bb and the fact that the defendant's delay in filing was reasonable and minimal.

Our analysis requires discussion of § 42-150bb, captioned "Attorney's fees in action based on consumer contract or lease," and of Practice Book § 11-21, captioned "Motion for Attorney's Fees." In analyzing these two enactments, we must determine whether realizing the statutory entitlement to attorney's fees, pursuant to § 42-150bb, is necessarily limited by the thirty day filing requirement in Practice Book § 11-21, or whether a trial court has the discretion to excuse a filing delay in order to effectuate the public policy of § 42-150bb. On the basis of the record before us, it is clear that the court did not believe it had such discretion, and, therefore, did not exercise it. Because the interpretation of a statute or rule of practice involves a question of law, our review of the trial court's interpretation is plenary. See *Commissioner of Social Services* v. *Smith*, 265 Conn. 723, 734, 830 A.2d 228 (2003).

We first address the statute. Section 42-150bb provides in relevant part: "Whenever any contract or lease entered into on or after October 1, 1979, to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee *shall be awarded as a matter of law* to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. . . ." (Emphasis added.) The parties do not

dispute that, for purposes of the application of § 42-150bb, the plaintiff is a commercial party and the defendant is a consumer. In sum, the provisions of § 42-150bb are applicable to the case at hand.[2]

Our Supreme Court has stated: "Under § 42-150bb, the court has no latitude to deny [attorney's fees] to a consumer who successfully defends an action brought against him by a commercial party." *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 66, 689 A.2d 1097 (1997). Attorney's fees are available, rather, by operation of law. Id. Therefore, the entitlement to attorney's fees, pursuant to § 42-150bb, is mandatory.[3] Our Supreme Court also has held that mandatory statutory provisions relate to matters of substance. *Statewide Grievance Committee* v. *Rozbicki*, 219 Conn. 473, 480–81, 595 A.2d 819 (1991), cert. denied, 502 U.S. 1094, 112 S. Ct. 1170, 117 L. Ed. 2d 416 (1992). Section 42-150bb is a legislative vehicle for consumer protection that affords consumers, as a matter of law, awards of reasonable attorney's fees for their successful defense or prosecution of actions based on consumer contracts.[4] Accordingly, the

[2] Section 42-150bb further provides that "the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party." Since the amount of attorney's fees set forth in the consumer contract in the present case was stated as "reasonable," the attorney's fees to be awarded to the successful consumer similarly should be an amount determined by the court to be reasonable.

[3] Our Supreme Court has stated previously that "§ 42-150bb is in derogation of the common law. Specifically, [t]he general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . Connecticut adheres to the American rule. . . . There are few exceptions. . . . Section 42-150bb is, however, one of those exceptions to the common-law rule." (Citation omitted; internal quotation marks omitted.) *Aaron Manor, Inc.* v. *Irving*, 307 Conn. 608, 616–17, 57 A.3d 342 (2013).

[4] Our Supreme Court has discussed previously the legislative history of § 42-150bb and "recognized that it was designed to provide equitable results for a consumer who successfully defended an action under a commercial contract and the commercial party who was entitled to attorney's fees."

entitlement to attorney's fees pursuant to § 42-150bb is a mandatory, substantive right.

We now turn to Practice Book § 11-21, which provides in relevant part: "Motions for attorney's fees *shall* be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered." (Emphasis added.) There is no dispute between the parties that the defendant's motion for attorney's fees was untimely as it was not filed within thirty days of judgment, but, rather, five days later. Moreover, the record makes plain that the trial court believed it was constrained to deny the defendant's motion on the basis that it was not timely filed in accordance with § 11-21. The question before us is whether the trial court correctly assumed that the time limitation of § 11-21 is mandatory and not directory.[5] If the former,

Aaron Manor, Inc. v. *Irving*, 307 Conn. 608, 617–18, 57 A.3d 342 (2013). Our review of the legislative history supports this proposition as well. As a sponsor of the bill, Senator Salvatore C. DePiano commented during a Senate hearing: "This bill would require that in a specified situation attorney's fees be awarded to a consumer who successfully brings or defends an action based upon a contract or lease whenever such contract or lease provides for the attorney's fees of a commercial party." 22 S. Proc., Pt. 13, 1979 Sess., p. 4275, remarks of Senator DePiano. In the House, similar comments were made by Representative Richard D. Tulisano, another sponsor of the bill. He commented: "Mr. Speaker, the legislation before us today provides [for] the first time the ability for consumers in this state to obtain attorney's fees, of reasonable amount, as a result of defending or prosecuting any action in which the commercial party has provided for attorney's fees for their own behalf. What this does is give some equity to the situation." 22 H.R. Proc., Pt. 22, 1979 Sess., p. 7489, remarks of Representative Tulisano. Representative Tulisano further commented that the purpose of the bill was to provide balance where the consumer contract, typically drawn up by the commercial party, provides for attorney's fees in the event of consumer liability under the contract. Id., pp. 7489–90.

[5] We recognize that recently this court analyzed Practice Book § 11-21 in *Cornelius* v. *Rosario*, 167 Conn. App. 120, 143 A.3d 611 (2016). At issue in *Cornelius* was the defendant's filing of a motion for attorney's fees twenty months after judgment had entered, and the question was what event, in a complicated procedural history, triggered the thirty day filing deadline of § 11-21. Id., 132–33. In *Cornelius*, however, this court did not consider the question of whether the thirty day filing provision in § 11-21 is mandatory

then the court had no leeway to exercise its discretion. If the latter, however, the court was required to exercise its discretion to determine whether to excuse the tardiness of the defendant's motion and to make an award of attorney's fees.[6] Finally, in a case in which the court has discretion to act, but fails to exercise its discretion, that failure alone is error. *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986); see also *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) ("[i]n the discretionary realm, it is improper for the trial court to fail to exercise its discretion").

As a general proposition, our decisional law has made it clear that the rules of practice are not intended to enlarge or abrogate substantive rights. See *In re Samantha C.*, 268 Conn. 614, 639, 847 A.2d 883 (2004). In the case at hand, as we have noted, a consumer's right to attorney's fees pursuant to the mandate of § 42-150bb is substantive as that right represents the core of the statute and the reason for its enactment. Thus, although we recognize the right of the judges of the Superior Court to enact rules of practice for the orderly conduct of the court's affairs, the enforcement of those

or directory, which is the question we now confront. Thus, while this court, in *Cornelius*, agreed with the trial court's denial of the defendant's motion for attorney's fees as untimely, the question of whether § 11-21 timing requirement is mandatory or directory was not addressed. The court in *Cornelius* opined: "The trial court held that because the motion was filed more than thirty days following the date that the final judgment was rendered, it was untimely under Practice Book § 11-21. We agree." Id., 136. Because this court, in *Cornelius*, offered no opinion as to whether the court has discretion to entertain a motion for attorney's fees, filed more than thirty days after judgment, *Cornelius* is not controlling.

[6] In this regard, we are mindful that discretion is not merely leeway in decision-making. Discretion "means a legal discretion to be *exercised* in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Emphasis in original; internal quotation marks omitted.) *State* v. *Colton*, 234 Conn. 683, 703, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996).

rules must be accomplished in the light of the substantive rights they are intended to actualize.

Also, in assessing any particular rule of practice, we are guided by the provisions of Practice Book § 1-8, which states: "The design of these rules being to facilitate business and advance justice, they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice."

With this foundation in mind, we turn to our analysis of Practice Book § 11-21. At the outset, we note that our Supreme Court has made clear that the proper procedural vehicle for a party seeking attorney's fees in an action based on a consumer contract is by filing a motion pursuant to Practice Book § 11-21. *Traystman, Coric & Kermamides, P.C.* v. *Daigle*, 282 Conn. 418, 432, 922 A.2d 1056 (2007) (*Traystman*). The reach of *Traystman*, however, is not as broad as the plaintiff contends. Contrary to the plaintiff's argument, the court in *Traystman* did not determine whether the thirty day time provision in Practice Book § 11-21 is mandatory. Instead, the court focused its analysis on whether a successful litigant in a consumer contract case could seek attorney's fees as part of a bill of costs filed pursuant to Practice Book § 18-5. Id. Answering this question in the negative, our Supreme Court opined that the appropriate route for a successful party in a consumer contract action is to file a motion for attorney's fees pursuant to Practice Book § 11-21. Id., 432–33.

Importantly, the court in *Traystman* explicitly declined to opine on whether the provisions of Practice Book § 11-21 are mandatory or directory. "[T]he trial court saw no need to consider whether the time limits provided by § 11-21 are mandatory or directory, or to exercise its discretion to excuse compliance with those

time limits. Indeed, in the proceedings before the trial court the defendant never responded to the plaintiff's claim that the defendant's request for attorney's fees was time barred by § 11-21, never argued that the rule's timing provision was directory rather than mandatory, and never explained why his failure to comply with the rule should be excused. We conclude that, under these circumstances, it would be inappropriate for this court to review the action of the trial court as if it had treated the portion of the defendant's bill of costs requesting attorney's fees pursuant to § 42-150bb as the effective equivalent of a motion for attorney's fees pursuant to Practice Book § 11-21 and had exercised its discretion to excuse compliance with the rule's timing requirement." Id., 433.

In sum, although our Supreme Court in *Traystman* determined that Practice Book § 11-21 is the appropriate vehicle for a successful party in a consumer contract case to seek attorney's fees, the court did not opine on whether the rule's timing requirement is mandatory or directory.

In analyzing Practice Book § 11-21, we must determine whether the use of the term "shall" creates a mandatory or directory duty, as the use of the word "shall" does not automatically create a mandatory duty.[7] Our Supreme Court has noted: "[A]lthough we have often stated [that] [d]efinite words, such as must or

[7] This court, in *Morera* v. *Thurber*, 162 Conn. App. 261, 267–68, 131 A.3d 1155 (2016), looked beyond the plain meaning of the word "shall" to determine whether its use in Practice Book § 25-26 (g) was mandatory or directory. The analysis hinged on the use of both "shall" and "may" in the same section, which required a hearing under certain circumstances, and the court stated: "[W]hen a [drafter] opts to use the words 'shall' and 'may' in the same statute, they 'must then be assumed to have been used with discrimination and a full awareness of the difference in their ordinary meanings.' " Id., 268. Unlike the rule under scrutiny in *Morera*, neither of the two enactments in question here contains such a duality.

shall, ordinarily express legislative mandates of a nondirectory nature . . . we also have noted that the use of the word shall, though significant, does not invariably establish a mandatory duty." (Citation omitted; internal quotation marks omitted.) *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 744, 865 A.2d 428 (2005). Rather, the test to apply in determining whether the use of the word "shall" connotes a mandatory duty, or is merely 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 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. . . . Such a statutory provision is one which prescribes what shall be done but does not invalidate action upon a failure to comply." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Rozbicki*, supra, 219 Conn. 480–81.[8]

In the case at hand, we are persuaded that the thirty day time provision set forth in Practice Book § 11-21 is intended to secure order and dispatch in the timely disposition of a pending issue. Therefore, the time limitation contained in the rule is directory and not mandatory. Indeed, our Supreme Court has observed that § 11-21 was adopted apparently in response to concerns raised following a decision of this court allowing an

[8] We recognize that the test utilized in *Rozbicki* related to statutory provisions and not Practice Book sections. The interpretation of rules of practice, however, is to be governed by the same principles as those regulating statutory interpretation. *Commissioner of Social Services* v. *Smith*, supra, 265 Conn. 734. Accordingly, "the test to determine whether a statute is mandatory or directory is applicable to rules of practice." *State* v. *Ocasio*, 50 Conn. App. 748, 755 n.7, 718 A.2d 1018 (1998), rev'd on other grounds, 253 Conn. 375, 751 A.2d 825 (2000).

award of attorney's fees five months after the entry of judgment. *Traystman, Coric & Kermamides, P.C.* v. *Daigle*, supra, 282 Conn. 432 ("[i]t is reasonable to conclude that § 11-21 was adopted to avoid an extended period of uncertainty about this potential liability after judgment"); see Practice Book (1999) § 11-21, commentary; *Oakley* v. *Commission on Human Rights & Opportunities*, 237 Conn. 28, 30, 675 A.2d 851 (1996).

From this review, we glean two important facts. First, the purpose of the timing provision in Practice Book § 11-21 is procedural and intended to facilitate the progress of the case since the timing of such a motion does not go to the essence of the right to reasonable attorney's fees. Second, the purpose of the timing provision in § 11-21 is to avoid a long period of delay between judgment and a request for attorney's fees.[9]

In light of the public policy of § 42-150bb to balance the equities between commercial contractors and consumers and the mandate of the statute that attorney's fees be awarded to a consumer who successfully defends a consumer contract claim, we conclude that the timing provision of Practice Book § 11-21 is directory and not mandatory. To hold to the contrary would rigidly exalt form over substance and, in the case of a minor failure to adhere to the rule's timing requirement, would prevent the court from fulfilling the public policy driven mandate of the statute.

Our reasoning is consistent with the analysis of our Supreme Court regarding an analogous rule of procedure. In *Statewide Grievance Committee* v. *Rozbicki*, supra, 219 Conn. 480, our Supreme Court was called

[9] Although we do not seek to interfere with the court's exercise of discretion, we note from the trial court record that the plaintiff made no claim that permitting a filing late by five days would be unjust or create surprise. Rather, the plaintiff simply claimed that the rule's timing provision was mandatory.

upon to assess Practice Book (1991) § 31 (a) (now Practice Book § 2-47 [a]) concerning the attorney grievance procedure. In part, § 31 (a) stated: "Any interim proceedings to the contrary notwithstanding, a hearing on the merits of the [presentment] shall be held within sixty days of the date the complaint was filed with the court." Faced with a record that demonstrated that a hearing on the merits had not been held until several months after the presentment, the court was required to assess whether the sixty day time period set forth in the rule was mandatory or directory. The court stated: "Practice Book § 31 (a) is designed to encourage order and dispatch in the prosecution of presentments. This section is cast in affirmative words, contains no penalty for noncompliance and purports only to establish a time limit for acting upon complaints. We conclude therefore that its terms are directory, and not mandatory, and that failure to meet its time requirements does not deprive the court of jurisdiction." Id., 481.

Our Supreme Court's analysis in *Rozbicki* is applicable equally to Practice Book § 11-21. The timing of a motion for attorney's fees is not a matter of substance. Instead, as we have noted, the substance of § 11-21 is the creation of a pathway for a party to seek the fees to which he or she is entitled which, in this instance, is as a successful consumer pursuant to the dictates of § 42-150bb. As with Practice Book (1991) § 31 (a), the timing requirement set forth in Practice Book § 11-21 is intended to avoid extensive delay and ensure order. In sum, the timing provision is a matter of procedure and, therefore, directory.[10]

[10] We recognize that the implication of this opinion is that the term "shall" in § 42-150bb is mandatory while the same term in Practice Book § 11-21 is directory. Our conclusions are based on the context and purpose of the statute and the rule of practice. As noted, the purpose of the statute is to create equity between a commercial contractor and a consumer in a consumer contract that provides attorney's fees for the contractor. To suggest that the term "shall" in § 42-150bb is merely directory would eviscerate the statute's central purpose. In that context, the term is mandatory. On the

As noted, the court denied the defendant's motion for attorney's fees because it felt constrained by the thirty day time limitation in Practice Book § 11-21 for the filing of such a motion. As a consequence, the court did not exercise its discretion to determine whether strict adherence to the rule would "work surprise or injustice." Practice Book § 1-8. Accordingly, a hearing on the defendant's motion is necessary.

The judgment is reversed and the case is remanded with direction to conduct a hearing on the defendant's motion for attorney's fees consistent with this opinion.

In this opinion the other judges concurred.

DION BUSH *v.* COMMISSIONER OF CORRECTION (AC 37238)

Sheldon, Keller and Foti, Js.

Syllabus

The petitioner, who had been convicted of murder and conspiracy to commit murder in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his appellate counsel had rendered ineffective assistance by improperly briefing certain issues on appeal following the denial of his first petition for a writ of habeas corpus. The petitioner and his codefendant in the criminal trial, R, claimed that they were not present when the victim was shot, but R informed the trial court that he might pursue a different defense strategy if the state presented evidence from which the jury could infer that the petitioner fired the shot that killed the victim. The trial court denied the petitioner's motion to sever the cases, which was based on antagonistic defenses, concluding that, at that time, the defenses did not conflict. Following his conviction, the petitioner filed his first habeas petition, claiming that he had been deprived of the effective assistance of his trial counsel, G, because G did not timely move to sever the petitioner's case or move to withdraw his representation due to an alleged conflict of interest.

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contrary, as discussed, the use of the term "shall" in Practice Book § 11-21 is directory because it does not directly bear on the essence of the matter, which, in this case, is to make an award of attorney's fees in accord with the dictates of § 42-150bb.

The petitioner argued that G had a conflict of interest because he represented the petitioner at the same time he represented another criminal defendant, M, who had been convicted of a crime involving the same weapon that was used in the petitioner's case. The habeas court denied the first petition and the petition for certification to appeal, and the petitioner appealed to this court, which concluded that the habeas court did not abuse its discretion in denying the petition for certification to appeal. The petitioner then sought a second writ of habeas corpus on the ground that his appellate counsel, T, had rendered ineffective assistance by failing to document that G had no tactical reason for failing to preserve the severance issue, and that there was no support in the record for the habeas court's determination that the petitioner and R did not have antagonistic defenses. Additionally, the petitioner claimed that T had inadequately briefed the claim of an alleged conflict of interest by G resulting from his representation of M, which rendered G's representation of the petitioner ineffective. The habeas court denied the second petition, concluding that there was no basis that necessitated severance of the trials, that G utilized sound strategy by not continuing to request a severance, and that the petitioner failed to show that there was a conflict of interest that precluded G from representing him. After the habeas court denied the petition for certification to appeal, the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the claim that T had inadequately briefed G's failure to move to sever the petitioner's trial, the petitioner having failed to demonstrate that the resolution of the issues raised were debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further: T adequately raised the issues related to severance in her appellate brief, and the petitioner was not prejudiced by T's alleged ineffective assistance, as he failed to show that G's performance in failing to move for severance was deficient or prejudicial; moreover, G's strategic reasons for not moving to sever the trials were sound, and this court could not conclude that there was a reasonable probability that the outcome of the proceedings would have been different, as the petitioner did not identify any key piece of evidence that would have been excluded from his trial had a motion to sever been granted; furthermore, the petitioner and R did not pursue antagonistic defenses, as their defenses were to deny that they were present at the shooting and to attack the credibility of the state's witnesses, which were not defenses of such a nature that in order for the jury to accept the petitioner's defense it would have had to reject R's defense.
2. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the claim that T had improperly briefed the claim that G rendered ineffective assistance due to an alleged conflict of interest, the petitioner having failed to demonstrate that the

resolution of that claim involved issues that were debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions were adequate to deserve encouragement to proceed further: T's appellate brief squarely and extensively addressed the conflict of interest issue, and, in light of the habeas court's findings that M had no involvement in the shooting for which the petitioner was being tried and that there was no link between M's case and the petitioner's, G did not actively represent conflicting interests; moreover, the petitioner failed to demonstrate more than a mere theoretical division of G's loyalties, as he failed to point to specific instances in the record that suggested a compromise of his interests for the benefit of M, and, even if G had investigated the possibility that M was involved in the shooting for which the petitioner was being tried, nothing in the record supported the theory that further investigation would have supported such conjecture.

Argued September 12—officially released December 6, 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, *Newson*, *J.*, denied the petitioner's motion for summary judgment; thereafter, the matter was tried to the court, *Mullins*, *J.*; judgment denying the petition; subsequently, the court, *Mullins*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

David J. Reich, for the appellant (petitioner).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Craig Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Dion Bush, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus as well as the denial

of his petition for certification to appeal.[1] The petitioner claims that the habeas court erred by not concluding that his appellate counsel in a prior habeas appeal was ineffective. Specifically, the petitioner argues that his prior habeas appellate counsel was ineffective by failing to properly brief issues on appeal relating to: (1) alleged ineffectiveness by the petitioner's criminal trial counsel for not moving to sever the petitioner's trial from that of his codefendant; and (2) an alleged conflict of interest by criminal trial counsel resulting from his representation of another client that rendered his representation of the petitioner ineffective. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal, and, accordingly, we dismiss the appeal.

The following facts underlying the petitioner's conviction, as set forth by our Supreme Court in the petitioner's direct appeal, are pertinent to our resolution of these issues. "On September 25, 1993, the victim, Norman Jones, a member of the Brotherhood street gang, was socializing at a party in Bridgeport. Antoin Pettway also was present at the party. At some point during the evening, the victim and Pettway left the party together and went to the Pequonnock housing project, where Pettway had an apartment. Upon arriving at the housing project, Pettway entered his apartment building. The victim, who did not live at Pequonnock, remained directly outside the building's front entrance.

"Pettway encountered Robert Robertson, a member of the Bush Mob gang, in the building's lobby. Robertson

[1] General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

asked Pettway if the person outside the building's entrance was Jones, and Pettway responded affirmatively. Both men then left the lobby. Robertson entered the stairwell and went upstairs, while Pettway took the elevator to his apartment.

"Shortly thereafter, Robertson and the [petitioner], who also was a member of the Bush Mob gang, entered the lobby from the stairwell. The two men, each of whom was armed with a handgun, then went to the building's front entrance and pointed their guns in the direction of the victim. Robertson diverted his aim from the victim and fired once into the air. The [petitioner], however, fired several rounds at the victim, stopping only when his gun had been emptied. As the [petitioner] and Robertson then retreated through the lobby, Bernard Johnson, who had been in the lobby at that time, asked them why they had shot at the victim. One of the two men responded that they had done so to retaliate for the recent murder of a Bush Mob gang member.

"Within minutes, Bridgeport police officers arrived and found the victim lying on the ground a short distance away from the entrance of the building. He had been shot once in the back and was unconscious. He subsequently was transported to Saint Vincent's Medical Center in Bridgeport, where attempts to save his life proved unsuccessful." (Footnote omitted.) *State* v. *Bush*, 249 Conn. 423, 425–26, 735 A.2d 778 (1999).

The petitioner and Robertson were both charged with murder as either a principal or an accessory in violation of General Statutes §§ 53a-54a (a) and 53a-8, and conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a). The petitioner was represented by Attorney Dante Gallucci, and Robertson was represented by Attorney Lawrence Hopkins. "Prior to trial, the state moved to consolidate the trials of the [petitioner] and Robertson. Neither the [petitioner] nor

Robertson objected to that motion, and thereafter, the trial court granted it.[2] Immediately before the start of the state's case-in-chief, however, Robertson moved to sever the trials on the ground that there was a *potential* for antagonism between his defense and the [petitioner's].[3] Although both the [petitioner] and Robertson planned to assert that they had not been present when the victim was shot, Robertson claimed that he *might* pursue a different strategy during the trial if, as anticipated, the state presented evidence from which the jury could infer that the [petitioner] had fired the shot that had killed the victim. Thereafter, the [petitioner] also moved for severance claiming that, if Robertson were to change his theory of defense during trial, there was a *potential* for antagonism between his defense and Robertson's. The trial court determined that, because at that time there was no conflict between the defenses of the [petitioner] and Robertson, the motions for severance on the basis of antagonistic defenses were premature. The court, therefore, denied those motions. In so doing, however, the court specifically stated that both the [petitioner] and Robertson could renew their severance motions if an actual conflict between their defenses arose during trial. Neither the [petitioner] nor

[2] "A joint trial expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called to testify only once. . . . [W]here proof of the charges against the defendants is dependent upon the same evidence and alleged acts . . . severance should not be granted except for the most cogent reasons." (Citation omitted; internal quotation marks omitted.) *State* v. *Robertson*, 254 Conn. 739, 765, 760 A.2d 82 (2000).

[3] "Robertson also moved for severance on the ground that certain statements made by the [petitioner] concerning the shooting were admissible only against the [petitioner] and would cause him substantial prejudice. The trial court, however, determined that such statements were admissible against both the [petitioner] and Robertson, and therefore, concluded that Robertson was not entitled to severance on that ground." (Emphasis omitted.) *State* v. *Bush*, supra, 249 Conn. 426 n.4.

Robertson renewed his motion for severance on the basis of *antagonistic defenses* at any time thereafter." (Emphasis in original; footnotes altered.) Id., 426–27.[4]

During the trial the state called as a witness Maria Caban, who testified that the petitioner told her that he had shot the victim and that Robertson was also present during the shooting. She also testified that the petitioner told her that Robertson did not fire at the victim. Instead, he indicated that Robertson "punked out" and fired a single shot into the air. She also stated that, subsequent to the shooting, a group of men came to her apartment to retrieve what she was told was the murder weapon, and that the petitioner, but not Robertson, was present at that time.[5] During cross-examination of Caban, Hopkins prompted her to reiterate those portions of her testimony that indicated that

[4] "On several occasions during the trial, Robertson renewed his motion for severance on the ground that certain additional statements made by the [petitioner] were not admissible against him and caused him undue prejudice. The trial court determined that, although those additional statements were not admissible against Robertson, they were not unduly prejudicial, and therefore, Robertson was not entitled to severance on that ground." (Emphasis omitted.) *State* v. *Bush*, supra, 249 Conn. 427 n.5.

[5] There also was testimony by Johnson, who had witnessed the shooting and, approximately one year later, gave a statement to the police. In his statement, which was admitted at the criminal trial as an exhibit under *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), he indicated that he knew the petitioner and knew Robertson by his street name, "Dulla," and that he saw Robertson fire one shot into the air and the petitioner fire the rest of the shots, killing the victim. During the criminal trial, however, he testified that everything in his statement to the police with respect to Robertson and the petitioner had been a lie and that the shooters, who both held their guns straight out and fired at the victim, had masks on, and that he did not recognize them. He also indicated that he could not tell how many shots each of the shooters had fired. During closing arguments, the primary focus of Hopkins' references to Johnson was that neither Johnson's testimony nor his statement was reliable, that he probably was not even at the scene at the time of the shooting, and that he had fabricated it all in order to obtain favorable treatment from the prosecution in his own criminal cases. The petitioner cites to only one brief portion of Hopkins' closing argument that references Johnson's statement that Robertson shot into the air in support of the

Robertson did not fire the shot that killed the victim. During his closing argument on behalf of Robertson, Hopkins argued that both Johnson and Caban lacked credibility, but that even if the jury believed their suspect testimony, it was clear that the bullet that killed the victim had been fired by the petitioner. The jury convicted the petitioner of murder and conspiracy to commit murder,[6] and the court, *Ford*, *J.*, imposed a total effective sentence of sixty years incarceration.

The petitioner, still represented by Gallucci, appealed his conviction to our Supreme Court, arguing, inter alia, that the trial court erred by denying his motion to sever his trial from that of Robertson. Our Supreme Court affirmed the conviction, concluding that the petitioner had failed to preserve the claim by failing to renew his severance motion on the basis of antagonistic defenses at any time during the trial as permitted by the court. *State* v. *Bush*, supra, 249 Conn. 428.

petitioner's claim that his and Robertson's defenses were antagonistic. The petitioner fails to mention that Johnson's inconsistent statements were exploited significantly by Hopkins and Gallucci to buttress the petitioner's and Robertson's defenses that they were not present at the time of the shooting.

[6] The record of the criminal trial does not reveal whether the jury found the petitioner guilty of murder as a principal or an accessory, or whether it found Robertson guilty of murder as a principal or an accessory. There was some evidence, however, through the testimony of Johnson, that both the petitioner and Robertson fired shots in the direction of the victim, and the court instructed the jury that "[a] defendant would be guilty of murder if the injury is caused by the shooting of the victim, even though it was not the defendant's gunshot but that of another with whom he is acting in concert that caused the death of [the victim]. It is of no consequence that the evidence may not clearly establish that the death of [the victim] was caused by [the petitioner] or [Robertson], or an accomplice, one to the other . . . . If you are not satisfied beyond a reasonable doubt that [the petitioner] personally . . . participated in the murder, you must consider whether he intentionally aided or abetted some other person in the commission of the murder in question. The same applies to [Robertson]." Ultimately, our Supreme Court, on the basis of its review of the facts presented to the jury, determined that the petitioner was convicted of murder; see *State* v. *Bush*, supra, 249 Conn. 424; and Robertson was convicted of murder as an accessory. See *State* v. *Robertson*, 254 Conn. 739, 740, 760 A.2d 82 (2000).

The petitioner then filed his first petition for a writ of habeas corpus.[7] Represented by Attorney Howard Wicker, the petitioner claimed that he was deprived of the effective assistance of counsel at his criminal trial because Gallucci did not, inter alia: (1) timely move to sever his trial from that of Robertson; or (2) move to withdraw from representing the petitioner because of a conflict of interest. During the petitioner's first habeas trial, Gallucci testified as a witness for the respondent, the Commissioner of Correction, and stated that the petitioner's defense was one of general denial, although the petitioner did not have a supportable alibi. With regard to Robertson's defense, Gallucci explained: "Well, the basic thrust of the defense, that he wasn't involved. I recall at some points, [Hopkins] was also trying to show . . . not only was [Robertson] not there and [he] didn't do it, but virtually nobody said [he] did it. It was a little different than our defense, but basically, the defenses were consistent; that [they] weren't there. [They] didn't do it." The habeas court, *White*, *J.* (first habeas court), denied the petition, concluding that the petitioner had failed to show that Gallucci was deficient in his performance at trial or that the petitioner was prejudiced by such alleged deficiencies. See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first habeas court also denied the petition for certification to appeal. Represented by Special Public Defender Mary Trainer, the petitioner appealed the first habeas court's judgment to this court. See *Bush* v. *Commissioner of Correction*, 92 Conn. App. 537, 885 A.2d 1265 (2005), cert. denied, 277 Conn. 906, 894 A.2d 986 (2006). This court concluded that the first habeas court did not abuse its discretion in denying the petition for certification to appeal.

The petitioner then filed his second petition for a writ of habeas corpus, the action underlying this appeal.

[7] The operative petition in the first habeas trial was the petitioner's amended petition, dated October 7, 2003.

The petitioner, represented by Attorney Frank Cannatelli, alleged ineffective assistance by Trainer, Wicker, and Gallucci.[8] After a trial, the habeas court, *Mullins*, *J.* (second habeas court), for reasons detailed subsequently in this opinion, denied the petition for a writ of habeas corpus as well as a subsequent petition for certification to appeal. The petitioner then brought the present appeal. The issues raised in the present appeal relate only to claims in the petition regarding the alleged ineffective assistance of Trainer as appellate counsel in the prior habeas appeal. Additional facts will be set forth as necessary.

As a preliminary matter, 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 [a writ of] 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 its 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

[8] The claim against Gallucci was limited to his capacity as trial counsel. The respondent filed a special defense that the third count of the petition, alleging ineffective assistance by Gallucci, should be barred as a successive petition. In its memorandum of decision, the second habeas court ruled that all but one claim in the third count had been abandoned, and that the remaining claim constituted a successive petition.

deserve encouragement to proceed further. . . . To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Furthermore, [i]n a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . *but by demonstrable realities.*" (Citations omitted; emphasis in original; internal quotation marks omitted.) *Griffin* v. *Commissioner of Correction*, 119 Conn. App. 239, 241–42, 987 A.2d 1037, cert. denied, 295 Conn. 912, 989 A.2d 1074 (2010).

"It is axiomatic that, in order to establish a claim of ineffective assistance of *appellate* counsel, a habeas petitioner must establish both deficient performance and the resulting prejudice. . . . The performance prong requires proof that appellate counsel's performance fell below an objective standard of reasonableness. . . . There is a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . Just as the decision of trial counsel not to object to certain evidence is a matter of trial tactics, not evidence of incompetency . . . the tactical decision of appellate counsel not to raise a particular claim is ordinarily a matter of appellate tactics, and not evidence of incompetency, in light of the presumption of reasonable professional judgment. . . .

"The prejudice prong requires proof that, had the prior performance been reasonable rather than inadequate, there is a reasonable probability that the petitioner would have prevailed on the appeal. . . . A failure to establish either prong will be fatal to a claim of ineffectiveness of counsel. . . . Our scope of review regarding the underlying facts found by the habeas court is the clearly erroneous standard, and the plenary

standard of review applies regarding the legal conclusion of whether those facts amount to ineffectiveness of counsel." (Citations omitted; emphasis added.) *Alterisi* v. *Commissioner of Correction*, 145 Conn. App. 218, 222–23, 77 A.3d 748, cert. denied, 310 Conn. 933, 78 A.3d 859 (2013).

We also stress that "[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 . . . and it is all too easy for a court . . . 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 . . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 577, 941 A.2d 248 (2008).

I

The petitioner first argues that the second habeas court erred by not concluding that Trainer's performance was deficient for failing to properly brief the issue of Gallucci's alleged ineffectiveness for not moving a second time to sever the petitioner's criminal trial from Robertson's. We do not find this argument persuasive.

The following additional facts are relevant to this claim. In the present appeal, the petitioner points to two instances in his criminal trial that are offered to show that he and Robertson pursued antagonistic defenses necessitating severance. The first instance is the cross-examination of Caban by Robertson's defense counsel, Hopkins, which transpired as follows:

"[Attorney Hopkins]: Miss Caban, you indicated that at some point shortly after the shooting you had an opportunity to speak to Mr. Bush, correct?

"[The Witness]: Yes.

"[Attorney Hopkins]: Dion Bush. And he told you at that time that [Robertson], although he may have been present, fired one shot and he, as you say, punked out. Did he tell you that he fired that shot into the air? . . .

"[The Witness]: He—he—excuse me. He said he wasn't trying to shoot him.

"[Attorney Hopkins]: Right. He shot—he wasn't trying to shoot him and that he himself, Mr. Bush, in fact, emptied his . . . weapon into the victim, Norman Jones, correct? He admitted to you that he killed him?

"[The Witness]: Yeah.

"[Attorney Hopkins]: All right. Now, I think you indicated that somebody at some point in time came to your apartment to retrieve what you were told was the murder weapon; is that right?

"[The Witness]: Yeah. . . .

"[Attorney Hopkins]: Let me ask you this: Mr. Robertson was not there at that time; isn't that a fact?

"[The Witness]: No, I don't think he was.

"[Attorney Hopkins]: Okay. And, in fact, you had named four individuals who were present when you claimed that that weapon was removed; is that right? Do you recall that—that Dion Bush was present? Do you recall telling that to the police in 1996 when you gave that written statement?

"[The Witness]: I recall." The witness continued to identify those present when the gun was removed, none of whom was Robertson.

The petitioner also points to Hopkins' closing argument, in which he argued, in part: "Any inference that one might draw, that I don't think came out from the testimony, regarding those facts, which bullet killed [the victim], the [prosecution] asks you to disregard that. It doesn't make any difference. All the testimony that they put on, it is clear, even if you were to believe it, that clearly the bullet that killed [the victim] had to come from Dion Bush, both Maria Caban and [Johnson], from what he says about the circumstances, assuming he was there, and assuming you could believe him, both say through some means the only thing they either heard or observed, in the case of Mr. Johnson, is Mr. Robertson firing one shot into the air, not attempting to hit the person who was the target . . . . Which bullet killed [the victim], as if it has no relevance whatsoever, it has a lot of relevance." According to the petitioner, this closing argument amounted to "[e]ssentially . . . prosecuting the petitioner."

In regard to the severance issue, the second habeas court concluded: "The credible evidence presented in the prior habeas [trial] established that both the petitioner and Robertson pursued defenses of denial that they committed the offenses and, therefore, were not presenting antagonistic defenses. There was no evidence that the petitioner could have strengthened his own case or arguments in support of severance. [The first habeas court] relied on the Supreme Court's decision in *State* v. *Robertson*, [254 Conn. 739, 760 A.2d 82 (2000)] . . . which addressed a preserved claim about severance, contrary to the petitioner's unpreserved claim on direct appeal, to conclude that the petitioner's and Robertson's defenses were not antagonistic.[9] That

[9] Our Supreme Court, in concluding that the trial court properly denied Robertson's motion for severance, "decline[d] to hold that a separate trial is necessary whenever any potentially incriminating evidence against one codefendant is introduced during a joint trial." (Internal quotation marks omitted.) *State* v. *Robertson*, supra, 254 Conn. 768. In doing so, it considered the trial court's numerous instructions to the jury to consider the cases

is, there was no basis that necessitated severance of the codefendants' trials. [The first habeas court] also concluded that Attorney Gallucci, who testified about his tactical reasons for not seeking severance after the trial court had denied Robertson's motion for severance, utilized sound tactical judgment by not again requesting severance. . . . [T]he petitioner has failed to show both deficient performance and the necessary prejudice." (Footnotes altered.)

The petitioner's claim is not that Trainer failed to raise the severance issue on appeal, but rather that her appellate brief did not persuasively or sufficiently articulate the severance claim. More precisely, the petitioner claims that the second habeas court erred in concluding that Trainer was not ineffective because she "failed to specifically document that (1) [Gallucci] had no tactical reason for failing to preserve the severance issue; (2) [the first habeas court's] finding that [our Supreme Court's] opinion in *State* v. *Robertson*, supra, [254 Conn. 739] is dispositive of the petitioner's severance issue is in error; [and] (3) [the first habeas court's] determination that the codefendants did not have antagonistic defenses is not supported by the record."[10]

against the petitioner and Robertson independently, as well as Robertson's failure to prove that he suffered substantial injustice as a result of the joint trial. Id.

[10] The petitioner also argues that Gallucci performed deficiently in not moving to sever the trials because the joint trial resulted in the admittance of evidence of a tattoo on Robertson's arm displaying the words "Bush Mob" and a picture of a fist holding a gun. This "highly prejudicial" evidence would not have been admitted, the petitioner argues, had he and Robertson been tried separately. Although, in separate counts in his amended petition in the second habeas trial, the petitioner did fault Wicker and Gallucci for, respectively, failing to properly brief the issue and for not objecting to the introduction of such evidence—claims that were later abandoned in the petitioner's posttrial brief—the petitioner did not raise a similar claim in his petition with respect to Trainer, whose performance as prior appellate counsel is the sole issue in this appeal. We also note that, although the issue of the tattoo was discussed in testimony during the second habeas trial, the second habeas court did not address the issue in its memorandum of decision. Therefore, as the petitioner did not raise this distinct claim in his petition, nor was it addressed by the second habeas court, we decline to

We conclude that Trainer adequately raised these issues in her appellate brief. On appeal from the denial of the petition for certification to appeal the denial of the first habeas petition, Trainer argued that the first habeas court's finding that Gallucci chose not to move for severance on the basis of trial tactics was error.[11] Trainer also objected to the first habeas court's reliance on *State* v. *Robertson*, supra, 254 Conn. 739,[12] and noted

review it. See *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 197–98, 19 A.3d 705 ("A petition for a writ of habeas corpus must set forth specific grounds for the issuance of the writ. Practice Book § 23-22 [1] specifically provides that the petition shall state the specific facts upon which each specific claim of illegal confinement is based and the relief requested . . . . A reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court." [Citation omitted; internal quotation marks omitted.]), cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011); see also *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 232, 828 A.2d 64 (2003) ("It is well established that [i]t is the appellant's burden to provide an adequate record for review. . . . It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision . . . to clarify the legal basis of a ruling . . . or to ask the trial judge to rule on an overlooked matter. . . . In the absence of any such attempts, we decline to review this issue." [Internal quotation marks omitted.]).

[11] Trainer argued in her appellate brief that "the [first habeas] court accepts [Gallucci's] explanation that his failure to move for severance was strictly strategy. . . . However, as the petitioner points out in his testimony, certain [in]culpatory evidence was admitted at trial, which wouldn't have come in, had it not been for [Robertson]. . . . As such, there was ample reason to move for severance. Most importantly, such a motion would have preserved the issue for appeal. [Gallucci] explains his actions by stating that the court and the jurors were impatient with cocounsel's severance requests. One offer of motion would have preserved the issue. . . . There was probably very little chance that a motion by the petitioner for severance would have been granted. The habeas court consistently denied [Robertson's] motions for severance. Petitioner's counsel only had to request once to preserve the issue. It is unreasonable to think that one motion would have caused such a problem with the court and the jury. By his failure to move, [Gallucci] has severely prejudiced the petitioner's future appellate success." (Citations omitted.)

[12] Trainer argued that "[t]he court states that, even if [Gallucci's] actions amounted to ineffective assistance, his actions did not cause prejudice to the petitioner's case and therefore did not satisfy the second prong of *Strickland*. . . . In support of this conclusion, the court points to the appeal taken by [Robertson] in which the issue of severance was raised and denied by [our Supreme] Court. . . . The court assumes that an appeal by the

the allegedly antagonistic defenses of the petitioner and Robertson.[13]

Moreover, the petitioner has not persuaded us that the manner in which Trainer briefed the severance claim prejudiced him because he has not shown that Gallucci's performance was deficient or that his decision not to move for severance prejudiced the petitioner. In his testimony before the habeas courts, Gallucci advanced several tactical reasons why he chose not to move for severance, namely, that: (1) in his experience, joint criminal trials have the benefit of tending to sow reasonable doubt among jurors as to all defendants where the evidence suggests that only one defendant—but it is unclear which one—committed the act; (2) he did not want to draw the ire of the judge and jury by moving to sever on the heels of one such motion by Robertson; and (3) he believed that severance would better enable the prosecution to strike a deal with Robertson in which he would testify against the petitioner in exchange for a lesser sentence.

"[I]t is all too easy for a court . . . to conclude that a particular act or omission of counsel was unreasonable . . . [and that] [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . ." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 577. As did the first habeas court, the second habeas court found that Gallucci had strong strategic reasons not to move for severance, and concluded that both the petitioner and Robertson

petitioner would also fail. . . . Petitioner's attorney, Attorney Wicker, correctly responds that the court cannot support that analogy because the petitioner's appeal probably would have been far stronger than [Robertson's] and potentially raise[d] totally different issues. . . . However, the court adopts [Gallucci's] reasoning that his actions were tactical and dismisses the petitioner's claim." (Citations omitted.)

[13] Trainer argued that "[Robertson's] attorney raised questions that harmed the petitioner in an effort to assist [Robertson]."

pursued nonantagonistic defenses of denial during the criminal trial. Under a plenary standard of review, we conclude that the petitioner has not demonstrated error in the second habeas court's determination that Gallucci's strategic reasons for not moving to sever the trials were sound.

We also agree with the second habeas court's determination that the petitioner and Robertson did not pursue antagonistic defenses. Antagonistic defenses necessitating severance occur "[w]hen . . . the jury can reasonably accept the core of the defense offered by either defendant only if it rejects the core of the defense offered by his codefendant . . . . To compel severance the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive. . . . Such compelling prejudice does not arise where the conflict concerns only minor or peripheral matters which are not at the core of the defense." (Citation omitted; internal quotation marks omitted.) *State* v. *Booth*, 250 Conn. 611, 621, 737 A.2d 404 (1999), cert. denied, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000). "[W]e will reverse a trial court's ruling on joinder only where the trial court commits an abuse of discretion that results in manifest prejudice to one or more of the defendants." (Internal quotation marks omitted.) Id., 620. The second habeas court looked favorably upon the findings of the first habeas court and adopted its reasoning. The first habeas court concluded that the petitioner's and Robertson's defenses were not antagonistic because they were not defenses of such a nature that in order for the jury to accept the defense of one defendant, it would have had to reject the defense of the other. It noted that the credible evidence established that both the petitioner and Robertson pursued defenses of denial and that both sought to attack the credibility of the state's witnesses, but did not succeed.

It further concluded that there was no basis for severance, and that even if Gallucci had renewed a motion for severance, it would have been denied. We observe that, before the jury could have begun to consider and determine which of the two defendants may have fired the fatal shot, it first would have had to reject their mutual, nonantagonistic defenses that they were not present.

Nor can we conclude that, had the petitioner succeeded in severing the trials, there was "a reasonable probability that the outcome of the proceedings would have been different . . . ." *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 575. The petitioner has not identified any key piece of evidence that would have been excluded from his trial had the two trials been severed.[14] In particular, the state still would have been able to present the testimony of Caban and Johnson, and Johnson's statement to the police, all of which implicated the petitioner as the person who shot the victim, as well as portions of "three tape-recorded telephone conversations between the [petitioner] and unidentified third parties . . . indicat[ing] that [he] had been involved in plans to threaten Johnson and Caban in an attempt to influence their testimony." *State* v. *Bush*, supra, 249 Conn. 429.

As the second habeas court noted, "the Appellate Court's [prior] review . . . to determine whether the

[14] To be sure, the petitioner argues that the evidence of Robertson's "Bush Mob" tattoo; see footnote 10 of this opinion; would not have been admitted against the petitioner had the trials been severed, and that such evidence was prejudicial to him. However, for the reasons set forth in footnote 10 of this opinion, we decline to review the merits of this claim. We do note, though, that according to Gallucci's testimony in the second habeas trial, the tattoo was far from the only evidence suggesting that the petitioner was a member of a gang. Gallucci testified: "[T]here had been so many references, even in the questions that were objected to, to Bush Mob, Bush Gang, Bush Gang, Bush Mob, that at some point everybody was going to be aware of the fact . . . ."

prior habeas court abused its discretion entailed review of this claim, the facts presented in support thereof, as well as the [first] habeas court's legal conclusions."[15] The second habeas court further found, and we agree, that "[Trainer's] testimony [in the second habeas trial] did not provide any evidence helpful to the petitioner." We therefore agree with the second habeas court that the petitioner has neither shown that Trainer was deficient for failing to properly brief these issues, nor that the petitioner was prejudiced by Trainer's allegedly deficient performance with regard to the severance issue.

Accordingly, as to the severance issue, the petitioner has not "demonstrate[d] 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.) *Griffin* v.

[15] In this court's per curiam decision dismissing the prior habeas appeal, it stated: "In dismissing the habeas petition, the [first habeas] court determined that the petitioner had failed to prove that there was any conflict of interest. The [first habeas] court also found that the petitioner had failed to establish that his counsel was deficient or that the petitioner was consequently prejudiced, in failing to renew the motion for severance of the petitioner's case from that of [Robertson] because, in the absence of antagonistic defenses between the defendants, there was no basis for a severance. . . . After a careful review of the record and briefs, we conclude that the petitioner has not demonstrated that the issues he raises are debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised deserve encouragement to proceed further." *Bush* v. *Commissioner of Correction*, supra, 92 Conn. App. 539–40. One of the major problems with the petitioner's claims is that this court has already rejected the claim that severance was warranted or that Gallucci had a conflict of interest. The petitioner seemingly argues that, in reviewing the first habeas appeal, this court presumably relied on only whatever arguments were set forth in Trainer's brief. The petitioner fails to acknowledge that, in resolving the severance and conflict of interest claims presented, the reviewing court would also consider the entire record, including the decision of the first habeas court and the arguments set forth in the state's brief. See *Alterisi* v. *Commissioner of Correction*, supra, 145 Conn. App. 223 (plenary review of whether facts found amounted to ineffective assistance of counsel).

Commissioner of Correction, supra, 119 Conn. App. 242. Thus, as to this issue, we reject the petitioner's claim that the second habeas court abused its discretion in denying the petition for certification to appeal.

II

The petitioner also claims that Trainer did not provide effective assistance of counsel because she failed to adequately brief the issue of an alleged conflict of interest by Gallucci resulting from his representation of another client that rendered his representation of the petitioner ineffective. We do not agree.

The following additional facts, as set forth by the second habeas court, are relevant to this claim. "This alleged conflict of interest, according to the petitioner, arose from [Gallucci] representing the petitioner and also representing another defendant, one Jamar McKnight . . . . The petitioner's posttrial brief argues that he wants to 'alert the court of a more larger conflict issue. During the testimony, the petitioner testified that he was upset that [Gallucci] represented him at the same time [Gallucci] represented . . . McKnight. McKnight was a case that was up on appeal at the time [Gallucci] represented [the petitioner]. The only relevance to this case is that the gun used by McKnight [in the crime that he had been convicted of] was also the same gun used here to kill the victim of this shooting. From a review of the whole record, it is clear that although the prosecutor [who prosecuted the petitioner also] prosecuted [McKnight], and although . . . [Gallucci] also represented [the petitioner], neither counsel brought this fact to the attention of [the criminal trial court]. The petitioner believes that this was a reason that [Gallucci] never pursued a third-party culpability defense, namely, that [the petitioner] did not do this crime, but McKnight did. This is relevant because the [first habeas court] put that responsibility of bringing

the conflict issue up to the trial court on the [petitioner], who was a juvenile when arrested, and in his early twenties when he went to trial. Neither attorney who tried this case brought this fact to the attention of the court, or [the criminal trial judge], so [the petitioner] could be asked whether he would waive any potential or actual conflict.' "

In addressing this claim, we apply the following standard of review pertaining to ineffective assistance of counsel claims based on an actual conflict of interest: "The sixth amendment to the United States constitution as applied to the states through the fourteenth amendment, and article first, § 8, of the Connecticut constitution, guarantee to a criminal defendant the right to effective assistance of counsel. . . . As an adjunct to this right, a criminal defendant is entitled to be represented by an attorney free from conflicts of interest. . . . Thus, [t]he underlying right to conflict free representation is effective assistance of counsel. . . .

"In a case of a claimed conflict of interest . . . in order to establish a violation of [his constitutional rights] the [petitioner] has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance. . . . Unlike other claims of ineffective assistance of counsel, where a petitioner claims that his counsel's performance was deficient because of an actual conflict of interest, prejudice does not need to be established. . . . Instead, [w]here there is an actual conflict of interest, prejudice is presumed because counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties." (Citations omitted; internal quotation marks omitted.) *Hedge* v. *Commissioner of Correction*, 152 Conn. App. 44, 50–51, 97 A.3d 45 (2014), cert. denied, 321 Conn. 921, 138 A.3d 282 (2016).

The second habeas court observed that "[t]he evidence presented . . . encompasses [Wicker's] testimony about his investigation of [the first] habeas claims and which claims to pursue when he amended the petition. Senior Assistant State's Attorney [Cornelius] Kelly testified that he prosecuted McKnight and the petitioner, and was unaware of any connection between the cases. Both Wicker and Kelly recalled testimony by a firearms expert that the shells from the McKnight shooting were of a similar type compared to those from the Bush/Robertson shooting. [Gallucci] testified that he represented McKnight at trial and on appeal. Gallucci did not see any conflict of interest that arose during the course of his representation because he represented McKnight first and completed the direct appeal prior to representing the petitioner."

The second habeas court concluded that "the petitioner has failed to show that there was a conflict of interest that precluded [Gallucci] from representing the petitioner. There is no evidence that there was any linkage between the McKnight case and the petitioner's case, nor is there any evidence showing that the shells were fired from the same weapon.[16] While the petitioner's allegations of ineffective assistance have now broadened to include habeas appellate counsel, the evidence is no greater than that presented to the first

[16] There actually was uncontroverted evidence presented at the petitioner's criminal trial that the same gun was used in both the murder for which McKnight was charged and the subsequent murder for which the petitioner and Robertson were charged. During cross-examination, Hopkins elicited the testimony of James Stephenson, a criminalist firearms and tool mark examiner employed by the Connecticut State Police, who testified that he had compared eight cartridge casings relating to McKnight's case with eight of the nine cartridge casings in evidence in the petitioner's case, and had determined that all sixteen cartridges had been fired from the same gun. Although it does not affect our resolution of this claim, we nonetheless conclude that the second habeas court's factual finding that there was no evidence that the same gun had been used in both murders is clearly erroneous.

habeas court. . . . [T]he Appellate Court's review of this claim to determine whether the prior habeas court abused its discretion entailed review of this claim, the facts presented in support thereof, as well as the habeas court's legal conclusions.[17] Accordingly, this basis of ineffective assistance by [Trainer] also must fail." (Footnotes added.)

On appeal, the petitioner argues that Trainer failed to adequately brief the claim that Gallucci "could not have investigated McKnight because to do so would have violated his duty under the Rules of Professional Conduct, Rule 1.7." Due to this purported inability to conduct an investigation, the petitioner claims, Gallucci failed to provide effective representation.

Although it is not clear to us how rule 1.7 of the Rules of Professional Conduct[18] prohibits an investigation of the type described by the petitioner, we conclude nonetheless that the issue of whether Gallucci labored under a conflict of interest is not "debatable among jurists of reason . . . ." (Internal quotation marks omitted.) *Griffin* v. *Commissioner of Correction*, supra, 119

[17] See footnote 15 of this opinion.

[18] Rule 1.7 of the Rules of Professional Conduct provides:

"(a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and

(4) each affected client gives informed consent, confirmed in writing."

Conn. App. 242. The second habeas court found credible Gallucci's testimony that McKnight had no involvement in the shooting for which the petitioner and Robertson were prosecuted and that he saw no link between the two cases aside from the petitioner knowing McKnight, and would have sought removal from the petitioner's case had he observed any link. Gallucci further indicated that the petitioner did not advise him that McKnight was or could have been the shooter. Our review of the record reveals nothing to disturb these findings.[19] We must therefore conclude that Gallucci did not "actively [represent] conflicting interests . . . ." (Internal quotation marks omitted.) *Hedge* v. *Commissioner of Correction*, supra, 152 Conn. App. 51. In other words, the petitioner cannot prevail on this claim because he has not progressed beyond a "mere theoretical division of loyalties"; (internal quotation marks omitted) *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 589, 867 A.2d 70, cert. denied, 273 Conn. 930, 873 A.2d 997 (2005); and has failed to point to specific instances in the record that suggest compromise of his interests for the benefit of McKnight.[20] Although it was established that the same

[19] At most, the record reflects a *potential* connection between the cases, as detailed herein, but such potential is not a sufficient basis for disturbing the second habeas court's ruling. In addition to the testimony of Stephenson contained in the transcript of the criminal trial, which was a full exhibit in the second habeas trial; see footnote 16 of this opinion; Wicker, in his testimony to the second habeas court, stated that it was his recollection that the same weapon was used in both the McKnight case and the petitioner's case, but that "[t]he weapon was the only issue [he] recall[ed] of commonality . . . ." Gallucci testified in the second habeas trial that he "remember[ed] there was a ballistics report that . . . purportedly linked the weapon to the shooting [involving McKnight] . . . but I don't remember as I'm sitting here if it actually was testified to because it was a lot of off-the-record stuff . . . ." Gallucci further stated that "I don't take everything [firearms examiners] say for gospel . . . but even assuming it was the same gun and that was correct, I didn't see the link because [McKnight] had nothing to do with our case."

[20] We note that pursuing a third-party culpability defense based on only the commonality of the gun used in fact may have been to the detriment

gun was used in both crimes, the record fails to support the existence of an actual conflict of interest because no other evidence suggests a connection between the two crimes. Even if Gallucci had explored the possibility that McKnight was somehow involved in the shooting for which the petitioner was on trial, nothing in the record supports the theory that further investigation would have disclosed information supporting such conjecture.[21]

Finally, we note that Trainer's appellate brief squarely and extensively addressed the conflict of interest issue.[22]

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of the petitioner because, as Gallucci explained in the second habeas trial, it could have served to connect the petitioner to a "stash house" through which guns were shared, or even to the crime of which McKnight was convicted.

[21] "[I]n explaining the requirement that the proffered evidence [in support of a third-party culpability defense] establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated: Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination." (Citation omitted; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 609–10, 935 A.2d 975 (2007).

[22] In her appellate brief, Trainer claimed that evidence introduced at the criminal trial showed that the same gun was used in both murders and that, because of his impaired loyalty, Gallucci was unable to introduce evidence that McKnight was already convicted for a murder in which the same gun was used. Trainer also argued that "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . For example, in the current [case], the conflict of interest clearly could have precluded [Gallucci] from exploring alternative defenses or from seeking consideration from the state for his client. . . . Because the petitioner has shown that his attorney had an actual conflict of interest, which adversely affected his representation, the court should reverse the judgment of the habeas court . . . ." (Citation omitted.)

Accordingly, with respect to this claim, the petitioner has not "demonstrate[d] 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.) *Griffin* v. *Commissioner of Correction*, supra, 119 Conn. App. 242. We therefore conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

RICHARD GIATTINO *v.* COMMISSIONER OF CORRECTION
(AC 37496)

Lavine, Keller and Flynn, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the second degree and risk of injury to a child, sought a writ of habeas corpus. He claimed, inter alia, that his trial counsel rendered ineffective assistance as a result of having failed to obtain certain of the victim's confidential school records that allegedly would have disclosed material with which to impeach the victim's credibility. The petitioner asserted that the school records also would have narrowed the time frame within which the incidents at issue allegedly occurred. The petitioner subpoenaed the school records to the habeas trial along with certain of the victim's confidential mental health records. The habeas court made a preliminary ruling during trial in which it declined the petitioner's request to review the school records in camera on the ground that there was no reason to do so at that point in the proceedings. The court stated that the records would be lodged with the court, and that it would consider whether to unseal them should it become necessary to do so later in the proceedings. The petitioner thereafter did not renew his motion for an in camera review of the school records or otherwise seek a definitive ruling on that matter before the close of evidence or in his posttrial brief to the court. The habeas court thereafter denied the petition for

a writ of habeas corpus and granted the petition for certification to appeal, and the petitioner appealed to this court. He claimed on appeal that the habeas court improperly declined to review the school records in camera and improperly rejected his claim of ineffective assistance of trial counsel. *Held*:

1. This court declined to review the petitioner's unpreserved claim that the habeas court improperly declined his request to review in camera certain of the victim's confidential school records: the habeas court's ruling was a preliminary one, and the petitioner never renewed his request for an in camera review of the records, or sought a definitive ruling on the matter before the close of evidence or in his posttrial brief to the court; moreover, contrary to the petitioner's claims, certain of the court's statements in its memorandum of decision did not constitute a ruling on the matter, but merely referenced its preliminary ruling, and the court did not assume during trial that the victim would not consent to the release of the school records, as the relevant colloquy between the parties and the court pertained only to the victim's mental health records, there was no discussion as to whether the victim should be asked to consent to an in camera review of the school records, and the petitioner did not raise that claim before the habeas court.

2. The petitioner could not prevail on his claim that the habeas court improperly rejected his assertion that his trial counsel provided ineffective assistance for allegedly having failed to adequately cross-examine the victim and to obtain the victim's confidential school records for impeachment purposes:

   a. This court declined to review the petitioner's unpreserved claim that trial counsel failed to adequately cross-examine the victim as to certain inconsistencies in her testimony and to establish a more definite time period during which the alleged instances of abuse occurred because the petitioner failed to raise those claims in his habeas petition and the habeas court did not address their merits in its memorandum of decision.

   b. This court could not conclude that the petitioner's trial counsel performed deficiently for having failed to obtain the victim's school records because the habeas court did not unseal the records, this court did not know whether they would have disclosed material with which to impeach the victim, and there was no evidence that the records contained evidence that could have been employed to exonerate the petitioner.

Submitted on briefs September 14—officially released December 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, *Fuger*, *J.*; thereafter, the court denied the petitioner's motion for disclosure of

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

Jennifer B. Smith, assigned counsel, filed a brief for the appellant (petitioner).

Maureen Platt, state's attorney, *Leon F. Dalbec, Jr.*, senior assistant state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Richard Giattino, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. He claims that the habeas court erred when it (1) declined to conduct an in camera review of school records pertaining to the victim[1] of the underlying crimes; and (2) rejected the petitioner's claim that his criminal trial counsel rendered ineffective assistance. We decline to reach the merits of the petitioner's first claim, and conclude that the habeas court did not err with regard to the second claim. We therefore affirm the judgment of the habeas court.

In 2011, the petitioner was convicted, following a trial to the court, *Prescott, J.*, of two counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1),[2] and one count of injury or risk of injury to, or impairing the morals of, a child in violation of

[1] 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 identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[2] General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person . . . ."

General Statutes § 53-21 (a) (2).[3] Aside from concluding that the prosecution proved each element of the crimes beyond a reasonable doubt, the trial court did not set forth detailed factual findings in rendering its determination of guilt. On the basis of its findings, however, we can conclude that the trial court was persuaded by evidence of the following facts.

The petitioner married the victim's mother in 2009 and shortly thereafter began residing with her and her family. During the relevant time period, the petitioner, the victim's mother, the victim, and the victim's three younger siblings all occupied a three bedroom apartment in Naugatuck. The petitioner was then forty-eight or forty-nine years old, and the victim was fourteen years old. The victim's boyfriend, Brandon Jones, then seventeen years old, and a family friend, Scott Beasley, also lived with the family in the apartment for substantial periods of time.

At the beginning of the marriage between the petitioner and the victim's mother, the victim's relationship with the petitioner was, by the victim's account, warm and close. The victim, who had no relationship with her biological father, considered the petitioner "like my father figure." The petitioner would take the victim and her siblings for rides on his motorcycle and to a park to play. The victim would confide in the petitioner about personal problems, such as if she had an argument with her boyfriend.

That relationship, however, soon began to change. One day the petitioner approached the victim to talk about sex. As the victim later testified at trial: "[the

[3] 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 . . . ."

petitioner] would say that he wanted to talk to me about having sex because . . . I was a virgin, and he wanted me to not be scared for the situations that I would have when I was older and I did start having sex." The victim testified that as a result of this conversation she "was in shock . . . cause I really didn't think that he would say something like that . . . cause I considered him like my father."

The petitioner then took things further. During one instance in which he approached the victim and started to talk about sex, the petitioner began kissing the victim on her mouth and breasts, stopping only when her mother entered the house. The victim described several more instances of sexual contact with the petitioner. The second instance occurred when the victim stepped out of the shower to find the petitioner standing in the bathroom. The petitioner began kissing the victim's mouth and breasts and inserted his fingers into her vagina. The third incident occurred as the victim was changing clothes in the bathroom. The petitioner entered and again began kissing the petitioner's mouth and breasts and digitally penetrated her. The fourth incident occurred when the victim was again in the bathroom, this time arranging her hair and texting on her phone. As the victim was sitting on the toilet, the petitioner entered the bathroom and approached her. After a few moments, the petitioner exposed his penis and, as the victim testified, "pushed [her] head forward and . . . made [her] move [her] mouth on his penis." The victim testified that she did not remember any of the dates on which the incidents occurred, but that they all happened in the "summertime" of 2009.[4] She later

[4] When asked by the prosecution on direct examination whether the petitioner initiated any other sexual contact with her in the bedroom belonging to the petitioner and the victim's mother, the victim recounted another incident that occurred between the third and fourth incidents described previously. As the victim described it, however, the encounter did not involve any physical contact between her and the petitioner. The victim testified that she entered the bedroom to find the petitioner sitting on the bed

testified that "[i]t was at . . . the end of the summertime that this all started that we were just starting to go back to school." When asked by the court whether "summertime" meant "like, August," the victim responded affirmatively.

The victim reported the abuse to Jones and then to her mother. The victim's mother forced the petitioner to leave the apartment. Shortly thereafter, the victim's mother took the victim to the family's nurse practitioner, Judy Moskal-Kanz, for a physical examination. The victim recounted the sexual abuse to Moskal-Kanz. Moskal-Kanz did not find any physical evidence of sexual abuse as a result of the physical examination. After the appointment with Moskal-Kanz, the victim reported the abuse to a detective at the Naugatuck Police Department and an investigator with the Department of Children and Families (department).

The petitioner was represented at trial by public defender Tashun Bowden-Lewis. The prosecution's case-in-chief consisted of testimony from the victim, the victim's mother, Jones, Beasley, Moskal-Kanz, and the department investigator. The petitioner's case-in-chief consisted solely of his own testimony, in which he denied the allegations. In closing argument, the petitioner highlighted inconsistencies in the victim's testimony and prior statements, as well as the lack of any physical evidence of abuse. The petitioner also contended that the victim had fabricated the charges to retaliate against the petitioner because he had earlier,

watching television. The victim testified that "I stood there for a second, I was watching a show with him, and he got up and I was—was going to go into the bathroom to use the bathroom, and he got up and he stood in front of me and I was—I just—like, I kept my head down, I didn't really—I didn't even look at him, I kept my head down and I—when I looked—I looked up cause he said—he was, like, [victim's name], I looked up, and I was, like, what? He said—I—and he—my little brother had to come home, and he knocked on the door and he sat back down, and I opened the door and I walked out and I left."

along with the victim's mother, ordered Jones to move out of the apartment. After a two day trial, the court found the petitioner guilty of the previously discussed three counts. The court sentenced the petitioner to a total effective term of twenty years imprisonment, execution suspended after twelve years, and twenty years of probation.

In 2014, the petitioner, represented by Attorney Jason C. Goddard, filed an amended petition for a writ of habeas corpus, wherein the petitioner alleged that his criminal trial counsel rendered ineffective assistance by, inter alia, failing to obtain records pertaining to the victim, including the victim's school records, in addition to other alleged failures in the pretrial investigative process. After a trial, the habeas court, *Fuger*, *J.*, for reasons detailed below, denied the petition but granted the petitioner certification to appeal. The petitioner then brought the present appeal.

I

The petitioner first claims that the habeas court erred when it declined to conduct an in camera review of the victim's school records. The respondent, the Commissioner of Correction, argues, however, that the habeas court merely issued a preliminary denial as to the school records, and that because the petitioner did not renew his motion for an in camera review, the petitioner failed to preserve the issue for appeal. We agree with the respondent, and accordingly decline to review the merits of this claim.

The following additional information is relevant to our discussion. Prior to the habeas trial, the petitioner filed a motion with the habeas court requesting disclosure of, inter alia, "[a]n unredacted copy of the victim's school records" from two high schools she attended. The petitioner did not provide any reasons in the motion

as to why such records would contain exculpatory information.

The petitioner subpoenaed the records from the Naugatuck public schools, and an attorney for the schools brought the records, under seal pursuant to General Statutes § 10-15b,[5] to the court on the morning of the habeas trial. At the beginning of the trial, the habeas court questioned the petitioner as to the relevancy of the victim's school records. The petitioner's attorney responded in part: "During the trial [the victim] had indicated . . . that one of the instances [of abuse] occurred. She recalled one of the instances because she had gotten into trouble in school that day.[6] So, I looked to—to verify that—sort of, to see if there was any—any truth to that, and . . . I needed the school records to see if there was any sort of disciplinary action taken in and around the time . . . of the incident." (Footnote added.)

After several more exchanges, the court stated: "Well . . . at this point I don't see any reason that I need to examine them. . . . Again, I'm not going to categorically rule out that there's that possibility because I haven't heard anything, but based on what I have heard, it doesn't seem like it's too likely . . . . I'm going to allow the subpoenaed records to be lodged with the

[5] General Statutes § 10-15b (c) provides in relevant part: "If any private or public school is served with a subpoena issued by competent authority directing the production of school or student records in connection with any proceedings in any court, the school upon which such subpoena is served may deliver such record or at its option a copy thereof to the clerk of such court. . . . Any such record or copy so delivered to such clerk shall be sealed in an envelope . . . . No such record or copy shall be open to inspection by any person except upon the order of a judge of the court concerned, and any such record or copy shall at all times be subject to the order of such judge. . . ."

[6] In her testimony in the criminal trial, the victim indicated that the third instance of sexual abuse described previously occurred on a day when her school called home to report that she "had gotten into trouble . . . ."

court. . . . Now, both of these records [the school records and other records the petitioner subpoenaed] shall remain sealed. In the event we get to the point that I think it might be necessary to determine whether they should be unsealed, then we'll bring that up on a second day of trial, so that I don't have to tie up [the individuals who brought the records to the court]. So, I'm going to put the onus on you, Mr. Goddard, to—you know, you've got to convince me that you're over the hurdle . . . . Until that, I'm not going to order them unsealed. Is that clear?" The petitioner's attorney replied that it was.

Although the petitioner questioned his criminal trial counsel at the habeas trial concerning the latter's decision not to seek disclosure of the school records, the petitioner never renewed his motion for in camera review of the records or otherwise sought a definitive ruling from the court on the matter before the close of evidence. In lieu of oral closing arguments, the petitioner and the respondent submitted posttrial briefs.

The following legal principles govern our disposition of this claim. "Practice Book § 60-5 provides 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. . . . 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." (Internal quotation marks omitted.) *Ferraro* v. *Ridgefield European Motors, Inc.*, 313 Conn. 735, 758–59, 99 A.3d 1114 (2014). Our Supreme Court has

concluded that the failure to renew a motion following a preliminary denial results in abandonment of that claim on appeal. See, e.g., *State* v. *Francis*, 246 Conn. 339, 352, 717 A.2d 696 (1998) ("because the trial court had ruled only preliminarily and allowed the defendant the opportunity to renew this line of questioning once its relevancy had been established, we conclude that this issue is not reviewable").

At the outset, we conclude that the previously discussed ruling of the habeas court was a preliminary one. It was, therefore, "incumbent on the [petitioner] to seek a definitive ruling . . . in order fully to comply with the requirements of our rules of practice for preserving his claim of error . . . ." *State* v. *Johnson*, 214 Conn. 161, 170, 571 A.2d 79 (1990). The fact that the ruling was preliminary, and that the petitioner was free, at a point later in the habeas trial, to make his offer of proof as to the relevancy of the school records, is plain from the language of the habeas court, which clearly placed such burden on the petitioner.[7]

The petitioner argues that this issue was subsequently preserved because, first, "he explicitly addressed how the records would have been favorable to the defense in his posttrial brief," and, second, the habeas court "expressly ruled on the claim in its memorandum of decision . . . ." We address, and dispose of, each argument in turn.

First, even assuming, arguendo, that the petitioner could successfully renew his motion for in camera review after the close of evidence in a posttrial brief, our review of the brief discloses that he made no such request. To be sure, the petitioner's posttrial brief argued that his criminal trial counsel performed deficiently in not obtaining the victim's school records. The

[7] This conclusion is further borne out by the fact that the court ordered the sealed records lodged with it until their relevancy was established.

petitioner thus claims that he renewed his motion for in camera review in his posttrial brief because he "thoroughly marshaled the evidence . . . to show how the victim's educational records would have been important to obtain to impeach the victim's credibility, and how they contained information that would have been material to his defense." This argument is without merit. It was not the habeas court's responsibility to divine the petitioner's intent, or, sua sponte, to raise again the issue of in camera review. We thus reject the petitioner's argument that his posttrial brief somehow served to renew his motion to conduct an in camera review of the victim's school records.

We are likewise not persuaded by the petitioner's second argument that the habeas court "did not consider [his] claim abandoned because it expressly ruled on the claim in its memorandum of decision . . . ." In its memorandum of decision, the habeas court concluded in part: "The petitioner asserts that his trial defense counsel failed to locate and introduce pertinent evidence that would have led the trial judge to conclude that the petitioner was not guilty. Nevertheless, the petitioner introduced no evidence that had any probative value to show that there was any such exculpatory material out there. To be sure, the petitioner tried to engage in speculative explorations of medical, psychological, and school records of the victim, but since the petitioner did not offer anything concrete to even suggest that there was any reliable admissible evidence contained therein, these records were not unsealed."

We do not believe that this portion of the habeas court's memorandum of decision constitutes a "ruling" on a motion for in camera review of the school records, particularly in light of the fact that, as explained previously, the petitioner did not renew his motion for in camera review in his posttrial brief or otherwise. Rather, the court appeared merely to be referencing its

preliminary ruling on the motion, not articulating a new one. Accordingly, the petitioner's request for in camera review of the victim's school records is not deemed preserved merely because the habeas court briefly addressed the issue in its memorandum of decision.

As a final matter, we address the petitioner's argument, made in passing in his appellate brief, that the habeas court erred because it "appeared to have assumed, without conducting a complete factual inquiry, that the victim would not consent to the release of her educational records." The petitioner refers to a point in the habeas trial when the court, the petitioner, and the respondent discussed whether the victim would waive her right to confidentiality as to certain sealed records that the petitioner subpoenaed. The relevant portion of that discussion is as follows:

"The Court: . . . I have two sealed envelopes here with material that apparently you've subpoenaed. . . . One is the—[the petitioner's] medical file. I presume you have—since you subpoenaed it, that you have no objection to [it] being unsealed.

"[The Petitioner's Counsel]: No objection, Your Honor. . . .

"The Court: And then I have some information from the Wheeler Clinic. . . . Ms. [Eva B.] Lenczewski [counsel for the respondent], do you know if the person who's referred to in these records intends to waive the confidentiality of the records?

"[The Respondent's Counsel]: Your Honor, I've not had any contact with her. I can't imagine that she would. This was a—

"The Court: Well, she might. I don't know.

"[The Petitioner's Counsel]: Well, she's here today. I—

"The Court: I . . . I have no idea, first of all, who she is. I presume that you might, Ms. Lenczewski.

"[The Respondent's Counsel]: I would presume that that is a record of the victim, the minor child at the time, and I would object to any—even questioning her about the consent to open them. It sounds like it's a fishing expedition.

"The Court: Well, I can't say it's a fishing expedition yet, but it certainly is beginning to have that appearance. But the first question is, whether it is or it isn't . . . would you be able to discuss with the person to whom the records pertain as to whether he or she would be willing to waive confidentiality? If so, then that eliminates a lot of problems. If not, then—well, we're right where we are anyway.

"[The Respondent's Counsel]: I would do that if Your Honor wished. I'm told by counsel that the individual is present, and he'll . . .

"The Court: You've never spoken to her, I take it?

"[The Respondent's Counsel]: I have never met her.

"The Court: So, you don't know her?

"[The Respondent's Counsel]: No.

"The Court: In the most broad terms possible, what is it you expect to see in these records?"

Citing no legal authority, the petitioner argues that the habeas court erred when, after the preceding colloquy, it "immediately turned to the question of whether the petitioner had made the requisite showing to overcome a lack of consent, without having confirmed that the victim had, in fact, decided not to waive her consent." The record reveals, however, that this discussion was confined to the subject of the victim's confidential mental health records. There was no discussion during

the habeas trial as to whether the victim should be asked to consent to an in camera review of her confidential school records. Moreover, our review of the record shows that the petitioner did not raise this claim before the habeas court. Accordingly, we elect not to review its merits. See *Ferraro* v. *Ridgefield European Motors, Inc.*, supra, 313 Conn. 758–59.

II

The petitioner next claims that the habeas court erred when it rejected his claim that his criminal trial counsel rendered ineffective assistance. Specifically, the petitioner claims that his criminal trial counsel was deficient in failing (1) to adequately cross-examine the victim about, inter alia, inconsistencies in her testimony, and (2) to obtain the victim's school records. The petitioner also argues that these deficiencies were prejudicial to him. For the reasons provided below, the petitioner cannot prevail on these claims.

A

The petitioner first claims that his criminal trial counsel performed deficiently in cross-examining the victim. More specifically, the petitioner asserts that counsel failed to challenge the victim with respect to "several glaring inconsistencies" in her testimony and failed to adequately cross-examine her in order to establish a more definite time period during which the alleged instances of abuse occurred. The respondent argues, however, that these issues are not reviewable because the petitioner failed to raise them in his amended habeas petition, and the habeas court did not address their merits in its decision. We agree with the respondent and therefore decline to review the merits of this claim.

The following legal principles guide our analysis. "Practice Book § 60-5 provides . . . 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." (Internal quotation marks omitted.) *Ferraro* v. *Ridgefield European Motors, Inc.*, supra, 313 Conn. 758–59. "A petition for a writ of habeas corpus must set forth specific grounds for the issuance of the writ. Practice Book § 23-22 (1) specifically provides that the petition shall state the specific facts upon which each specific claim of illegal confinement is based and the relief requested . . . . A reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court. . . . Appellate review of claims not raised before the habeas court would amount to an ambuscade of the [habeas] judge." (Internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 131 Conn. App. 336, 351, 27 A.3d 404 (2011), aff'd, 312 Conn. 345, 92 A.3d 944 (2014).

As to the petitioner's argument that his criminal trial counsel was deficient in failing to challenge the victim with respect to inconsistencies in her testimony, the petitioner identifies two such inconsistencies. The first occurred when, at the criminal trial, the victim testified that the petitioner had abused her five times,[8] in contrast to a statement to the police in which she reported six to seven instances. The second claimed inconsistency occurred when, as previously discussed in footnote 4 of this opinion, in response to a question from the prosecution as to whether the petitioner initiated any other sexual contact with the victim in the petitioner's bedroom, the victim recounted another incident that did not involve any physical contact. In his amended habeas petition, the petitioner did not assert these claims of failure to explore inconsistencies in the victim's testimony, nor did the habeas court, in its written memorandum of decision, address them. We therefore decline to reach the merits of these claims.

[8] We note that one of these instances, as described by the victim, did not involve physical contact. See footnote 4 of this opinion.

As to the petitioner's argument that his criminal trial counsel was deficient in failing to adequately cross-examine the victim in order to establish a more definite time period during which the alleged instances of abuse occurred, thereby forgoing an opportunity to impeach the victim or develop an alibi defense, this particular claim also does not appear in the amended habeas petition, nor did the habeas court address the matter. We therefore decline to reach the merits of this claim as well.

In his reply brief, the petitioner nonetheless argues that the preceding issues were preserved because, first, in his amended habeas petition, he asserted that his criminal trial counsel was ineffective for failing to obtain the victim's school records. The petitioner continues: "The sole purpose in obtaining these records was to cross-examine, impeach, or otherwise challenge the victim's testimony. There was no other reason to obtain these records." Such a position essentially obligates the habeas court to divine the petitioner's intent. To the contrary: it is the petitioner's responsibility to clearly present his claim to the habeas court, as well as the specific facts upon which his claim relies. See *Rodriguez* v. *Commissioner of Correction*, supra, 131 Conn. App. 351.

Second, the petitioner argues that he properly raised these claims because, in his posttrial brief, he asserted: "Counsel failed to obtain documentary evidence that would have compromised the victim's credibility, failed to adequately cross-examine the victim regarding her glaring inconsistencies, many of which proved the incidents could not have happened." The petitioner's posttrial brief goes on to discuss alleged ineffectiveness by his criminal trial counsel for, inter alia, failing to adequately cross-examine the victim about the time line of the abuse. However, we again observe that "[a] reviewing court will not consider claims not raised in

the habeas petition or decided by the habeas court." (Internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, supra, 131 Conn. App. 351; see also *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 169, 10 A.3d 578 ("[i]t is well settled that [t]he 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 upon what he has 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. . . . This court is not bound to consider claimed errors unless it appears on the record that the question was distinctly raised . . . and was ruled upon and decided by the court adversely to the appellant's claim." [Internal quotation marks omitted.]), cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011). Thus, even if we were to conclude that the petitioner raised in his posttrial brief his claim that his criminal trial counsel was ineffective in cross-examining the victim, such claim would still be unpreserved on appeal because the petitioner did not distinctly raise it in his habeas petition, nor did the habeas court specifically rule on it in its memorandum of decision. We therefore decline to review the merits of the petitioner's claim that his criminal trial counsel was ineffective for failing to adequately cross-examine the victim.

B

The petitioner next claims that his criminal trial counsel performed deficiently because she did not obtain the victim's school records. The petitioner asserted this claim in his amended habeas petition, as well as in his posttrial brief. Furthermore, the habeas court addressed this issue in its memorandum of decision. The petitioner has therefore preserved this claim for appeal. However, for the reasons provided below, the petitioner cannot prevail with respect to this claim.

We begin with the applicable standard of review. "[T]he right to counsel is the right to the effective assistance of counsel. . . . There are two components of a claim of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 424, 589 A.2d 1214 (1991).

"The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. . . . Whether the representation a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 285 Conn. 585, 597–98, 940 A.2d 789 (2008).

The habeas court concluded with regard to this claim: "The petitioner asserts that his trial defense counsel failed to locate and introduce pertinent evidence that would have led the trial judge to conclude that the petitioner was not guilty. Nevertheless, the petitioner introduced no evidence that had any probative value to show that there was any such exculpatory material out there. To be sure, the petitioner tried to engage in speculative explorations of medical, psychological, and school records of the victim, but since the petitioner did not offer anything concrete to even suggest that there was any reliable admissible evidence contained therein, these records were not unsealed. . . . Simply

put, there is no basis at all in any of the evidence put forth to conclude that [the petitioner's criminal trial counsel] was in any way ineffective."

The petitioner claims that "[t]here was no reasonable strategic basis for [the petitioner's criminal trial counsel] not to obtain the victim's [school] records because the prosecuting authority's case was based entirely on the credibility of the victim, and the only information that she had to undermine the credibility of the victim was obtained from biased sources." The petitioner argues that had his criminal trial attorney obtained the records, she would have been able to, first, impeach the victim by revealing that she had been skipping school and was suspended for stealing, and that she deceived her parents as to her involvement in both of these activities; and, second, establish a time line of the abuse that could have led to the development of an alibi defense. We address, and dispose of, each argument as follows.

As to the petitioner's argument that the victim's school records would have disclosed material with which to impeach the victim's credibility—namely, that the victim had been skipping school and was suspended for stealing—the problem, of course, is that because the habeas court did not unseal the victim's school records, we do not in fact know whether those factual assertions are correct.[9] Thus, we cannot conclude on

[9] To be sure, the petitioner testified before the habeas court that the victim was disciplined by her school for stealing a cell phone. However, in its memorandum of decision, the habeas court concluded in part: "The petitioner is deemed not to be credible as almost all of his statements in his testimony were self-serving and unworthy of belief." As explained previously, we must accept the credibility determinations of the habeas court unless they are clearly erroneous. See *Crawford* v. *Commissioner of Correction*, supra, 285 Conn. 597. Our review of the record does not reveal, and the petitioner has not identified, any evidence persuading us that this credibility determination is clearly erroneous. Additionally, the petitioner presented no evidence purporting to show that the victim had been skipping school.

this basis that the petitioner's criminal trial counsel performed deficiently in failing to obtain the victim's school records.

We likewise find no merit in the petitioner's second argument that, had his criminal trial counsel obtained the victim's school records, "she could have used them to cross-examine the victim about the date that school started and narrow down the time line of the five incidents of sexual abuse." The petitioner's argument in this regard appears to proceed as follows: the petitioner's criminal trial counsel failed to obtain the victim's 2009–2010 school calendar,[10] which would have shown that the victim began school on August 27, 2009. Using this date and the victim's testimony concerning the time line of the abuse, including, apparently, her testimony that one incident occurred on the afternoon of a day when she had been disciplined at school, the petitioner reasons that the instances of abuse could have occurred only within a period of three consecutive days in late August, 2009. The petitioner continues: "Had trial counsel narrowed down the time line of the abuse to a three day period, she could have developed an alibi defense to present at the petitioner's trial."

This argument relies on a faulty factual premise, to wit: the victim testified that all of the instances of abuse occurred in August, 2009. The more plausible reading of the victim's testimony is that the abuse merely *began* in August, 2009, at about the time that the victim's school year began.[11] Moreover, this claim rests on the

[10] For reasons that are not immediately apparent, the petitioner seems to equate the victim's generic school calendar with her confidential school records. There is no evidence that the victim's school calendar, which was entered as an exhibit in the habeas trial, is confidential.

[11] As previously discussed, the victim initially testified before the trial court that the instances of abuse happened in the "summertime" of 2009. However, after being prompted to clarify by the trial court, she stated that "[i]t was at . . . the end of the summertime that this all started that we were just starting to go back to school." When asked by the court whether "summertime" meant "like, August," the victim answered, "Yes."

unproven premise that, had specific dates been identified by means of the calendar and other school records, the petitioner could have provided compelling alibi evidence for such dates.[12] This being the case, we fail to see how the victim's school calendar or disciplinary record (the existence of which, we have noted, is entirely conjectural at this point) provide any material exculpatory to the petitioner. See *Griffin* v. *Commissioner of Correction*, 119 Conn. App. 239, 241–42, 987 A.2d 1037 ("[i]n a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . *but by demonstrable realities*" [emphasis in original; internal quotation marks omitted]), cert. denied, 295 Conn. 912, 989 A.2d 1074 (2010).

Accordingly, the habeas court's conclusion that the petitioner failed to demonstrate that his criminal trial counsel performed deficiently was not in error, as there is no evidence that the victim's school records contained evidence that could have been employed to exonerate the petitioner. Consequently, we need not address the petitioner's prejudice argument. See *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 704, 23 A.3d 682 (2011) ("[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").

The judgment is affirmed.

In this opinion the other judges concurred.

[12] It is perplexing that the petitioner argues that his criminal trial counsel performed deficiently for failing to pursue an alibi defense, while at the same time providing no information whatsoever as to what that alibi might have been, despite the fact that, under the petitioner's (albeit flawed) reasoning, "[t]here was only a three day period in which the five [instances of abuse] could have occurred." (Emphasis omitted.)

ANGEL NIEVES *v.* COMMISSIONER OF CORRECTION (AC 38172)

Beach, Keller and Norcott, Js.

Syllabus

The petitioner, who had been convicted of the crime of murder in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance by failing to introduce into evidence the purportedly exculpatory statement of a witness under the spontaneous utterance exception to the hearsay rule. Specifically, subsequent to the shooting incident the witness had given a statement to the police describing the shooter as having neck tattoos. The petitioner claimed that because he did not have tattoos on his neck, the statement by the witness was exculpatory and should have been presented by trial counsel at his criminal trial. In a subsequent statement to the police, the witness specifically identified the petitioner as the shooter. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly determined that trial counsel's representation of the petitioner was not deficient with respect to counsel's decision not to introduce the witness' statement that the shooter had neck tattoos: trial counsel testified that the decision not to attempt to offer the witness' statement regarding the neck tattoos was a matter of trial strategy, as counsel were concerned about the possibility of the state offering into evidence the second statement by the witness identifying the petitioner as the shooter, which would have been damaging to the petitioner, this court would not second-guess counsel's decision that presenting the first statement was potentially harmful to the case, and even if the first statement was a spontaneous utterance and admissible as an exception to the hearsay rule, counsel was not required to present it, as the presentation of testimonial evidence is a matter of trial strategy; moreover, there were multiple strategic reasons not to offer the witness' statement regarding the tattoos, despite its potentially exculpatory weight, and the petitioner failed to demonstrate that the second statement identifying the petitioner as the shooter would not have been admitted into evidence due to the witness' violation of a sequestration order.

Argued September 20—officially released December 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; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Damon A. R. Kirschbaum, with whom, on the brief, was *Vishal K. Garg*, for the appellant (petitioner).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

NORCOTT, J. Following a grant of certification to appeal, the petitioner, Angel Nieves, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly concluded that he had not demonstrated that his trial counsel rendered ineffective assistance by failing to present an exculpatory statement made by a state's witness describing the perpetrator of the crime with which the petitioner was charged. We disagree and, accordingly, affirm the judgment of the habeas court.

The following undisputed facts and procedural history are relevant to the disposition of the petitioner's claims. The victim was murdered during a shooting incident on April 18, 2002. *State* v. *Nieves*, 106 Conn. App. 40, 43, 941 A.2d 358, cert. denied, 286 Conn. 922, 949 A.2d 482 (2008). The petitioner was arrested as a suspect in March, 2003.[1] Of the six witnesses who testified, three gave a similar description of the shooter to the police and again at trial, and three positively

[1] The petitioner turned himself in to the authorities after evading the police for almost a year.

identified the petitioner as the shooter in court.[2] One witness testified that the petitioner admitted to murdering the victim. The witness whose statement is at issue in this case, Maria Quinones, did not testify but gave the same general description of the shooter to Christine Mertes, the canvassing officer. Unlike other witnesses, however, Quinones described the shooter as having neck tattoos.[3]

On May 31, 2005, following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a), carrying a pistol without a permit in violation of General Statutes § 29-35, and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). On August 30, 2005, the petitioner was sentenced to a total effective term of sixty-eight years of imprisonment. The petitioner's conviction was affirmed on direct appeal. See id., 40.

On December 16, 2014, the petitioner filed an amended petition for a writ of habeas corpus, alleging

[2] Although the descriptions varied slightly, three witnesses agreed that the shooter was Hispanic and wore a yellow T-shirt and jeans or dark shorts. Two of those three also testified that the shooter was five feet, seven inches, or five feet, eight inches. One in-court witness testified that the petitioner was the shooter, but refused to look at him for in-court identification. The trial court noted that it had "very reluctant, frightened . . . witnesses in this case."

[3] According to the record, the petitioner does not have neck tattoos, and, therefore, it was of value to the petitioner to have eyewitness testimony describing the shooter as having such. In an oral statement to Mertes on the night of the murder, Quinones described the tattoos as praying hands on the right side of the shooter's neck, and Japanese writing on the left side. The petitioner alleges in his brief that another witness, Norman Figueroa, also described the shooter as having neck tattoos. However, Figueroa's alleged statement is not corroborated by the record, nor does the petitioner argue that the statement should have been presented by trial counsel, and there is no mention or analysis of any impact of such potential testimony in the petitioner's brief. We therefore deem this argument abandoned and decline to review it. See *Fradianni* v. *Protective Life Ins. Co.*, 145 Conn. App. 90, 92 n.2, 73 A.3d 896 (claim or argument not briefed deemed abandoned), cert. denied, 310 Conn. 934, 79 A.3d 888 (2013).

that his trial counsel provided ineffective assistance because they[4] failed to offer as "substantive evidence a statement relating to the identification of the shooter under an exception to the hearsay rule." On March 16, 2015, the habeas court, *Oliver, J.*, heard evidence at a hearing on the petition. On June 19, 2015, the court denied the petition, finding that trial counsel had not provided ineffective assistance. The petitioner then filed a petition for certification to appeal from the court's judgment, which the court granted on July 2, 2015. This appeal followed. Additional facts will be set forth as necessary.

The petitioner first claims that his trial counsel rendered ineffective assistance by failing to introduce the purportedly exculpatory statement of Quinones, despite its potential availability under the spontaneous utterance exception to the hearsay rule, which was based on trial counsel's "erroneous belief that the identification was an inadmissible out-of-court statement." We are not persuaded.

We begin by setting forth the applicable standard of review. "A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 686, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 647 (1984)], [our Supreme Court] has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. . . . The claim will succeed only if both prongs

[4] Two attorneys, George Flores and Sara Bernstein, represented the petitioner at trial; he alleges that both rendered ineffective assistance.

are satisfied." (Internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 538, 138 A.3d 378 (2016).

"[According to] *Strickland*, [an ineffective assistance of counsel] 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." (Emphasis in original; internal quotation marks omitted.) *Hall* v. *Commissioner of Correction*, 124 Conn. App. 778, 782–83, 6 A.3d 827 (2010), cert. denied, 299 Conn. 928, 12 A.3d 571 (2011).

"In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Delvecchio* v. *Commissioner of Correction*, 149 Conn. App. 494, 500, 88 A.3d 610, cert. denied, 312 Conn. 904, 91 A.3d 906 (2014). "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." (Internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, 147 Conn. App. 331, 338–39, 82 A.3d 658 (2013), cert. denied, 311 Conn. 916, 84 A.3d 883 (2014).

As to the performance prong, "[i]t is well established that when analyzing a claim of ineffective assistance, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Sanders* v. *Commissioner*

of Correction, 83 Conn. App. 543, 551, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004).

"[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. 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." (Internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 539.

The facts found by the habeas court regarding trial counsel's representation of the petitioner will not be disturbed absent a showing that they were clearly erroneous. *Banks* v. *Commissioner of Correction*, supra, 147 Conn. App. 338. The court's ultimate determination as to whether these findings satisfy the legal standard for ineffective assistance of counsel, however, is subject to plenary review. Id.

In the present case, the habeas court determined that trial counsel's representation of the petitioner was not deficient with respect to counsel's decision not to introduce Quinones' statement that the shooter had neck tattoos under the spontaneous utterance exception to the hearsay rule. The court also found that the petitioner

was not prejudiced by his trial counsel's performance. Specifically, the court correctly and succinctly found that Quinones, in a subsequent statement to the police, "specifically identif[ied] the petitioner as the shooter," and that counsel's decision not to attempt to offer the statement regarding the neck tattoos "was based on their carefully considered legal opinions and experience . . . ." The court found that counsel "did not think the initial statement qualified as an excited utterance" and were concerned about the possibility of the state offering into evidence Quinones' second statement identifying the petitioner as the shooter as a response to any attempt to introduce the statement regarding the neck tattoos. The court further refused to "assume that the jury would have credited the oral statement offered by the defense to such a degree that it would have overcome not only the evidence in the trial record, but a later identification by that same witness of the petitioner as the killer." These determinations, combined with the state's "strong case against the petitioner, including several eyewitnesses to the murder of the victim," supported a finding that the petitioner had not suffered any prejudice.

We note that "our review of an attorney's performance is especially deferential when his or her decisions are the result of relevant strategic analysis. . . . Thus, [a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken." (Citation omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 540–41.

The petitioner's trial counsel specifically testified before the court that they had considered and chosen not to present Quinones' statement as part of their trial

strategy. They weighed that choice against the alternative, which was to present it and risk the state offering into evidence her subsequent statement identifying the petitioner as the shooter. Thus, even if Quinones' statement regarding the neck tattoos was a spontaneous utterance, and, thus, admissible as an exception to the rule against hearsay,[5] the petitioner's trial counsel were not obligated to present it. "[T]he presentation of testimonial evidence is a matter of trial strategy." *Chace* v. *Bronson*, 19 Conn. App. 674, 680–81, 564 A.2d 303, cert. denied, 213 Conn. 801, 567 A.2d 832 (1989).

Trial counsel reasonably determined that offering Quinones' statement would have hurt, rather than helped, the petitioner's case.[6] "[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not

[5] "The excited utterance exception is well established. Hearsay statements, otherwise inadmissible, may be admitted into evidence to prove the truth of the matter asserted therein when (1) the declaration follows a startling occurrence, (2) the declaration refers to that occurrence, (3) the declarant observed the occurrence, and (4) the declaration is made under circumstances that negate the opportunity for deliberation and fabrication by the declarant." (Internal quotation marks omitted.) *State* v. *Kendall*, 123 Conn. App. 625, 666, 2 A.3d 990, cert. denied, 299 Conn. 902, 10 A.3d 521 (2010). Mertes testified at the habeas trial that Quinones appeared excited and upset while describing the shooter. The petitioner relies on this testimony in an attempt to argue that Quinones' statement would unequivocally have been admitted under the spontaneous utterance exception to the hearsay rule. This is not necessarily so. The record reflects that Mertes did not have immediate contact with her after the shooting. Therefore, it is not clear that Quinones' statement was admissible under the spontaneous utterance exception, as it must have been made under such circumstances as to negate the "opportunity for deliberation and fabrication by the declarant." (Internal quotation marks omitted.) Id. Regardless, and as later explained, we need not reach a conclusion as to whether Quinones' statement qualified as a spontaneous utterance.

[6] The petitioner also argues that trial counsel failed to adequately research whether Quinones' statement would fall under the spontaneous utterance exception. In light of the fact that trial counsel weighed the potential admission of Quinones' statement against other potentially damaging evidence that would then have likely been admitted, we need not address whether such a failure constitutes deficient performance.

to investigate or call certain witnesses or to investigate potential defenses, such as when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or *potentially harmful to the case* . . . ." (Emphasis added.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 681–82, 51 A.3d 948 (2012).

Here, there were multiple reasons for trial counsel not to present Quinones' statement.[7] Quinones' other descriptions of the shooter in her first statement were virtually identical to those of the other eyewitnesses, and thus, it is inconceivable that, as the petitioner argues, this evidence would have "significantly undermined the state's case against [him]." Presenting the first statement would allow the state to then explore potential explanations for the discrepancy between her first statement and those of the other eyewitnesses.[8] Trial counsel would therefore have had to impeach their own witness. Offering the statement regarding the neck tattoos also would have allowed the state to not only call Quinones as a witness, but also to offer Quinones' subsequent identification statement through the testimony of the lead detective, William Siemionko.[9] Conn. Code Evid. § 8-8 (impeachment of nontestifying declarant with inconsistent statement).[10] That statement, if

[7] In reconstructing the circumstances, "a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632, 126 A.3d 558 (2015).

[8] The discrepancy between Quinones' original statement and the other eyewitnesses' testimony was perhaps due to a fear of retaliation by the petitioner, as it appeared from the record that more than one witness was fearful of presenting testimony against him.

[9] Quinones' identification statement was originally made to Detective Siemionko during the course of his investigation.

[10] Section 8-8 of the Connecticut Code of Evidence states: "When hearsay has been admitted in evidence, the credibility of the declarant may be impeached, and if impeached may be supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.

admitted, would have been potentially harmful to the petitioner's case, as it would have not only discredited Quinones' original statement regarding the tattoos, but would have amounted to evidence of another eyewitness identification.[11] Trial counsel testified during the habeas trial proceedings that presenting testimony through Mertes' report was imprudent as police officers are aligned with the state. Thus, there were multiple strategic reasons to not offer Quinones' statement regarding the tattoos, despite its potentially exculpatory weight.

The petitioner also argues that the court erred in concluding that Quinones' statement identifying the petitioner as the shooter would have been admitted into evidence. Specifically, the petitioner asserts that there was no reasonable basis for the state to present Quinones as a witness to testify with regard to her identification of the petitioner as the shooter due to her violation of a sequestration order. However, the petitioner does not cite any case law to support his argument that the sole remedy to a violation of a sequestration order is to preclude that witness' testimony in its entirety. In fact, while a court "may choose to preclude a witness from testifying or to strike a witness' testimony to remedy unfairness resulting from a violation . . . the exclusion of witness testimony . . . is not the preferred remedy for a violation of a sequestration order." (Citation omitted; internal quotation marks omitted.) *State* v. *Guerrera*, 167 Conn. App. 74, 99, 142 A.3d 447, cert. granted on other grounds, 323 Conn. 922, 150 A.3d 1152 (2016). As Quinones' subsequent statement identi-

Evidence of a statement of the declarant made at any time, inconsistent with the declarant's hearsay statement, need not be shown to or the contents of the statement disclosed to the declarant."

[11] The record also reflects that Quinones knew the petitioner, which would amount to an additional reason not to try to admit her statement into evidence.

fying the petitioner as the shooter probably could[12] have been admitted under several scenarios, we must reject the petitioner's argument.

For the foregoing reasons, the habeas court properly concluded that the petitioner's trial counsel had not performed below an objective standard of reasonableness. Accordingly, the petitioner's claim of ineffective assistance fails to satisfy the performance prong of *Strickland*,[13] and we need not reach whether the petitioner was prejudiced[14] in a way that deprived him of a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

[12] We have set forth a variety of ways that the trial court could have admitted Quinones' statement. It is well settled that a trial court's "ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Dunbar*, 51 Conn. App. 313, 323–24, 721 A.2d 1229 (1998), cert. denied, 247 Conn. 962, 724 A.2d 426 (1999). Thus, the trial court would likely have been well within its province to admit Quinones' statement under the previously mentioned methods.

[13] Because the petitioner has failed to meet the performance prong of *Strickland*, we need not reach the issue of prejudice under *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). "It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Emphasis omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 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).

[14] It should be noted that the petitioner, in his brief, equates the duty of defense counsel under *Strickland* to provide effective assistance of counsel to the duty of prosecutors under *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose exculpatory evidence. In sum, the petitioner argues that this court should conclude that the failure of trial counsel to present Quinones' testimony is equivalent to a *Brady* violation because of its exculpatory content. This is incorrect and must be addressed. Prosecutors have a duty under *Brady* and rule 3.8 (4) of the Rules of Professional Conduct to disclose "to the defense . . . all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ." No such duty applies to defense counsel. As explained previously, defense counsel has the discretion to make a strategic decision whether to present a witness' statement that, although potentially exculpatory in nature, may hurt rather than help the defense case.

PARILLO FOOD GROUP, INC. *v.* BOARD OF ZONING APPEALS OF THE CITY OF NEW HAVEN (AC 38023)

Alvord, Sheldon and Mullins, Js.

Syllabus

The plaintiff restaurant appealed from the decision of the defendant board of zoning appeals granting the plaintiff's application for a special exception to operate the restaurant with a full liquor permit and imposing a condition limiting the plaintiff's hours of operation. The plaintiff previously had a special exception that permitted the service of wine and beer but, following a fire, the plaintiff rebuilt the restaurant and filed an application for a special exception to operate with a full restaurant liquor permit. The defendant granted the application subject to, inter alia, the condition that limited the plaintiff's hours of operation. The plaintiff appealed to the trial court, claiming that the defendant lacked the authority to impose the condition because the Liquor Control Act (§ 30-1 et seq.) governed the hours of operation for restaurants authorized to provide full liquor service. The plaintiff claimed that its hours of operation could only be limited pursuant to statute (§ 30-91 [b]) by vote of a town meeting or by ordinance to reduce the number of hours during which sales of alcoholic liquor are permissible in the municipality. The trial court concluded that the defendant could not limit the hours of sale of alcohol under the guise of zoning and that this condition of the special exemption was illegal. The defendant, on the granting of certification, appealed to this court, claiming that the trial court improperly concluded that the Liquor Control Act divested the defendant of the power to attach conditions limiting the hours of operation of restaurants that serve alcohol. *Held* that the trial court improperly determined that the defendant was precluded from imposing the condition restricting the plaintiff's hours of operation and improperly determined that the condition was illegal, as that condition limiting the plaintiff's hours of operation was authorized by the local zoning regulations and was not in conflict with the provisions of § 30-91 (b): the legislature did not intend to occupy the entire field of regulation under the Liquor Control Act, but rather intended that municipalities and local zoning boards have some input regarding the location of establishments that sell alcohol and conditions relating to the operation of those businesses; furthermore, there was no conflict between the defendant's authority under the local zoning regulations to impose the condition that limited the plaintiff's hours, which was based on the adverse effect on the public convenience and the welfare of neighboring residential uses resulting from this particular change in the plaintiff's business to full alcohol

service together with the addition of a bar, and the purpose and intent of § 30-91 (b), which permits a town to limit the hours of service in all types of businesses selling alcohol in all of the zoning districts in town because of a general determination that such a limitation is in the best interests of the town.

Argued October 5—officially released December 6, 2016

Procedural History

Appeal from the decision by the defendant granting the plaintiff's application for a special exception in connection with the operation of a restaurant with a liquor permit, with conditions, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Blue*, *J.*; judgment sustaining the appeal in part, from which the defendant, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Proloy K. Das, with whom were *Roderick R. Williams*, assistant corporation counsel, and, on the brief, *Sarah Gruber*, for the appellant (defendant).

Brian F. Valko, with whom was *Amy P. Blume*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, the Board of Zoning Appeals of the City of New Haven, appeals from the judgment of the trial court sustaining the appeal of the plaintiff, Parillo Food Group, Inc., from the defendant's decision granting the plaintiff's application for a special exception to operate a restaurant serving liquor that imposed a condition limiting its hours of operation. On appeal, the defendant claims that the court improperly concluded that it had no authority to limit the hours of operation of the plaintiff's restaurant.[1] Specifically, the

[1] The defendant granted the special exception subject to five conditions, two of which were not challenged by the plaintiff and two of which the defendant conceded were advisory and not integral to the decision. The only condition at issue is the first condition: "Hours of operation not to extend past 11:30 p.m. daily. (Consistent with conditions attached to similar requests in this neighborhood.)"

defendant claims that the court (1) should have determined that municipal zoning boards have the authority to place temporal restrictions on special exception uses, (2) erroneously concluded that Connecticut's Liquor Control Act, General Statutes § 30-1 et seq., divests the defendant of its power to attach conditions limiting the hours of operation of restaurants that serve alcohol, and (3) erroneously concluded that the challenged condition was not integral to the defendant's approval of the special exception. We agree with the defendant's second claim and, accordingly, reverse the judgment of the trial court.[2]

The record reveals the following facts and procedural history. The plaintiff leases property on State Street in New Haven, on which it operates a restaurant. The property is situated in a BA zone, and the area surrounding the restaurant is used for both residential and commercial purposes. Three dwelling units are located above the restaurant, and there also is a separate two-family dwelling located on the subject property. The use of the property as a restaurant began in the 1990s.

In August, 2000, the defendant granted a special exception to Amato Bernardo that permitted the service

[2] With respect to the defendant's first claim, the plaintiff does not challenge the authority of municipal zoning boards to impose temporal conditions, in certain situations, on special exception uses. Nevertheless, the defendant urges this court to "clarify that municipal zoning authorities may place reasonable hours of operation restrictions on local businesses when considering applications for special exceptions." Because this issue is not in controversy between the parties, we decline to address it. "This court does not render advisory opinions. . . . As our Supreme Court explained more than a century ago, [s]uch action on our part would be clearly extrajudicial. It would be a case purely of advice and not of judgment." (Citations omitted; internal quotation marks omitted.) *National Amusements, Inc.* v. *East Windsor*, 84 Conn. App. 473, 485, 854 A.2d 58 (2004).

We also do not address the defendant's third claim. Because we conclude that the defendant had the authority to impose the condition limiting the hours of operation, it is not necessary to determine whether that condition was integral to the defendant's approval of the special exception.

of wine and beer in the then existing forty-two seat restaurant. In September, 2011, the plaintiff leased the restaurant portion of the property. In January, 2012, the restaurant was severely damaged by fire. The plaintiff expended approximately $15,000 to rebuild the restaurant, and, on January 25, 2013, it filed an application for a special exception to operate a forty-seven seat restaurant with a full restaurant liquor permit. Additionally, the plaintiff requested permission to allow three on-site parking places instead of the twelve spaces ordinarily required for a forty-seven seat restaurant.

The defendant held a public hearing on the plaintiff's application on March 12, 2013. Several individuals attended the hearing, some speaking in favor of the proposal and others speaking against it. Exhibits were submitted to the defendant, including an advisory report prepared by the New Haven City Plan Department (department) and an advisory report prepared by the New Haven City Plan Commission (commission). At a voting session held on April 9, 2013, the defendant's board members discussed the plaintiff's application and the commission's suggestions in its report. The members voted unanimously to approve the special exception subject to the five conditions stated in that report. By letter dated April 12, 2013, the defendant notified the plaintiff of its decision. The plaintiff appealed to the Superior Court, challenging the authority of the defendant to impose the conditions.

The trial court held a hearing on November 13, 2014. The court heard testimony from Daniel Parillo, the president of the plaintiff corporation, and found that the plaintiff was aggrieved.[3] Following that determination, the parties' counsel presented their arguments to the court. They agreed that the pivotal issue before the court was whether the defendant had the authority to

[3] The court's finding of aggrievement has not been challenged on appeal.

impose a limitation on the hours of the restaurant's operation as set forth in the first condition attached to the special exception. That condition provided: "Hours of operation not to extend past 11:30 p.m. daily. (Consistent with conditions attached to similar requests in this neighborhood.)" Although not expressly alleged in its administrative appeal or argued in its pretrial brief, plaintiff's counsel claimed at the hearing that the provisions of the Liquor Control Act governed the hours of operation for restaurants authorized to provide full liquor service.[4] According to the plaintiff, only a town, by vote of a town meeting or by ordinance; see General Statutes § 30-91 (b);[5] could limit those hours of operation. The trial court allowed both parties to submit supplemental briefs addressed to that particular issue.

The court issued its memorandum of decision on December 12, 2014. The court made the following determination: "Local authorities unquestionably have a general power to regulate health, safety, and welfare factors affecting establishments where liquor is sold. . . . Such regulation must, however, be done in a comprehensive, but not inconsistent, manner. . . . When local authorities seek to regulate the hours of operation of establishments selling alcoholic beverages . . . § 30-91 (b) tells them exactly how to do this. They must do so by vote of a town meeting or by ordinance." (Citations

[4] General Statutes § 30-91 (a) provides in relevant part: "The sale or the dispensing or consumption or the presence in glasses or other receptacles suitable to permit the consumption of alcoholic liquor by an individual in places operating under . . . restaurant permits . . . shall be unlawful on: (1) Monday, Tuesday, Wednesday, Thursday and Friday between the hours of one o'clock a.m. and nine o'clock a.m.; (2) Saturday between the hours of two o'clock a.m. and nine o'clock a.m.; (3) Sunday between the hours of two o'clock a.m. and eleven o'clock a.m. . . ."

[5] General Statutes § 30-91 (b) provides in relevant part: "Any town may, by vote of a town meeting or by ordinance, reduce the number of hours during which sales under subsection (a) of this section, except sales pursuant to an airport restaurant permit, airport bar permit or airport airline club permit, shall be permissible. . . ."

omitted; internal quotation marks omitted.) Citing *Bora* v. *Zoning Board of Appeals*, 161 Conn. 297, 302, 288 A.2d 89 (1971), and *Greenwich* v. *Liquor Control Commission*, 191 Conn. 528, 540, 469 A.2d 382 (1983), the court concluded that the defendant could not limit the hours of sale of alcohol under the guise of zoning. Accordingly, the court found the condition limiting the plaintiff's hours of operation to be illegal. After finding that the condition was not an integral component of the defendant's decision, the court modified that decision by removing that condition from the approval of the special exception. The defendant filed the present appeal after this court granted its petition for certification to appeal.

We first set forth the applicable legal principles and standard of review that guide our analysis. "In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule,[6] according to which, [c]onclusions reached by [a zoning] commission must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission]. . . .

[6] "This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely consistent with effective administration. . . . The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the decision of the board." (Internal quotation marks omitted.) *Meriden* v. *Planning & Zoning Commission*, 146 Conn. App. 240, 247, 77 A.3d 859 (2013).

The question is not whether the trial court would have reached the same conclusion, but whether the record before the [commission] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Citations omitted; footnote added; internal quotation marks omitted.) *Municipal Funding, LLC* v. *Zoning Board of Appeals*, 270 Conn. 447, 453, 853 A.2d 511 (2004).

With respect to special exceptions, "General Statutes § 8-2 (a) provides in relevant part that local zoning regulations may provide that certain . . . uses of land are permitted only after obtaining a special permit or special exception . . . subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. . . . The terms special permit and special exception are interchangeable. . . . A special permit allows a property owner to use his property in a manner expressly permitted by the local zoning regulations. . . . The proposed use, however, must satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values. . . . An application for a special permit seeks permission to vary the use of a particular piece of property from that for which it is zoned, without offending the uses permitted as of right in the particular zoning district. . . . When ruling upon an application for a special permit, a planning and zoning board acts in an administrative capacity. . . . [Its] function . . . [is] to decide

within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. . . . We have observed that the nature of special [permits] is such that their precise location and mode of operation must be regulated because of the topography, traffic problems, neighboring uses, etc., of the site. . . . Review of a special permit application is inherently fact-specific, requiring an examination of the particular circumstances of the precise site for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed facility would be built." (Citations omitted; internal quotation marks omitted.) *Meriden* v. *Planning & Zoning Commission*, 146 Conn. App. 240, 244–45, 77 A.3d 859 (2013). When considering an application for a special permit, a zoning board is called upon to make a decision as to whether a particular proposal would be compatible with the particular zoning district "under the circumstances then existing." *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, 222 Conn. 607, 614, 610 A.2d 1205 (1992).

"The general conditions such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit. . . . [B]efore the zoning commission can determine whether the specially permitted use is compatible with the uses permitted as of right in the particular zoning district, it is required to judge whether any concerns, such as parking or traffic congestion, would adversely impact the surrounding neighborhood. . . . Connecticut courts have never held that a zoning commission lacks the ability to exercise discretion to determine whether the general standards in the regulations have been met in the special permit process. . . . If the special permit process were purely ministerial there would

be no need to mandate a public hearing." (Internal quotation marks omitted.) *Children's School, Inc.* v. *Zoning Board of Appeals*, 66 Conn. App. 615, 619–20, 785 A.2d 607, cert. denied, 259 Conn. 903, 789 A.2d 990 (2001). Where a special exception is involved, "the board may impose conditions only to the extent allowed by the zoning regulations themselves. . . . Without such a grant of power, the board . . . would be unable to impose a condition even where one was obviously desirable." (Citations omitted.) *Shulman* v. *Zoning Board of Appeals*, 154 Conn. 426, 429, 226 A.2d 380 (1967).

It is undisputed that the plaintiff is entitled to operate a restaurant as a permitted use in the BA zone. In order to serve alcoholic liquor, however, the plaintiff was required to obtain a special exception pursuant to article V, § 42, of the New Haven Zoning Ordinance (regulations). Section 63 (d) of the regulations, pertaining to special exceptions, provides the following statement of purpose: "It is recognized . . . that there are certain uses and features which, because of their unique characteristics, cannot be distinctly classified or regulated in a particular district or districts, without consideration, in each case, of the impact of such uses and features upon neighboring uses and the surrounding area, compared with the public need for them at particular locations. Such uses and features are therefore treated as special exceptions." (Emphasis omitted.)

Section 63 (d) (3) of the regulations provides the defendant with the following guidelines in evaluating an application for a special exception: "Special exceptions shall be granted only where the [defendant] finds that the proposed use or feature or the proposed extension or substantial alteration of an existing use or feature is in accord with the public convenience and welfare after taking into account, where appropriate . . . (b) [t]he resulting traffic patterns and adequacy of proposed off-street parking and loading . . . (c) [t]he

nature of the surrounding area and the extent to which the proposed use or feature might impair its present and future development . . . (d) [t]he proximity of dwellings, churches, schools, public buildings and other places of public gathering . . . (e) [a]ll standards contained in this ordinance . . . (f) [t]he comprehensive plan of the City of New Haven, and other expressions of the purpose and intent of this ordinance." (Emphasis omitted.) In addition to these general conditions, § 63 (d) (5) authorizes the defendant to impose specific conditions on a special exception when appropriate: "In granting a special exception, the [defendant] may attach such additional conditions and safeguards as are deemed necessary to protect the neighborhood, such as, but not limited to, those listed in paragraph 63 (c) (3) of this ordinance. Failure to comply with any such condition or safeguard shall constitute a violation of this ordinance." The conditions listed in § 63 (c) (3) include, inter alia, "[l]imitation of size, number of occupants, *method or time of operation*, or extent of facilities . . . ." (Emphasis added.)

The applicable zoning regulations clearly authorize the defendant to attach a condition limiting the hours of operation when granting a special exception. In reaching its decision that such a condition was warranted in the present case, the defendant had to rely on the record of the proceedings before it, which included the evidence presented at the public hearing and the advisory reports of the department and the commission.[7] At the public hearing, the defendant was apprised of the fact that the plaintiff had added a separate bar area to the restaurant with seven seats. The dining area accommodated forty seats, for a total of

[7] The department's advisory report was submitted pursuant to § 63 (e) (2) of the regulations, and the commission's advisory report was submitted pursuant to § 63 (d) (6) of the regulations.

forty-seven seats. An opposition to the plaintiff's application, titled "[a]pproval of this special exception would intensify the present use and cause undue hardship to neighboring residents and businesses due to the lack of parking," that was signed by approximately forty-five people, was presented to the defendant. Additionally, concerns were expressed that the addition of the bar would change the nature of the restaurant's former use. Although only seven seats were in the bar area, one speaker at the hearing noted that many people would congregate in that area, standing behind the seats and ordering drinks. Further, individuals who identified themselves as living in the neighborhood for several years stated that the parking situation was "awful" and a "nightmare," that there were many families with small children living in the area, that there would be "more bar action," and that the traffic would increase if the restaurant had a full liquor permit.

The advisory reports both recommended granting the special exception with conditions. The department's report contained the following statement: "The proposed change from beer and wine to full alcohol service (including a bar) does change the nature of the restaurant. Practically speaking, the question is whether or not it is apparent (or even just likely) that . . . this change . . . will result in an establishment that can operate 'in accordance with the public convenience and welfare' as was determined to be the case for the previous restaurant in 2000. In the view of staff, much of what could be viewed as additional impact is mitigable. For example, while it is unlikely that extending full liquor service to diners would in any way affect existing neighborhood conditions, the addition of a bar might. In many cases, bar service continues far past dining hours into early morning hours, occasionally disturbing nearby residents. Staff suggests that the imposition of hours of operation reflecting dining hours is not only

appropriate but is reflective of recent policy in respect to restaurants located not only on State Street but also in other neighborhood business districts within the City." The department suggested adding a condition to the approval of the special exception that the "[h]ours of operation [are] not to extend past 11:30 p.m. daily."

The commission's report expressed similar concerns. In reviewing the criteria in the regulations pertaining to the granting of special exceptions, the commission noted: "The Plan's Housing and Neighborhood Planning section advises that neighborhoods be protected against potentially deleterious and/or nuisance influences. Any approval of this application should provide some assurances of that protection." The commission recommended that the application be approved with five conditions, including the following: "Hours of operation not to extend past 11:30 p.m. daily. (Consistent with conditions attached to similar requests in this neighborhood.)"[8] At the defendant's voting session on April 9, 2013, it followed the recommendation of the commission and approved the plaintiff's special exception with the five conditions listed in the commission's advisory report.

The plaintiff claims, however, that even if temporal conditions relating to a business' operation may be appropriate under certain circumstances, the defendant could not limit the plaintiff's hours of operation because

[8] The plaintiff challenges the defendant's statement that similar conditions relating to hours of operation have been imposed on similar establishments in the area, noting that the restaurant across the street has a full liquor permit and has no restriction on its hours of operation. The competitor restaurant, however, secured its liquor permit twenty-eight years prior to the public hearing on the plaintiff's application. As previously noted, a zoning board must consider the circumstances "then existing" when it acts upon an application for a special exception. *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 614. Neighborhood conditions may have changed substantially within those twenty-eight years.

the provisions of the Liquor Control Act grant only the city of New Haven, and not its zoning board, the authority to restrict the hours during which its restaurant can sell liquor. The plaintiff argues, and the trial court agreed, that § 30-91 (a) sets forth the permissible hours of operation for a restaurant with a full liquor permit and that § 30-91 (b) allows a municipality to restrict those hours by vote of a town meeting or by ordinance. In other words, as argued, although a municipality has the authority to restrict the hours of sale, a zoning board has no such authority. We disagree.

The plaintiff maintains that the defendant erroneously construes the trial court's decision as holding that the preemption doctrine precludes the defendant from restricting the plaintiff's hours of operation. We conclude that the preemption doctrine does factor into our analysis because the trial court essentially has determined that a local zoning board is precluded, by virtue of § 30-91 (b), from restricting the hours of operation of a restaurant that possesses a full liquor permit. Even though the regulations expressly authorize the defendant to impose such a condition in granting a special exception, the court, in adopting the reasoning of the plaintiff, determined that zoning boards are preempted by the provisions of the Liquor Control Act from restricting the hours of service because only a municipality is expressly authorized to do so by § 30-91 (b). Accordingly, we look to the legal principles involved in the determination of when a local ordinance is preempted by a state statute.

"The authority to engage in zoning is drawn from the police power, which is the source of all zoning authority." (Internal quotation marks omitted.) *VIP of Berlin, LLC* v. *Berlin*, 50 Conn. Supp. 542, 549, 951 A.2d 714 (2007), aff'd, 287 Conn. 142, 946 A.2d 1246 (2008). "There is overlap in the General Statutes between the authority of a zoning commission and the exercise of

the municipal police power through the adoption of ordinances by a town's legislative body. Many of the subjects over which the municipality is given the power to regulate by [General Statutes] § 7-148 are traditionally the subject of zoning and planning regulations as well. . . . Where the language and purpose of two statutes overlap, they are to be read in concert." (Citation omitted; internal quotation marks omitted.) Id., 551.

"The State may regulate any business or the use of any property in the interest of the public welfare or the public convenience, provided it is done reasonably. . . . The limit of the exercise of the police power is necessarily flexible, because it has to be considered in the light of the times and the prevailing conditions." (Internal quotation marks omitted.) *Modern Cigarette, Inc.* v. *Orange*, 256 Conn. 105, 118, 774 A.2d 969 (2001). "[I]n determining whether a local ordinance is preempted by a state statute, we must consider whether the legislature has demonstrated an intent to occupy the entire field of regulation on the matter or whether the local ordinance irreconcilably conflicts with the statute." Id., 119.

In the present case, when reviewing various provisions of the Liquor Control Act, it becomes apparent that the legislature intended municipalities and local zoning boards to have some input regarding, inter alia, the location of establishments that sell alcohol and conditions relating to the operation of those businesses. As already noted, § 30-91 (b) authorizes a town, by vote of a town meeting or by ordinance, to reduce the number of hours during which sales of alcoholic liquor are permissible. Further, a town may vote to prohibit the sale of alcoholic liquor within its boundaries. General Statutes § 30-9. Additionally, the Department of Consumer Protection must refuse to grant permits for the sale of alcoholic liquor in no-permit towns and where

prohibited by the zoning ordinance of any city or town. General Statutes § 30-44.

We next examine the relevant statutes and the New Haven Zoning Ordinance to determine whether there is a conflict that precludes the defendant from imposing the hours of operation condition authorized by the local zoning regulation. "Whether an ordinance conflicts with a statute or statutes can only be determined by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives. . . . Therefore, [t]hat a matter is of concurrent state and local concern is no impediment to the exercise of authority by a municipality through the enactment of an ordinance, so long as there is no conflict with the state legislation. . . . Where the state legislature has delegated to local government the right to deal with a particular field of regulation, the fact that a statute also regulates the same subject in less than full fashion does not, ipso facto, deprive the local government of the power to act in a more comprehensive, but not inconsistent, manner." (Citations omitted; internal quotation marks omitted.) *Modern Cigarette, Inc.* v. *Orange*, supra, 256 Conn. 119.

"Therefore, merely because a local ordinance, enacted pursuant to the municipality's police power, provides higher standards than a statute on the same subject does not render it necessarily inconsistent with the state law. Whether a conflict exists depends on whether the ordinance permits or licenses that which the statute forbids, or prohibits that which the statute authorizes. If, however, both the statute and the ordinance are prohibitory[9] and the only difference is that

[9] Section 30-91 (a), which provides that sales of alcoholic liquor shall be unlawful during certain hours, is a prohibitory statute. The condition imposed by the defendant on the plaintiff's special exception also is prohibitory in that it extends the hours during which the plaintiff's sale of alcoholic liquor would be prohibited.

the ordinance goes further in its prohibition than the statute, but not counter to the prohibition in the statute, and the ordinance does not attempt to authorize that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict. . . . Where a municipal ordinance merely enlarges on the provisions of a statute by requiring more than a statute, there is no conflict unless the legislature has limited the requirements for all cases." (Footnote added; internal quotation marks omitted.) Id., 120.

Our resolution of this appeal requires us to construe provisions of state statutes, i.e., provisions in the Liquor Control Act, and the local zoning regulations. "This analysis entails the construction of the relevant [zoning] regulations and [state] statutes, and is therefore a matter of law over which we exercise plenary review of the trial court's decision." *Zimnoch* v. *Planning & Zoning Commission*, 302 Conn. 535, 547, 29 A.3d 898 (2011).

The parties do not dispute that, under certain circumstances, a zoning board may impose conditions relating to a business' hours of operation in granting a special exception. Decisions regarding applications for special exceptions are particularly fact bound. A zoning board must consider "the particular circumstances of the precise site," including whether the "mode of operation must be regulated because of the topography, traffic problems [and] neighboring uses . . . of the site." (Internal quotation marks omitted.) *Meriden* v. *Planning & Zoning Commission*, supra, 146 Conn. App. 245. The defendant in this case concluded that a change from the plaintiff's service of beer and wine to full alcohol service, including a bar, would adversely affect the public convenience and welfare of the neighboring residential uses unless a condition limiting the hours of operation was imposed. This decision involves a particular use of a particular business in a particular zone.

As such, we conclude that the exercise of such authority pursuant to the regulations does not conflict with the purpose and intent of § 30-91 (b). The provisions of § 30-91 (b) permit a town to limit the hours of service in all types of businesses selling alcohol in all of the zoning districts in that town. It is a legislative decision, expressing a policy that service of alcohol should be restricted. Unlike a zoning board's administrative decision relating to an application for a special exception, a town, when it acts by vote of a town meeting or by ordinance pursuant to § 30-91 (b), has determined that everyone within its boundaries must limit the hours of sale because of a general determination that such a limitation is in the best interests of the town. The purposes for limiting the hours of operation in connection with a special exception and the purposes for restricting the hours of sale of liquor on a townwide basis are separate and distinct, and both the local zoning regulation and the state statute can coexist without conflict.

We conclude that the condition imposed by the defendant on the plaintiff's special exception, which limited the hours of operation with respect to the sale of alcoholic liquor, was authorized by a regulation that was not in conflict with the provisions of § 30-91 (b). The defendant's restriction of hours merely went further in its prohibition on sales as set forth in § 30-91 (a). For the reasons stated in this opinion, the trial court improperly determined that the defendant was precluded from imposing the condition restricting the plaintiff's hours of operation and improperly determined that the condition at issue was illegal.[10]

[10] The trial court also relied on the cases of *Bora* v. *Zoning Board of Appeals*, supra, 161 Conn. 297, and *Greenwich* v. *Liquor Control Commission*, supra, 191 Conn. 528, in reaching its conclusion that the condition was illegal.

In *Bora*, a 1971 decision by our Supreme Court, the defendant zoning board of appeals granted the application for a variance from the off street parking regulations so that the applicant could operate a cafe without provid-

The judgment is reversed and the case is remanded to the trial court with direction to dismiss the plaintiff's appeal.

In this opinion the other judges concurred.

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ing the requisite eight parking spaces. *Bora* v. *Zoning Board of Appeals*, supra, 161 Conn. 299. The board attached a condition to the variance that limited the hours of the applicant's operation of the cafe. Our Supreme Court determined that the zoning board exceeded its powers, as granted to it by the zoning ordinance, and concluded that the board had acted illegally. Id., 302. This was not a case involving a special exception, with the authority to impose a condition limiting the hours of operation as set forth in the zoning ordinance. The condition in *Bora* was attached to a *variance of parking space regulations*. The special exception in the present case was required in order for the plaintiff to sell alcoholic liquor.

In *Greenwich*, our Supreme Court determined that the plaintiff town had improperly refused to certify that an applicant's request for an issuance of a nightclub liquor permit from the Liquor Control Commission did not violate the town's zoning ordinance. *Greenwich* v. *Liquor Control Commission*, supra, 191 Conn. 539–40. The applicant's restaurant already had a valid restaurant liquor permit, and the applicant wanted to remain open one hour longer as permitted by a nightclub liquor permit. Id., 535–36. Our Supreme Court stated that the town had failed to point to any zoning laws that prohibited the applicant's certification for a nightclub liquor permit. Id., 539. Further, "[w]hat they did attempt, *without any basis in their zoning laws* and without having employed the legitimate legislative option of limiting the hours of sale afforded by § 30-91 (a), was to prohibit the issuance of this permit under the guise of zoning." (Emphasis added.) Id., 540. We do not find the holding of this case to be applicable to the present situation.

We also note that the Supreme Court case of *P. X. Restaurant, Inc.* v. *Windsor*, 189 Conn. 153, 454 A.2d 1258 (1983), contains language that is supportive of our decision. Our Supreme Court stated: "It is also reasonable . . . to imply that liquor premises are subject to local zoning ordinances which involve matters other than location. Once a liquor location is approved there may be additional health, safety and welfare factors unrelated to the fact that liquor will be sold at that location. These are zoning matters of local concern and thus are within the expertise of local authorities." Id., 160.

STATE OF CONNECTICUT *v.* NORMAN P.*
(AC 37947)

Sheldon, Prescott and Flynn, Js.

Syllabus

The defendant, who had been convicted of several crimes resulting from the alleged sexual assault of his wife, appealed to this court. He claimed, inter alia, that the trial court improperly refused to admit into evidence the full written statement that he had given to the police about the incident at issue. The court had admitted certain portions of the statement during the state's cross-examination of the defendant, in which he testified about certain details of the events at issue that he had not disclosed in his written statement. Thereafter, during redirect examination, the defendant sought to admit the full statement under the applicable provision (§ 1-5 [b]) of the Connecticut Code of Evidence so that the jury would understand the context of the portions that had been admitted and why he had not disclosed to the police certain of the details that he testified about on cross-examination. The court ruled that the full statement was inadmissible on the ground that it was self-serving hearsay. The defendant also claimed that the court improperly refused to mark for identification and to conduct an in camera review of certain of the complainant's confidential counseling records. *Held*:

1. The trial court erroneously ruled that the defendant's full written statement to the police was inadmissible because it was self-serving hearsay, as the court disregarded binding Supreme Court precedent and failed to properly construe § 1-5 (b) of the Connecticut Code of Evidence, which permitted the defendant to introduce the full statement regardless of whether it was otherwise inadmissible: the court's refusal to admit the statement in its entirety handcuffed the defendant's ability to argue why he had not disclosed to the police certain details regarding the events at issue, the complete statement was necessary to explain the state's paraphrasing of a certain portion of the statement during closing argument to the jury and to prevent the jury from being misled, and the admission of the complete statement would have allowed the jury to place into context a certain inconsistent statement that the defendant made during the state's cross-examination of him and to better assess his credibility, which was a critical issue at trial; accordingly, in light of the importance of the defendant's testimony, the weakness of the state's case, and the fact that the jury did not find him guilty of all of

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

the charges against him, the court's exclusion of the complete statement was harmful, and the defendant was entitled to a new trial.

2. The trial court's refusal to mark the complainant's confidential counseling records for identification constituted manifest error, as the court had an absolute duty to mark and to seal the records for possible appellate review; moreover the court's refusal to review the records in camera was improper, the defendant having made a sufficient preliminary showing that there was reasonable ground to believe that the records might contain information that would be useful to impeach the complainant's credibility.

Argued October 6—officially released December 6, 2016

Procedural History

Substitute information charging the defendant with four counts of the crime of sexual assault in a spousal relationship, and with the crimes of attempt to commit sexual assault in a spousal relationship, assault of an elderly person in the second degree and assault of an elderly person in the third degree, brought to the Superior Court in the judicial district of Hartford, where the court, *Kwak*, *J.*, denied the defendant's motion for disclosure of certain confidential records; thereafter, the matter was tried to the jury; verdict of guilty of three counts of sexual assault in a spousal relationship, and assault of an elderly person in the second degree and assault of an elderly person in the third degree; subsequently, the court denied the defendant's motion for a new trial and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Reversed; new trial.*

Marina L. Green, assigned counsel, with whom were *Emily Graner Sexton*, assigned counsel, and, on the brief, *Michael S. Taylor*, assigned counsel, for the appellant (defendant).

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

Opinion

PRESCOTT, J. The defendant, Norman P., appeals from the judgment of conviction, rendered after a jury trial, of three counts of sexual assault in a spousal relationship in violation of General Statutes § 53a-70b, one count of assault of an elderly person in the second degree in violation of General Statutes § 53a-60b, and one count of assault of an elderly person in the third degree in violation of General Statutes § 53a-61a. On appeal, the defendant claims, among other things, that the trial court improperly (1) refused to admit into evidence his full written statement to the police after portions of the statement had been introduced by the state, and (2) refused to mark for identification the complainant's privileged records from Interval House, an organization that provides counseling and other services to domestic violence victims, as well as declined to conduct an in camera inspection of these records.[1] We agree that the court improperly excluded the defendant's complete statement to the police, and, accordingly, we reverse the judgment of conviction and remand the case for a new trial. Because one of the remaining evidentiary issues is likely to arise again on remand, we address that claim as well.[2] To that end,

[1] The defendant also makes the following additional claims on appeal: the prosecutor violated his due process rights by referring to statements not in evidence during cross-examination and closing argument; the court improperly refused to conduct an in camera review of confidential records from the court support services division of the Judicial Branch; and the court improperly admitted evidence, as prior uncharged misconduct, of two photographs of the complainant depicting prior injuries allegedly caused by the defendant.

[2] Generally speaking, if we reverse a judgment and remand the case for a new trial, we sometimes choose to review other claims that are likely to arise on retrial. See, e.g., *State* v. *T.R.D.*, 286 Conn. 191, 195, 942 A.2d 1000 (2008). Because the Interval House records may well contain a statement by the complainant regarding the alleged assault with which the defendant was charged, the claims regarding these specific records are likely to arise again on retrial. Because the remaining evidentiary claims raised by the defendant on appeal are more tangential to the ultimate issue in the present case, however; see footnote 1 of this opinion; we are not persuaded that

we agree with the defendant that the court improperly refused to mark the Interval House records for identification and improperly refused to conduct an in camera review of the Interval House records after the defendant made the requisite threshold showing pursuant to *State* v. *Esposito*, 192 Conn. 166, 179–80, 471 A.2d 949 (1984).

Given the evidence presented at trial, the jury reasonably could have found the following facts. On the evening of Thursday, August 2, 2012, the defendant was at home with the complainant, who was the defendant's sixty-one year old wife, and their twenty year old son, B.P., who had a strained relationship with the defendant. A dispute over the operation of the air conditioning system arose between the defendant and B.P. A verbal argument between the two, in which the complainant interceded on B.P.'s behalf, soon escalated into a physical altercation. Eventually, in an effort to avoid calling the police and possibly having the two men arrested, the complainant told B.P. that it would be best if he left the house and went to his grandmother's residence. B.P. then left.

Thereafter, the defendant approached the complainant and, using his closed fist, punched her in the chest with such force that it took her breath away. The complainant punched the defendant back, injuring her shoulder in the process, and the defendant began hitting and jabbing the complainant repeatedly in the midsection with the television remote control, causing the complainant severe bruising. The complainant eventually retreated to the upstairs bedroom where she usually slept, away from the master bedroom where the defendant usually slept.

Several minutes later, the defendant entered the complainant's bedroom where she was lying down on the

they are necessarily likely to arise again on retrial, and, therefore, we decline to address them.

bed, pulled the covers off of her, and stated that he was "going to show [her] something." He then ripped off the nightgown she was wearing, prompting the complainant to attempt to push and kick him away from her. The complainant was unsuccessful in her efforts, however, because the defendant was physically stronger than her, one of her shoulders had no strength as a result of it having been injured earlier, and the defendant was restraining her other uninjured hand. The defendant then began to insert his finger into the complainant's rectum, and the complainant pleaded with him to stop because he was hurting her. The defendant refused and threatened that the more the complainant protested, the harder he would continue the penetration. The complainant soon realized that the defendant was penetrating her with more than one finger and that he was also curling his fingers inside of her, like a hook, pulling at her. At some point during the assault, the complainant saw that she was emitting blood and feces onto the bedsheet.

After a period of time, the defendant directed the complainant to go to the bathroom to wash herself off. He then walked her into the bathroom and to the bathtub, all the while refusing to remove his finger from her rectum. Filling the tub with water and directing the complainant to get in, the defendant proceeded to remove his own clothing and enter the tub with her. The defendant then pulled the complainant onto his lap and began to manipulate a bar of soap into her rectum, although the complainant did not know this at the time because she could not see what he was doing behind her. Consumed with pain, the complainant kept trying to remove the defendant's hand from her rectum, but was unable to overcome his strength. Eventually, the complainant complained that her stomach was cramping and that she needed to move her bowels, so the defendant released her and allowed her to sit on the

toilet. In addition to emitting blood and feces, the complainant expelled the bar of soap into the toilet, thereby realizing for the first time that he had pushed the soap inside of her.

Afterward, the defendant led the complainant back into the complainant's bedroom, and the complainant, overcome with exhaustion, could not attempt to fight him any longer. The defendant proceeded to lean the complainant over the bed and penetrate her rectum with his penis and fingers. After the defendant stopped the assault, he fell asleep on the bed, and the complainant lay crying on the floor.

Eventually, near daylight, the complainant got up, got dressed, and began wandering on foot around the streets in her neighborhood. The complainant attempted to telephone a friend of hers and a friend of the defendant, but neither answered, so the complainant called the defendant's brother, and told him about the assault. At some point while she was walking, the complainant felt "a gush [of wetness] come down in [her] pants" and, after returning to the house, discovered that she had had an involuntary bowel movement that was mixed with blood and "white stuff," which she assumed was from the bar of soap. She cleaned herself off and lay down on the couch in the basement until it was time for her to go to work in the afternoon.

Although the complainant had difficulty walking because of her injuries, she went to work that Friday, Saturday, and Sunday because she did not want to be alone in the house with the defendant. On Monday evening, the complainant confided in her close friend and coworker about the assault, and accepted the friend's invitation to stay the night at her house. The next day, on Tuesday, the complainant saw her primary care physician, told him of her injuries, and informed him that they had been the result of an assault by the defendant.

The doctor diagnosed the complainant with a rectal tear and ultimately referred her to Interval House for counseling.

On Thursday, almost one week after the assault, the complainant took her car to a shop to be serviced. While at the service shop, the complainant experienced another involuntary bowel movement and decided at that point that she would report the assault to the police. The complainant then drove straight from the service shop to the police station, where the authorities took her statement and, thereafter, accompanied her to her home to collect evidence. When the defendant arrived home from work that day, he encountered the police outside his house. Upon request, he followed a police detective to the police station. During an interview with the detective, he gave a sworn written statement concerning the events that occurred on August 2 and 3, 2012. The following day, the defendant was arrested pursuant to an arrest warrant.

Prior to trial, on December 5, 2014, the state filed a substitute long form information, charging the defendant with four counts of sexual assault in a spousal relationship in violation of § 53a-70b, one count of criminal attempt to commit sexual assault in a spousal relationship in violation of General Statutes §§ 53a-49 and 53a-70b, one count of second degree assault of an elderly person in violation of § 53a-60b, and one count of third degree assault of an elderly person in violation of § 53a-61a. During his jury trial, the defendant testified that the sexual encounter with his spouse had been consensual, and that her rectal injuries had been caused by the defendant using his fingers to retrieve a small piece of soap that had accidentally slipped inside of her when the defendant was lubricating her anal area for intercourse. Following the trial, the defendant was

convicted on all but two of the counts.[3] He was sentenced to a total effective term of thirty-six years of imprisonment, execution suspended after twenty-four years, with ten years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We turn first to the defendant's claim that the court improperly refused to admit the defendant's complete sworn statement to the police after other portions of the statement had been introduced by the state during trial. Specifically, the defendant argues that the court misinterpreted § 1-5 (b) of the Connecticut Code of Evidence and that, pursuant to § 1-5 (b), the entire statement should have been admitted in order for the jury to understand the context of those portions that were previously introduced by the state during its cross-examination of the defendant. In response, the state argues that the court properly ruled that the police statement constituted nothing more than a prior consistent and self-serving hearsay statement offered by the defendant to boost his favorable testimony through repetition. The state further asserts that "nothing in the defendant's police statement provided any 'context' essential to a proper understanding of the inaccuracies and omissions pointed out by the state on cross-examination and fully conceded by the defendant on cross-examination, with an explanation." We agree with the defendant.

[3] The defendant was acquitted on count five, which charged him with attempt to commit sexual assault in a spousal relationship for allegedly trying to compel his spouse to perform oral sex on him, and acquitted on count three, which was one of the counts that charged him with sexual assault in a spousal relationship for allegedly penetrating his spouse's anus with his penis. In its brief, the state misidentifies conduct of which the defendant was found not guilty. Additionally, in its "counterstatement of the facts," the state sets forth the conduct forming the basis for count five, on which the defendant was acquitted, and does not set forth the conduct forming the basis for count four, on which the defendant was convicted.

The following additional facts and procedural history are relevant to this claim. During cross-examination of the defendant, the prosecutor questioned him at length about what was included and what was not included in his signed statement to the police, dated August 9, 2012. The prosecutor asked the defendant to verify that he made several declarations about the events that occurred on August 2 and 3, 2012, in his signed police statement, including the type of sexual intercourse he engaged in with the complainant, when he used the bar of soap, the state of the bedroom where the alleged assault occurred, whether the complainant ever told him she was in pain, when he next saw the complainant after the alleged assault, and what occurred during his altercation with B.P. on the night in question. Although the defendant confirmed for the jury that he had, in fact, told the police many of these details, he disputed the accuracy of other assertions contained in the written account. For example, when the prosecutor asked him if "you signed the statement that said that after the vaginal intercourse, you went to the bathroom to look for a bar of soap," the defendant replied: "I told the police it wasn't a bar. A piece of soap, I told the police. . . . [The police officer] . . . said in America it is called a bar." Similarly, when the prosecutor asked if "you told the police that you had penile/vaginal sex with your wife," the defendant attested that "[t]hat was a mischaracterization" and that "[t]hose words were inserted by the police. Those are not my words."

When the prosecutor questioned the defendant about details concerning the alleged assault that he had testified to at trial, but were not contained in his signed statement, the defendant repeatedly made clear that those specifics were missing from his statement because he answered only the precise questions that the police interviewer asked of him and did not offer extra details that went beyond the limited scope of each

inquiry. For instance, in one exchange, the following colloquy took place between the prosecutor and the defendant:

"Q. And you never told the police that, though, did you?

"A. The police did not ask me detailed questions. It was like giving—the question that the police officer asked me . . . I gave them that answer.

"Q. So, for the first time, you're claiming that Monday night into Tuesday morning you saw your wife at the house?

"A. I'm not claiming [that] for the first time.

"Q. Well, sir, you didn't tell the police on August 9th when they came to your house at 1 o'clock in the morning that your wife had been in the house Monday night, did you?[4]

"A. I have only answered the question [that] the police asked. . . .

"Q. . . . [B]ut you told the police later on in the day on August 9th after they had been to your house that the TV had been smashed on Monday night . . . .

"Q. And when you talked to that officer [at the police station in the evening of August 9], you talked to him—you told him that you were claiming that the TV was damaged Monday night, but you didn't say anything about your wife being home on Monday night, did you? Yes or no?

[4] The complainant had testified that on Monday, she had spent the night with a friend so as to avoid the defendant. The defendant, in an attempt to demonstrate that she was being untruthful and instead was still sleeping in the same house with him, testified that he saw her in the house on "Monday night [into] Tuesday morning . . . ."

"A. I didn't—I wasn't—as I said, the only—the only question I answer was [what do] they call it—the question the officer asked me."[5] (Footnote added.)

Subsequently, during redirect examination, the defendant's written police statement became the subject of questioning once more, this time by defense counsel, and the defendant again testified that the detective did not transcribe the defendant's words in the exact manner as he said them aloud. Thereafter, defense counsel stated that he would like to offer the defendant's police statement as an exhibit, to which the prosecutor objected on the ground that it was self-serving hearsay and not an admission by a party opponent. Defense counsel responded: "[T]his statement read in its entirety is consistent with his trial testimony. The [state] has in cross-examination picked out inconsistencies, claiming that it's inconsistent with . . . his trial testimony. And that, for the jury to understand whether those are really inconsistencies or not, the jury should have the whole statement in its entirety so they can see exactly how it flows, what he said, what it was about and the context of it . . . ." Defense counsel also asked the court for five minutes to assemble his argument and corresponding case citations, and the court agreed to take a brief afternoon recess.

Upon returning from the court's recess, the prosecutor asserted that our Supreme Court's decisions in *State* v. *Hines*, 243 Conn. 796, 709 A.2d 522 (1998), and *State* v. *Jackson*, 257 Conn. 198, 777 A.2d 591 (2001),[6] were

[5] In another similar exchange during cross-examination, after the prosecutor pointed out that the defendant failed to tell the police that B.P. had hit the complainant when she intervened in the dispute between the defendant and B.P. on the evening in question, the defendant repeatedly responded that he "only [answered] the question [that] the police asked" and, for this reason, "didn't tell a lot of things to the police" during his interview.

[6] Although the record is not entirely clear, it appears that these cases had been mentioned in some capacity by the parties and the trial judge during the court's recess, such that each was aware that the cases might be part of the discussion when court was called back in session.

inapposite to defense counsel's argument in the present case because *Hines* was overturned,[7] and *Jackson* "points out that the defendant's statement to the police is hearsay and . . . even when he testifies, it doesn't give him the right to introduce otherwise inadmissible hearsay. It doesn't fall within any of the recognized exceptions." The court then sustained the state's objection, stating that "according to *State* v. *Jackson*, [supra, 198] the entire written statement is inadmissible if it's . . . self-serving hearsay. So, I'm going to—since you've already brought out on redirect, [defense counsel], regarding your client's prior consistent statement[s], certainly, they come in, but I'm not going to admit the entire statement."

In an effort to further clarify his argument for the court and for the record, defense counsel then stated: "[A]s I indicated in a note that the [courtroom] clerk delivered to you during a recess, the citations that the clerk wrote were from the Practice Book, including . . . § 1-5 (b) of the [Connecticut] Code of Evidence . . . in order for the jury to understand . . . what the defendant was actually asked about and why he said certain things and didn't say certain things in response to certain questions, and to understand the context of things he did say that went into the statement, the—the entire statement should be admitted so that the jury will have an understanding and be able to better evaluate the credibility of the defendant and his testimony. The statement is consistent with much of his

[7] The state's assertion was incorrect. Although one portion of *Hines*, not relevant to this issue, had been criticized by our Supreme Court in a subsequent case; see *State* v. *Sawyer*, 279 Conn. 331, 353, 904 A.2d 101 (2006), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 454–55 n.23, 953 A.2d 45 (2008); the holding in *Hines* on this question remains good law and has been cited repeatedly by our appellate courts. See, e.g., *State* v. *Burney*, 288 Conn. 548, 559–60, 954 A.2d 793 (2008); *State* v. *Gauthier*, 140 Conn. App. 69, 78–79, 57 A.3d 849, cert. denied, 308 Conn. 907, 61 A.3d 1097 (2013); *State* v. *Arcia*, 111 Conn. App. 374, 382–83, 385, 958 A.2d 1253 (2008), cert. denied, 290 Conn. 907, 964 A.2d 543 (2009).

trial testimony, and the purported inconsistencies, when read in the context of the statement, which include the omissions that the state referred to, can't be understood unless this—the jury has the statement before them. That's the—that's the purpose of offering it, Your Honor." In response, the court reiterated that it "made [its] ruling . . . and you've made your record. Thank you."

We begin by setting forth the applicable standard of review and principles of law. "To the extent a trial court's [ruling regarding] admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no judgment call by the trial court . . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Miller*, 121 Conn. App. 775, 780, 998 A.2d 170, cert. denied, 298 Conn. 902, 3 A.3d 72 (2010). Because the court's interpretation of § 1-5 (b) of the Connecticut Code of Evidence is being challenged, our review is plenary.

"Our cases have long held that, when one party to a litigation or prosecution seeks to introduce admissions that constitute only a portion of a conversation, the opposing party may introduce other relevant portions of the conversation, irrespective of whether they are self-serving or hearsay." (Internal quotation marks omitted.) *State* v. *Jackson*, supra, 257 Conn. 213. This principle is codified in § 1-5 (b) of the Connecticut Code of Evidence, which provides: "When a statement is introduced by a party, another party may introduce any

other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it." "The purpose of this rule is to ensure that statements placed in evidence are not taken out of context. . . . This purpose also demarcates the rule's boundaries; a party seeking to introduce selected statements under the rule must show that those statements are, in fact, relevant to, and within the context of, an opponent's offer and, therefore, are part of a single conversation." (Citation omitted; internal quotation marks omitted.) *State* v. *Jackson*, supra, 213.

Moreover, in *State* v. *Hines*, supra, 243 Conn. 807–808, our Supreme Court held that "[w]hen a party has impeached a witness with portions of a statement that are inconsistent with his or her trial testimony, the trial court may, in its sound discretion, admit the entire statement for rehabilitative purposes, in order to place the allegedly inconsistent statement into context and to prevent the jury from being misled." "[This] precludes selective admission by one party that serves only to distort reality and allow legal technicalities to obfuscate the truth . . . ." (Internal quotation marks omitted.) *State* v. *Efrain M.*, 95 Conn. App. 590, 598, 899 A.2d 50, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006).

Here, the defendant argues that the court misinterpreted the Connecticut Code of Evidence because the question of whether a statement is self-serving hearsay is irrelevant to the question of its admissibility under § 1-5 (b). In response, the state argues that the court properly excluded the complete police statement because it "constituted nothing more than a self-serving, prior consistent hearsay statement that had no relevance to offsetting the state's claim of recent contrivance as to certain details and, therefore, was no more admissible than any other out-of-court statement

that a party might proffer in an effort to improperly boost a witness' favorable testimony through repetition."

Because the court is vested with the discretion to admit or to bar the statement on fairness grounds only *after* it has made the legal determination that the particular statement is subject to § 1-5 (b) of the Code of Evidence; see *State* v. *Miguel C.*, 305 Conn. 562, 572, 46 A.3d 126 (2012); we begin our analysis by reviewing whether the court's exclusion of the defendant's complete police statement was based on a proper interpretation of § 1-5 (b). As previously discussed, the court was specifically asked to rely on the *Jackson* decision in overruling the state's objection, but ultimately determined that the statement should be excluded because "according to *State* v. *Jackson*, [supra, 257 Conn. 198] the entire written statement is inadmissible if it's . . . self-serving hearsay." In short, there is no reasonable basis from which the court could have concluded that *Jackson* so holds. In fact, *Jackson* expressly stands for the proposition that whether a statement is self-serving hearsay is entirely irrelevant to the question of its admissibility under § 1-5 (b) of the Connecticut Code of Evidence. Id., 213. Moreover, the court's interpretation of § 1-5 (b) utterly fails to take into account that portion of the rule that expressly states that "another party may introduce any other part of the statement, *whether or not otherwise admissible* . . . ." (Emphasis added.) Therefore, we conclude that the court disregarded binding Supreme Court precedent, and failed to construe properly § 1-5 (b) of the Connecticut Code of Evidence, by erroneously ruling that the statement was inadmissible on the ground that it was self-serving hearsay.

Having decided that the court improperly excluded the statement on the basis of an improper interpretation of the Connecticut Code of Evidence, we next turn to whether that error was harmful, such that the defendant

is entitled to a new trial. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the . . . case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [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. *Eleck*, 314 Conn. 123, 129, 100 A.3d 817 (2014).

Here, the defendant asserts that the court should have admitted the defendant's complete written statement to the police under § 1-5 (b) because, for two reasons, it would have provided context for the portions of the statement previously introduced by the state: (1) the brevity of the statement might have caused the jury to credit the defendant's testimony as to why his statement to the police was missing certain details to which he testified at trial; and (2) the statement as a whole would have allowed the jury to assess the defendant's credibility without being misled by the prosecutor's paraphrasing of certain portions of the statement, most importantly, her argument that the defendant had "conceded that he signed under oath to that truth that he put a *bar* of soap in [the complainant's] anus . . . ."

(Emphasis added.) In addition, the defendant argues that the trial court's improper exclusion of his complete statement to the police was not harmless given the importance of his testimony at trial, the weakness of the state's case against him, and the fact that the jury did not find him guilty of two of the seven counts with which he was charged. It is important to note that the state failed to brief whether such error was harmless and, instead, confined its analysis to whether the full statement was properly excluded.

First, we agree with the defendant that the omission of certain information from his police statement is better understood when viewed in light of the brevity of the police statement as a whole. As previously discussed, the state chose to introduce substantive portions of the defendant's police statement during the defendant's cross-examination. When the state then repeatedly questioned him as to why he left out certain details from the written statement that he later testified to at trial, the defendant made clear that he only answered the narrow questions asked of him by the police interviewer. Although the state argues that the complete statement should not have been admitted because it did not contradict any of the points made by the state during the defendant's cross-examination, this is not the proper standard for considering the defendant's proffer. Rather, a statement should be admitted in its entirety, upon the party declarant's timely request, to "ensure that statements placed in evidence are not taken out of context." (Internal quotation marks omitted.) *State* v. *Jackson*, supra, 257 Conn. 213. The defendant was entitled to have the jury consider that the statement was only approximately one page in length and that about one-half of its substance concerned incidents that occurred solely between the defendant and B.P., in order to better assess the state's assertion that

the defendant must be lying on the witness stand regarding certain facts because he never told the police about those facts during his police interview. Without permitting the entire statement to be admitted to show its brevity, the court unduly handcuffed the defendant's ability to argue that he had not disclosed certain details regarding the events in question because the interview questions were limited in scope and duration, as reflected by the shortness of the statement.

Second, we agree with the defendant that the complete police statement was necessary to better explain the state's paraphrasing of a portion of the statement concerning the nature of the bar of soap that was involved in the alleged assault. Specifically, the prosecutor stated during closing argument: "The defendant conceded everything in his statement. He conceded that he signed under oath to that truth that he put a bar of soap in her anus and that he originally told the police officer there was penile/vaginal sex, which he admitted later on was not the truth and which she said was not the truth." During direct examination, however, the defendant testified that he used a small piece of soap[8] to lubricate the complainant's anal area and that the piece accidentally slipped inside of her. Similarly, the language used in the police statement was not "a bar of soap," as the prosecutor characterized it, but a "*used* bar of soap," which is more consistent with the defendant's trial testimony. (Emphasis added.) Permitting the

[8] On this point, the following exchange took place between defense counsel and the defendant during direct examination:

"Q. . . . [D]escribe the size of the piece [of soap] that you took out . . . .

"A. About the size of my finger.

"Q. Okay. I want to show you the top of this pen, this magic marker, and ask you, was it the piece that you took out [of] the dish?

"A. Something—yeah. We keep those inside. Yes.

"Q. Okay. So, it was about the size of the top of the magic marker I'm holding in my hand . . . .

"A. Yes."

jury to see the actual statement would have allowed it to better assess the defendant's credibility, a critical issue in the present case. Therefore, the complete police statement was necessary "in order to place the allegedly inconsistent statement into context and to prevent the jury from being misled." *State* v. *Hines*, supra, 243 Conn. 808. Accordingly, we conclude that had the court properly applied § 1-5 (b) of the Connecticut Code of Evidence to the facts of the present case, it necessarily would have led to the determination that the defendant should have been permitted to have his complete police statement admitted into evidence to ensure that portions of the statement previously introduced by the state were not taken out of context.

Third, we agree with the defendant that the trial court's improper exclusion of his complete statement to the police was not harmless given the importance of the defendant's witness testimony, the weakness of the state's case against the defendant, and the fact that the jury did not find him guilty of two of the seven counts with which he was charged. Because the defendant conceded that he *did* have a sexual encounter with his spouse on the night in question, but claimed that the encounter was consensual and that her rectal injuries had been caused accidentally, his trial testimony was critical to his defense against the state's charges. Moreover, because of the nature of the defendant's version of events and the fact that the only two witnesses to the alleged assault were the complainant and the defendant, the outcome in this case primarily rested on a credibility contest between the complainant and the defendant, not on any physical evidence presented to the jury. As previously discussed, excluding the defendant's complete statement to the police as a full exhibit unfairly placed the state's selected portions of that statement out of context and likely implicated the defendant's credibility in a negative way. Given the

importance to the state's case that the defendant's testimony be found untrustworthy, we cannot conclude that the court's exclusion of the statement did not have a substantial effect on the jury's verdict. This is especially true in light of the fact that the jury did not find the defendant guilty on all of the charges against him, thereby indicating that the jury did not fully credit the testimony of the complainant or fully discredit the testimony of the defendant. The defendant, therefore, is entitled to a new trial.

II

Our conclusion that a new trial is warranted because the court improperly interpreted § 1-5 of the Connecticut Code of Evidence is dispositive of the defendant's appeal, thus eliminating the need to address most of the defendant's remaining claims. Nevertheless, because the defendant's claim concerning the court's refusal to mark for identification and inspect in camera the complainant's Interval House records is likely to arise again on remand, we also address it in this opinion. See *State* v. *Arroyo*, 284 Conn. 597, 601 n.3, 935 A.2d 975 (2007).

The claim is twofold: first, the defendant claims that the court improperly refused to mark for identification the complainant's privileged Interval House records; and second, he claims that the court improperly refused to conduct an in camera review of the Interval House records after he made the requisite threshold showing for the review.[9] In response, the state argues that

[9] In his brief, the defendant organizes his analysis of this claim by first asserting that the court improperly refused to mark for identification the Interval House records, and then, as part of his contention that this error was harmful, by arguing that the court also improperly concluded that he failed to make a sufficient showing, pursuant to *State* v. *Esposito*, supra, 192 Conn. 179–80, that he was entitled to have the records reviewed in camera. For the reasons that we discuss, we conclude that the court improperly failed to mark the records for identification. We also conclude that it is likely that the issue of whether the defendant is entitled to an in camera review of the records will arise on retrial. We thus choose to address that

although the court's refusal to mark the documents for identification was improper, the defendant did not make an adequate showing that an in camera review of the privileged Interval House records was warranted. We agree with both parties that the refusal to mark the records for identification was improper, and agree with the defendant that an adequate showing for an in camera review of the records was made.

The following additional facts and procedural history are relevant to these claims. When the complainant told her doctor during her August 7, 2012 appointment that the defendant was responsible for her injuries, the doctor recommended that she speak with someone from Interval House. Before the start of trial, the complainant's records from Interval House were subpoenaed, and the organization complied with the subpoena by providing those records, under seal, to the court clerk. Thereafter, during trial, the doctor testified that the complainant did, in fact, speak to an individual from Interval House over the telephone. The doctor testified: "[A]nyone who I am concerned might be in a domestic violence relationship or the victim of a domestic violence act, it's my practice to get that individual on the phone with a counselor at the time of the office visit." The complainant also testified that she spoke with an individual from Interval House, whom she categorized as being "a sexual abuse counselor," when she was at the doctor's office on August 7, 2012.

Because the Interval House records are privileged as communications between a victim and a battered woman's or sexual assault counselor; see General Statutes § 52-146k; the defendant requested during a pretrial motion hearing on December 5, 2014, that the court

claim here because both the state and the defendant have fully briefed and argued it, and the state has not asserted that the defendant failed to independently raise it as a claim on appeal.

review the records in camera for exculpatory information that could be used to impeach the complainant. Specifically, the defendant made the following offer of proof: "[I]nitially, [the complainant] told the doctor, as evidenced in these medical reports, only one thing [about the alleged assault], that the defendant penetrated her rectum with his fingers and twisted hard. . . . No evidence—no indication here whatsoever of penile penetration or attempted anal sex. There [are] four counts here of attempted or committed anal intercourse, at least two of them deal with penile penetration. . . . The allegation, Your Honor, at her deposition and in the police reports, is that he penetrated her with his penis and with soap on two occasions, at least, in the bathroom and then again on the bed . . . ."

The defendant then argued that the Interval House records would likely indicate whether the complainant told the Interval House employee the same version of events that she told the doctor, i.e., the one containing no reference to the alleged penile and soap penetration or to the physical nonsexual assault, or the same version of events she told the police, i.e., the one containing those additional allegations. Accordingly, the defendant contended, the court should review the documents in camera before the start of the trial to determine whether the statement the complainant made to Interval House necessarily conflicted either with her statement to her doctor or with her statement to the police and, thus, is exculpatory because it could be used to impeach her trial testimony. The defendant argued that he needed any impeachment material likely to be found in the Interval House records to prepare for the trial and for the complainant's cross-examination.

The court ruled that the defendant did not make the threshold showing for an in camera review, but informed him that if he raised the issue on cross-examination of the complainant, and if "there's something in

there which may indicate that [the complainant] may have said something different to the Interval House that may be impeachment material, then . . . I'll look at the Interval House records in camera at that time. But right now, you haven't shown me anything that would indicate that there's something in there. You're just guessing right now." Accordingly, the court denied the motion without prejudice. When the defendant later renewed his motion to review the records after the complainant's cross-examination, the court again denied the motion, stating that the defendant "still [had] not made a threshold showing that there's anything in there other than your conjecture."

Subsequently, before the start of the fourth day of trial, the defendant requested that the court mark for identification the complainant's Interval House records, but the court declined to do so "because [it] never looked at them." When the defendant pointed out that that is the exact reason why they need to be marked for appellate review, the court replied: "No, I don't believe so . . . . I believe once I look at them and if I determine that there's nothing in there that's impeachment material, then they need to be marked and sealed for the Appellate Court. But I could be wrong; I don't know." The defendant asked the court to reconsider on the basis of case law, although he could not cite an applicable case at that time, and again explained that the defendant was entitled to have the records be preserved for appellate review. The court then stated: "Give me the case cite, and I'll look at it, but for now it's not going to be marked."

Thereafter, before the start of the defendant's sentencing hearing on February 26, 2015, the defendant highlighted for the court specific parts of his motion for a new trial, dated December 24, 2014, and stated: "[P]aragraph eight deals with the issue of whether or not the court should mark for identification and seal

for appellate review the Interval House records. Even though they were not reviewed by the court in camera, Your Honor, I believe the case law is that the court has the obligation to do so to preserve for appellate review in the event that an appellate court thinks that the—or rules that the court should have conducted an in camera review so that there can be a record for further review. So, that was one new citation. At the time of trial, the court asked me if I had any case law on the obligation to seal it, and at that time, I didn't. Although I thought that it was an obligation, I couldn't recite that for the court and never brought this case to the court's attention during trial, and I apologize for that, but I thought at the time of the motion for [a] new trial, this might be a time for the court to mark these records for purposes of preserving the record for appeal. So, I'd ask the court to do that based on *State* v. *Bruno* [236 Conn. 514, 673 A.2d 1117 (1996)]."

In response, the court stated: "The court has had the opportunity to review the case, *State* v. *Bruno*, [supra, 236 Conn. 514] cited by the defendant in [his] motion to—for a new trial. The facts in *Bruno* are distinguishable from our current case, mostly because the documents that were requested in *Bruno* were psychiatric records, which the . . . trial court found that the defendant had failed to make a threshold showing that there was anything in there that would be probative. So, in that case, the court denied the in camera review and did not mark the psychiatric records, which the Appellate Court did find that was an error, but it was a harmless error. In our case, those aren't psychiatric records. These are records that are protected by statute, the Interval House records." On that basis, the court again declined to mark the records for identification.

A

We first turn to whether the court improperly refused to mark the Interval House records for identification.

We agree with both the state and the defendant that this was improper.

Although evidentiary matters typically fall within the court's discretion, "[t]he right to have a proffered exhibit marked for identification is indeed a broad one." *State* v. *Onofrio*, 179 Conn. 23, 34, 425 A.2d 560 (1979). "A trial court has the absolute duty to mark for identification and seal for possible appellate review any such records offered, whether or not an in camera inspection is undertaken, even in the absence of an objection to its failure to do so from the parties." *State* v. *Bruno*, supra, 236 Conn. 538. "A trial court's refusal to permit documents to be marked as exhibits for identification is 'manifest error.' " *State* v. *Onofrio*, supra, 43.

In the case at hand, the state concedes that the court's refusal to mark the Interval House records for identification was error. We agree. Although the court attempted to distinguish *Bruno*, we can divine no practical difference between psychiatric records, and records of communications between a victim and a battered woman's or sexual assault counselor, both of which are protected by statute. See General Statutes § 52-146d (privileged communications between psychiatrist and patient); General Statutes § 52-146k (privileged communications between victim and domestic violence counselor or sexual assault counselor). Thus, for the second time in this case, the court was presented with binding case law on an evidentiary issue and proceeded to disregard it. The court's impropriety was " 'manifest error.' " *State* v. *Onofrio*, supra, 179 Conn. 43.

B

We turn next to the defendant's claim that the court improperly refused to inspect in camera the Interval House records despite the fact that he had made a sufficient preliminary showing required for such inspection. We agree with the defendant.

"[I]n camera judicial review of a victim's privileged records currently represents the most common method of balancing statutory privileges against the defendant's trial rights." (Internal quotation marks omitted.) *State* v. *Slimskey*, 257 Conn. 842, 856 n.9, 779 A.2d 723 (2001). "It is well settled in this state that before a criminal defendant may obtain an in camera inspection of a witness' confidential records for purposes of impeachment, he or she must first demonstrate that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be stricken. *State* v. *Esposito*, [supra, 192 Conn. 179] . . . . Our assessment of the trial court's decision to restrict the defendant's access to the witness' confidential records must, however, take into account the recognized principle that such a restriction implicates the defendant's constitutional right to impeach and discredit state's witnesses." (Citations omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 252 Conn. 533, 557, 747 A.2d 487 (2000). Thus, "[u]pon 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." (Internal quotation marks omitted.) *State* v. *Howard*, 221 Conn. 447, 457–58, 604 A.2d 1294 (1992).

"It is well established that impeachment evidence may be crucial to a defense, especially when the state's case hinges entirely upon the credibility of certain key witnesses. . . . The rule laid out in [*Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] requiring disclosure of exculpatory evidence applies to materials that might well alter . . . the credibility of a crucial prosecution witness." (Internal quotation marks omitted.) *State* v. *Esposito*, 235 Conn. 802, 815–16, 670 A.2d 301 (1996). Our Supreme Court has

held that "[i]nconsistencies may be shown not only by contradictory statements but also by omissions." *State* v. *Whelan*, 200 Conn. 743, 748 n.4, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Therefore, "[i]f a former statement fails to mention a material fact presently testified to, which it should have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent." (Internal quotation marks omitted.) *State* v. *Reed*, 174 Conn. 287, 303, 386 A.2d 243 (1978).

To meet his or her threshold burden for obtaining in camera review of privileged records, "the defendant must do more than assert that the privileged records may contain information that would be useful for the purposes of impeaching a witness' credibility." *State* v. *McClelland*, 113 Conn. App. 142, 160, 965 A.2d 586, cert. denied, 291 Conn. 912, 969 A.2d 176 (2009). "The defendant's offer of proof should be specific and should set forth the issue in the case to which the [confidential] information sought will relate." (Internal quotation marks omitted.) *State* v. *George J.*, 280 Conn. 551, 599, 910 A.2d 931 (2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007). At the same time, however, "[o]ur Supreme Court has urged trial courts to permit the defendant a certain latitude in his [or her] attempt to make [the preliminary showing required to obtain an in camera inspection of confidential records] . . . ." (Internal quotation marks omitted.) *State* v. *Rosado*, 52 Conn. App. 408, 418, 726 A.2d 1177 (1999).

In the present case, we conclude that the defendant satisfied the threshold requirement for an in camera inspection of the complainant's Interval House records. Rather than merely asserting a general belief that the privileged records might contain impeachment information to be used against the complainant during cross-examination, the defendant's offer of proof here was well-defined and sufficiently set forth the issue in the

case to which the information sought would relate. As a preliminary matter, we note that the defendant asserted to the court that, without knowing precisely what the complainant told Interval House, the evidence led to the conclusion that she provided some sort of backstory concerning the alleged assault to the Interval House individual. We, too, are persuaded that it is not unreasonable to infer from the existence of the complainant's subpoenaed Interval House records that the complainant would have been asked by Interval House to explain why she was calling and, thus, would have provided a statement about the events that gave rise to her referral to the organization. Accordingly, we now turn to the crux of the defendant's offer of proof.

Specifically, the defendant argued that the complainant's version of events concerning the alleged assault that she told her doctor was inconsistent from the version of events that she later told the police, because the former statement omitted material facts that would have been natural to mention to the health care provider. For example, the defendant cited for the court how the complainant told her doctor that the defendant forcefully put his fingers in her anus during the alleged assault, but did not say that the defendant struck her in the chest or that he forcefully inserted his penis and a bar of soap into her anus.[10] Because these two statements were inconsistent with each other, the defendant argued, it was reasonable to infer that a third statement to Interval House must necessarily conflict with at least one of them and, thus, would be exculpatory in nature because it serves as impeachment evidence for the trial testimony of the complainant, the state's key witness in the case.

[10] The defendant also explained the importance of these inconsistencies to the court by noting that at least three of the counts with which he was charged were based on penile penetration, conduct that was never mentioned to the doctor.

Ultimately, the defendant's offer of proof here was not a mere attempt "to conduct a general fishing expedition into a witness' privileged records." (Internal quotation marks omitted.) *State* v. *Slimskey*, supra, 257 Conn. 856 n.9. Rather, the defendant laid a sufficient foundation to indicate a " 'reasonable ground to believe' "; *State* v. *Ortiz*, supra, 252 Conn. 557; that the Interval House records contained material useful for impeachment of a crucial prosecution witness, the complainant, whose credibility was a critical factor to obtain a conviction. We conclude, therefore, that the court improperly ruled that the defendant had not made a sufficient showing to compel an in camera inspection of the records.

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

In this opinion the other judges concurred.

TOWN OF MONROE *v.* DISCOVER PROPERTY AND CASUALTY INSURANCE COMPANY (AC 38332)

Beach, Sheldon and Lavery, Js.

Syllabus

The plaintiff town sought, inter alia, a judgment declaring that the defendant insurer, pursuant to a certain insurance contract between the parties, was required to defend and to indemnify the plaintiff in a separate action that had been brought against it by B Co. In the underlying action, B Co. had asserted claims for breach of contract, promissory estoppel and negligent misrepresentation. The defendant denied the plaintiff's request for defense and indemnity, and, after the case was decided in favor of B Co. on the breach of contract and negligent misrepresentation counts, the plaintiff appealed to this court, which reversed the trial court's judgment and directed judgment on all three counts for the plaintiff. Thereafter, the trial court in the present action granted the defendant's motion for summary judgment, concluding that certain allegations in B Co.'s complaint, if true, amounted to a contract, for which coverage for damages and the derivative negligent misrepresentation claim was excluded under a certain policy clause. The trial court rendered judgment for the defendant, and the plaintiff appealed to this

court. The plaintiff claimed that the trial court erred in holding that B Co.'s allegations of negligent misrepresentation fell within the policy exclusion and that the defendant thus had no duty to defend the plaintiff. *Held* that the trial court improperly concluded that the parties' insurance policy excluded coverage for B Co.'s negligent misrepresentation claim and that the defendant thus had no duty to defend the plaintiff, as it was possible that the allegations in the negligent misrepresentation count set forth a claim that was outside the terms of the policy exclusion and, thus, triggered the defendant's duty to defend: the policy exclusion stated that it was inapplicable to liability for damages that the plaintiff incurred in the absence of the contract or agreement, and, because B Co.'s complaint left open the possibility that a finder of fact could determine that the alleged negligent misrepresentation did not arise out of a contract, the policy exclusion did not preclude the defendant's duty to defend; furthermore, there was no merit to the defendant's claims that there was no coverage because B Co.'s complaint sought relief other than damages that were covered under the policy or that the policy's personal profit exclusion clause barred coverage on the basis of certain types of gains to which the plaintiff was not entitled, as the plaintiff did not allege that it received any such gains.

Argued September 19—officially released December 6, 2016

Procedural History

Action to recover damages for, inter alia, breach of an insurance contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Jeffrey J. Vita, with whom was *Bethany L. Barrese*, for the appellant (plaintiff).

Paul G. Roche, with whom, on the brief, was *Joseph H. Carlisle*, for the appellee (defendant).

Opinion

BEACH, J. The plaintiff, the town of Monroe, appeals from the judgment of the trial court rendering summary judgment in favor of the defendant insurer, Discover

Property and Casualty Insurance Company. The plaintiff claims that the court erred in holding that the allegations brought by a third party against the plaintiff in a prior action (underlying action) fell within an exclusion in the applicable policy, and, therefore, that the defendant had no duty to provide a defense to the plaintiff. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The record reveals the following facts and procedural history. In 2005, the plaintiff purchased a "Public Entity Errors and Omissions Liability Policy" (policy) from the defendant. In 2006, Bellsite Development, LLC (Bellsite), instituted an action against the plaintiff. It alleged that the plaintiff had agreed to assist in the "development and implementation of a wireless telecommunications tower," and had harmed Bellsite by abandoning that agreement. The operative complaint in the underlying action alleged (1) breach of contract (count one); (2) promissory estoppel (count two); and (3) negligent misrepresentation (count three). The plaintiff requested defense and indemnity from the defendant, its insurer. The defendant denied coverage. The plaintiff retained counsel to defend its interests in the underlying case, and the case was tried. In the trial court, the case was decided in favor of Bellsite on counts one and three of the operative complaint. On appeal, this court reversed the judgment and directed judgment in favor of the plaintiff on all three counts. *Bellsite Development, LLC* v. *Monroe*, 155 Conn. App. 131, 154, 122 A.3d 640, cert. denied, 318 Conn. 901, 12 A.3d 1279 (2015).

The plaintiff then brought the present action seeking both a declaratory judgment that the defendant had a duty to defend and damages arising from the defendant's alleged breach of that duty. The defendant filed a motion for summary judgment, alleging that the plaintiff could not prevail as a matter of law because the policy excluded coverage for the claims as alleged in the

underlying complaint. On August 11, 2015, the court granted the defendant's motion. The court determined that (1) the allegations regarding an agreement, if true, amounted to a finding of a procurement contract, for which coverage was excluded; and (2) Bellsite's negligent misrepresentation claim, as alleged in the third count, arose out of that contract. Therefore, the allegations, as alleged in the underlying complaint, all fell within the clause of the policy excluding coverage for contractual damages. This appeal followed.

As a preliminary matter, we set forth the appropriate standard of review. "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 456, 870 A.2d 1048 (2005). "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." (Internal quotation marks omitted.) Id., 455–56.

"Construction of a policy of insurance presents a question of law, over which our review is de novo. . . . It is beyond dispute that an insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the complaint . . . . The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts [that] bring the injury within the coverage. . . . If an allegation of the complaint falls *even possibly* within the coverage, then the [insurer] must defend the insured." (Citations omitted;

emphasis added; internal quotation marks omitted.) *Wentland* v. *American Equity Ins. Co.*, 267 Conn. 592, 600, 840 A.2d 1158 (2004); *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 409, 746 A.2d 1252 (2000); see also *Schwartz* v. *Stevenson*, 37 Conn. App. 581, 584–85, 657 A.2d 244 (1995).

If the allegations of a complaint necessarily fall within the terms of a policy exclusion, however, an insurer does not have a duty to defend. *New London County Mutual Ins. Co.* v. *Bialobrodec*, 137 Conn. App. 474, 479, 48 A.3d 742 (2012). An insurer is "entitled to prevail under a policy exclusion [only] if the allegations of the complaint *clearly and unambiguously* establish the applicability of the exclusion to each and every claim for which there might otherwise be coverage under the policy." (Emphasis added; internal quotation marks omitted.) Id.; see also *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 592 (applicability of exclusion for liquor liability not clearly and unambiguously established where complaint alleged driver caused accident while intoxicated); *Schwartz* v. *Stevenson*, supra, 37 Conn. App. 586 (applicability of exclusion for vehicles owned by third parties not clearly and unambiguously established where complaint did not specify who owned vehicle at issue).

Section I (2) (d) (1) of the policy excluded coverage for "[a]ny claim . . . [b]ased upon, arising out of, directly or indirectly resulting from, or in consequence of construction, architectural or engineering contracts or any other procurement contract; or (2) [f]or which the insured has assumed the liability in a contract or agreement." The policy also stated in § I (2) (d) (2) that "[t]his exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement."

The plaintiff argues that the court erred in determining that the allegations of negligent misrepresentation

in the underlying complaint fell within the policy's contract exclusion. Specifically, the plaintiff contends that the allegations of the complaint could not support the finding of an enforceable contract, or of a procurement contract of any kind, and, therefore, it could not be proved that the negligent misrepresentation cause of action arose out of that contract. The plaintiff also argues that even if the allegations supported the existence of a contract, Bellsite's negligent misrepresentation claim was a tort claim "separate and independent from" Bellsite's contractual claims, and coverage was not necessarily precluded by the policy's contract exclusion. Because the claims were not necessarily excluded by the policy language, the plaintiff argues, the defendant had a duty to defend.

In response, the defendant argues that Bellsite's negligent misrepresentation claim did arise out of its breach of contract claim because count three incorporated all of the facts alleged in count one without including any additional facts. The defendant also argues that "[n]egligent misrepresentation arises out of business transactions," and that the "underlying business transaction that the negligent misrepresentation allegedly arose out of was the alleged underlying contract." The defendant argues that because "the allegedly breached contract is the sole basis alleged in the underlying complaint for the misrepresentation," the negligent misrepresentation claim did not trigger the defendant's duty to defend. We disagree.

The determinative issue is whether coverage for the negligent misrepresentation claim outlined in count three is negated by the policy's contract exclusion. To determine whether a complaint has triggered the defendant's duty to defend, we must compare the language of the complaint with the language of the policy. *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 398, 757

A.2d 1074 (2000). An insurer does not have a duty to defend "if the allegations of the complaint *clearly and unambiguously* establish the applicability of [a policy] exclusion . . . ." (Emphasis added; internal quotation marks omitted.) *New London County Mutual Ins. Co.* v. *Bialobrodec*, supra, 137 Conn. App. 479. The insurer does have a duty to defend "[i]f an allegation of the complaint falls *even possibly* within the coverage . . . ." (Emphasis added; internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, supra, 273 Conn. 470. Because in the present case it is possible that the allegations in Bellsite's negligent misrepresentation claim set forth a claim that is outside the terms of the exclusion, the underlying complaint triggered the defendant's duty to defend.

In count three of its operative complaint, which alleged negligent misrepresentation, Bellsite incorporated the allegation from count one that "it was promised that if Bellsite received the necessary approvals for construction of a tower, the town would locate its police communications systems on the tower." Other allegations refer to this promise as "an agreement" that Bellsite acted "in reliance on," but there is no further description of the alleged contract between the parties. Bellsite also alleged in count three, however, that the plaintiff made various "statements, representations, promises and assurances" that "constitute[d] negligent misrepresentation . . . ." Depending on the evidence presented, a finder of fact perhaps could find on these allegations that a contract existed and that any alleged negligent misrepresentation "arose out of" that contract, but it could also find that regardless of whether an enforceable contract had been created, one or more negligent misrepresentations had been made in the course of discussions between the parties, and there was arguably no limiting language as to when such misrepresentations were made. Bellsite separated its

claims of breach of contract and negligent misrepresentation into separate counts in its complaint, and the allegations of the third count quite clearly allege negligent misrepresentation.

In fact, when the underlying action reached this court on appeal, this court treated Bellsite's claims of breach of contract and negligent misrepresentation as separate and distinct. *Bellsite Development, LLC* v. *Monroe*, supra, 155 Conn. App. 131. The defendant argues that the manner in which the action was ultimately treated by a court is irrelevant because the duty to defend is dependent only on the language of the complaint. Although the defendant's characterization of the duty to defend is correct; see *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 592; this court's prior analysis is useful to consider because it illustrates that the trier could have found that the plaintiff was liable for negligent misrepresentation even in the absence of a contract between the parties. The policy exclusion specifically states that the exclusion "does not apply to liability for damages that the insured would have in the absence of the contract or agreement." Because the complaint left open the possibility that the alleged negligent misrepresentation did not arise out of a contract, the defendant's duty to defend was not precluded by the contract exclusion.

In recognizing the possibility that the negligent misrepresentation claim did not arise out of a contract between the parties, we acknowledge that the phrase "arose out of" is defined broadly in Connecticut. See *Nationwide Mutual Ins. Co.* v. *Pasiak*, 161 Conn. App. 86, 98–99, 127 A.3d 346 (2015), cert. granted on other grounds, 320 Conn. 913, 130 A.3d 266 (2016). This court has previously stated that a negligent misrepresentation may arise out of a business pursuit where the "tortious acts and resulting injuries in the underlying action were connected with, had their origins in, grew out of, flowed

from, or were incident to the [party's] business pursuits . . . ." Id., 101. The defendant argues that under this broad definition, the negligent misrepresentation claim must have arisen out of a contract between the parties because it "flowed from" the same facts alleged in Bellsite's breach of contract claim. The defendant assumes too much. The facts alleged in the complaint may or may not have provided the basis on which to prove an enforceable contract, but the "statements, representations, promises and assurances" of the plaintiff, as alleged in count three of the underlying complaint, could have been made outside of contract negotiations, or, even if made in the context of contract negotiations, could perhaps have been severable from contract terms. It was entirely possible from a reading of the allegations of the complaint that the negligent misrepresentation claim, while arising from the "same facts" as the contract claim, did not arise out of a contract. This possibility triggered the defendant's duty to defend in the underlying action.

The defendant argues two alternative grounds for affirming the trial court's decision: (1) that the policy's "personal profit" exclusion barred coverage for the underlying negligent misrepresentation claim; and (2) that the underlying action did not seek "covered damages" under the policy. These claims do not have merit.

The policy's personal profit exclusion barred coverage for "[a]ny liability based upon or attributable to an insured gaining any profit, advantage, or remuneration to which that insured is not legally entitled." The defendant argues that the allegations of the underlying complaint fall within this exclusion because "the underlying complaint specifies certain work of [Bellsite] that the [plaintiff] allegedly received for free because the [plaintiff] allegedly failed to pay for the work." The underlying complaint, however, does not allege that the plaintiff received any "profit, advantage, or remuneration" to

which it was not entitled. Rather, it alleges that the plaintiff failed to honor its agreement to place its equipment on a tower contemplated by Bellsite, and Bellsite was thereby harmed. The allegations of the underlying complaint do not necessarily fall within the exclusion.

The defendant also argues that "there is no coverage under the policy for the underlying complaint's allegations because the underlying complaint does not seek covered damages under the policy." The defendant argues that the underlying complaint sought restitution and compensation for work done by Bellsite, and that restitution and compensation do not constitute damages. The underlying complaint clearly sought money damages as compensation for its expenditures. The policy stated that the insurer was to pay "on behalf of the insured those sums that the insured becomes legally obligated to pay as damages because of a 'wrongful act' to which this insurance applies." There is no merit to this claim.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for summary judgment and for further proceedings according to law.

In this opinion the other judges concurred.

VILLAGE APARTMENTS, LLC *v.* STANLEY P. WARD, JR., ET AL.
(AC 38047)

Lavine, Alvord and Bear, Js.

Syllabus

The plaintiff sought to quiet title to a right-of-way over certain of the defendants' real property. The trial court determined that the Marketable Title Act (§ 47-33b et seq.) extinguished the right-of-way because it was not preserved in the roots of title of the parties as required by the act

and because it did not meet the statutory (§ 47-33h) easement exceptions. The trial court concluded that the defendants' muniments of title did not describe the right-of-way sufficiently to enforce it and that the muniments of title did not specifically identify the recorded title transaction that created the right-of-way. The trial court found that, although "roads and tracks" are included in the list of exceptions in § 47-33h, there were no signs of a cart path or tracks on the subject property. *Held*:

1. The plaintiff could not prevail on its claim that its easement rights over the subject property had been extinguished, the trial court's finding having been supported by the evidence: the record revealed that the property was subject to the subject right-of-way, it did not describe the right-of-way's metes and bounds, and did not incorporate by volume and page the title transaction that created the right-of-way, and, therefore, the reference to the right-of-way was used only to describe the boundaries of certain tracts of land conveyed to the defendants' predecessor in title; additionally, the relevant deeds failed to provide any reference to a record title transaction creating the right-of-way as required by § 47-33d.

2. The plaintiff's claim regarding its right-of-way was without merit, despite visible evidence of merestones, the remnants of a fence, and the remnants of a cart path on the subject property; the fence and merestones were not included as a matter of law, within the definition of "other physical facility" under § 47-33h, and, therefore, the court did not err in concluding that the presence of a fence and merestones on the defendants' property did not except the plaintiff's claims to a right-of-way from application of the act.

Argued September 21—officially released December 13, 2016

Procedural History

Action seeking, inter alia, to quiet title to a right-of-way over certain real property of the named defendant et al., brought to the Superior Court in the judicial district of New London and tried to the court, *Moukawsher, J.*; judgment in part for the named defendant et al., from which the plaintiff appealed to this court. *Affirmed.*

Matthew G. Berger, for the appellant (plaintiff).

Garon Camassar, for the appellees (named defendant et al.).

Opinion

BEAR, J. The plaintiff, Village Apartments, LLC, appeals from the judgment of the trial court rendered in favor of the defendants Stanley P. Ward, Jr., and Rose Mary Ward, after a trial to the court, quieting title to a claimed easement in the form of a right-of-way (right-of-way) over the defendants' real property (property).[1] The court determined that the Marketable Title Act (act), General Statutes § 47-33b et seq., extinguished the right-of-way because it was not preserved in the roots of title of the parties as required by the act and did not meet the apparent easement exceptions in General Statutes § 47-33h. On appeal, the plaintiff claims that the court erred in finding that the act extinguished its right-of-way (1) because it predated and was not properly set forth in either root of title; and (2) although there were visible, physical indicators of the existence of the right-of-way. We affirm the judgment of the trial court.

In the first count of its complaint against the defendants, the church, and Citizens Bank, dated July 9, 2012, and returned to the court on August 1, 2012, the plaintiff sought to quiet title to the alleged deeded right-of-way over the defendants' property and the church's property.[2] The defendants alleged as a special defense, inter alia, that the act extinguished any rights that the plaintiff had to the claimed right-of-way. Following a trial to the

[1] St. John's Roman Catholic Church of Montville (church) and Citizens Bank, also known as RBS Citizens, N.A. (Citizens Bank), were also defendants in this action. In accord with a stipulation, the court rendered judgment, quieting title to and confirming a right-of-way over the church's property. The church and Citizens Bank have not appealed and, therefore, all references to the defendants herein are to Stanley P. Ward, Jr., and Rose Mary Ward.

[2] In the second and third counts of its complaint, the plaintiff alleged trespass and interference with its easement rights by the defendants. Because the plaintiff has not raised these claims in its appeal, they are not before us.

court,[3] the court, *Moukawsher*, *J.*, rendered judgment in favor of the defendants and Citizens Bank on June 9, 2015, and in favor of the plaintiff, as stipulated between it and the church. This appeal followed.

The following factual findings of the court are relevant to this appeal. In 1877, an easement in the form of a right-of-way was created over property now owned separately by the defendants and the church in favor of property now owned by the plaintiff. Pursuant to the act, the plaintiff's root of title[4] is a 1968 deed that conveyed the property "[t]ogether with and subject to such rights of way, pipe line and other easements and privileges as will of record appear." The defendants' roots of title are one or two 1944 deeds[5] that referred

[3] The trial was held before *Hon. Thomas F. Parker*, judge trial referee, on June 24, 2014. The parties submitted posttrial briefs and an additional hearing was held before Judge Parker on January 14, 2015, at which the parties waived the 120 day deadline for the issuance of a decision. On April 7, 2015, the court, *Cole-Chu*, *J.*, transferred the case to the court, *Moukawsher*, *J.*, without a decision having been rendered by Judge Parker. Judge Moukawsher reviewed the transcripts, exhibits, and briefs, and held an additional hearing for arguments on June 5, 2015.

[4] " 'Root of title' means that conveyance or other title transaction in the chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it is recorded . . . ." General Statutes § 47-33b (e).

[5] Although the court, *Moukawsher*, *J.*, stated that the parties agreed that the defendants' root of title was a 1944 deed, the parties now argue, the chain of title reveals, and Judge Parker noted, that the defendants' roots of title are two deeds from 1944 conveying undivided one-half interests from Rose Sepowitz, individually and as executor of the estate of Peter Sepowitz, to John Sepowitz. In describing the property, the deeds are identical. Whether the defendants' root of title was one deed, or two deeds that were identical except for the parties thereto, it does not affect our analysis or conclusions. For convenience, we will refer to the defendants' root of title as the two 1944 deeds. The 1944 deeds conveyed five tracts. The defendants purchased only three of those tracts in 1986 with Paul Ward, and in 1990, they purchased Paul Ward's interest in those tracts.

to a "Frank Calvert" "right of way."[6] The 1944 deeds did not set forth that the property is subject to the Frank Calvert right-of-way, did not describe the right-of-way's metes and bounds, and did not incorporate by volume and page the title transaction that created that right-of-way.

The court found that as of the dates of the trial, the alleged right-of-way area showed no evidence of ruts or marks that might suggest that it had been used as a cart path or track as claimed by the plaintiff. Photographs in evidence showed that the only open area within the alleged right-of-way revealed nothing to suggest its use as a cart path or track. The photographs showed that much of the disputed area was strewn with boulders, was covered with mature trees, and was incapable of accommodating any kind of path. From this and other evidence, the court concluded that there were no signs of a cart path or track on the property.

In its memorandum of decision, the court concluded that the defendants' muniments of title[7] did not describe the right-of-way sufficiently to enforce it and that the muniments of title did not specifically identify the recorded title transaction that created the right-of-way. In its analysis, the court rejected the plaintiff's argument that references to the right-of-way in the 1944 deeds were necessary to determine the location of the five tracts conveyed therein. Consequently, the court concluded that the act extinguished the right-of-way unless

[6] The so-called Frank Calvert right-of-way is not defined, explained, or set forth in the 1944 deeds or any other muniment of title.

[7] "The term 'muniments of title' is defined, in relevant part, as '[t]he records of title transactions in the chain of title of a person purporting to create the interest in land claimed by such person and upon which he relies as a basis for the marketability of his title, commencing with the root of title and including all subsequent transactions.' Black's Law Dictionary (6th Ed. 1990)." *Johnson* v. *Sourignamath*, 90 Conn. App. 388, 398 n.14, 877 A.2d 891 (2005).

an exception applied. The plaintiff argued that merestones[8] marking the right-of-way, a wire fence running along it, and signs of a cart path were physical evidence sufficient to satisfy one of the § 47-33h exceptions. The court concluded that fences and merestones were not included in the list of exceptions contained in § 47-33h and, although roads and tracks were included in the list, there were no signs of a cart path or tracks on the property. Accordingly, the court found that § 47-33h did not apply. In light of these determinations, the court declared that the defendants' property was not subject, under General Statutes § 47-31, to the purported right-of-way described in volume 21, page 99, and volume 21, page 100, of the Montville land records.[9] This appeal followed.

I

The plaintiff claims that the trial court erred in determining that the act extinguished the right-of-way because the right-of-way predated the roots of title. Specifically, it contends that the reference to the Frank Calvert right-of-way in the 1944 deeds that constitute the defendants' roots of title is a specific reference satisfying § 47-33h. Additionally, the plaintiff argues that reference to the right-of-way in the deeds puts a reasonable title searcher on notice of the existence of

[8] A merestone is "[a] stone that marks land boundaries." Black's Law Dictionary (9th Ed. 2009).

[9] General Statutes § 47-31 (a) provides: "An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the property, or any part of it, or to have any estate in it, either in fee, for years, for life or in reversion or remainder, or to have any interest in the property, or any lien or encumbrance on it, adverse to the plaintiff, or against any person in whom the land records disclose any interest, lien, claim or title conflicting with the plaintiff's claim, title or interest, for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property."

an easement and that determination of the location of the right-of-way was necessary to ascertain the location of the three parcels constituting the defendants' property. The defendants argue that their roots of title do not specifically identify a recorded title transaction creating the right-of-way and that the description of the right-of-way was too vague to convey it. We agree with the defendants.

We begin by setting forth the applicable standard of review. "The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, presents a question of law over which our review is plenary. . . . Furthermore, the meaning of language used in a deed also raises a legal issue such that, when faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Sourignamath*, 90 Conn. App. 388, 393–94, 877 A.2d 891 (2005).

"Pursuant to the act, any person who has an unbroken record chain of title to an interest in land for a period of forty years, plus any additional period of time necessary to trace the title back to the latest connecting title instrument of earlier record[10] (which is the root of title

[10] General Statutes § 47-33c provides: "Any person having the legal capacity to own land in this state, who has an unbroken chain of title to any interest in land for forty years or more, shall be deemed to have a marketable record title to that interest, subject only to the matters stated in section 47-33d. A person has such an unbroken chain of title when the land records of the town in which the land is located disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which conveyance or other title transaction purports to create such interest in land, or which contains language sufficient to transfer the interest, either in (1) the person claiming that interest, or (2) some other person from whom, by one or more conveyances or other title transactions of record, the purported interest has become vested in the person claiming the interest; with nothing appearing of record, in either case, purporting to divest the claimant of the purported interest."

under the act) has a marketable record title[11] subject only to those pre-root of title matters that are excepted under the statute or are caused to reappear in the latest forty year record chain of title. . . . The act declares null and void[12] any interest in real property not specifically described in the deed to the property which it purports to affect, unless within a forty year period, a notice specifically reciting the claimed interest is placed on the land records in the affected land's chain of title." (Footnotes added; internal quotation marks omitted.) *Coughlin* v. *Anderson*, 270 Conn. 487, 507, 853 A.2d 460 (2004).

"Even marketable record title, however, may be subject to certain interests. Section 47-33d[13] provides in

[11] General Statutes § 47-33b (a) provides: " 'Marketable record title' means a title of record which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in section 47-33e . . . ."

[12] General Statutes § 47-33e provides: "Subject to the matters stated in section 47-33d, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether those interests, claims or charges are asserted by a person sui juris or under a disability, whether that person is within or without the state, whether that person is natural or corporate, or is private or governmental, are hereby declared to be null and void."

[13] General Statutes § 47-33d provides: "Such marketable record title is subject to: (1) All interests and defects which are created by or arise out of the muniments of which the chain of record title is formed; provided a general reference in the muniments, or any of them, to easements, use restrictions or other interests created prior to the root of title are not sufficient to preserve them, unless specific identification is made therein of a recorded title transaction which creates the easement, use restriction or other interest; (2) all interests preserved by the recording of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with section 47-33f; (3) the rights of any person arising from a period of adverse possession or use, which was in whole or in part subsequent to the effective date of the root of title; (4) any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title

relevant part: 'Such marketable record title is subject to: (1) All interests and defects which are created by or arise out of the muniments of which the chain of record title is formed . . . .' Thus, if an easement over a subject piece of property arises out of one or more of the muniments, including the deeds, of which the chain of record title is formed, a property owner takes the land subject to that easement. This general provision is subject to a proviso contained in § 47-33d (1), however, which provides that 'a general reference in the muniments, or any of them, to easements, use restrictions or other interests created prior to the root of title are not sufficient to preserve them, unless specific identification is made therein of a recorded title transaction which creates the easement, use restriction or other interest . . . .' " (Footnote added.) *McBurney* v. *Cirillo*, 276 Conn. 782, 808–809, 889 A.2d 759 (2006), overruled in part on other grounds by *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 284–89, 914 A.2d 996 (2007). Section 47-33d therefore requires either a specific reference in the muniments to easements, use restrictions, or other interests or a general reference to such interests accompanied by a specific identification of a recorded title transaction creating the easement.

"The reason that a general reference to pre-root of title interests is not sufficient to preserve and prevent their extinguishment is to avoid any necessity for a search of the record back of the root of title, as well as to eliminate the uncertainties caused by such general references. Connecticut Bar Association, Connecticut

of record is started; provided such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of section 47-33e; (5) the exceptions stated in section 47-33h as to rights of reversioners in leases, as to apparent easements and interests in the nature of easements, and as to interests of the United States, this state and political subdivisions thereof, public service companies and natural gas companies."

Standards of Title (1999), standard 3.10, comment one. Effectively, it requires one claiming a deeded right-of-way over the property of another to establish conclusively that at some point, some owner in the servient estate's chain of title actually made a conveyance validly creating that right-of-way. Otherwise, an invalid or nonexistent right-of-way could ripen into existence over a period of time through the mere insertion into the land records of language asserting it." (Internal quotation marks omitted.) *Johnson* v. *Sourignamath*, supra, 90 Conn. App. 401.

"[T]he ultimate purpose of [the act] is to simplify land title transactions through making it possible to determine marketability by limited title searches over some reasonable period of the immediate past and thus avoid the necessity of examining the record back into distant time for each new transaction. . . . [The act is] designed to decrease the costs of title assurance by limiting the period of time that must be covered by a title search." (Citation omitted; internal quotation marks omitted.) *Il Giardino, LLC* v. *Belle Haven Land Co.*, 254 Conn. 502, 537, 757 A.2d 1103 (2000).

In the present case, the parties agree that the defendants' roots of title are two 1944 deeds that refer to a Frank Calvert right-of-way.[14] The two 1944 deeds do not provide that the property is subject to that right-of-way, do not describe the right-of-way's metes and bounds, and do not incorporate by volume and page the title transaction that created the right-of-way. The reference to the right-of-way is used only to describe the boundaries of certain tracts of land conveyed to the defendants' predecessor in title. Additionally, the deeds fail to provide any reference to a record title transaction creating the right-of-way as required by § 47-33d; indeed, Frank Calvert is not named in the

[14] See footnote 5 of this opinion.

1877 deed creating the right-of-way or in any other transaction in the defendants' chain of title.[15] See *Johnson* v. *Sourignamath*, supra, 90 Conn. App. 401 (purported interests and claims must appear in chain of title of property against which interest or claim is being made).

Consequently, the court did not err in concluding that the right-of-way does not burden the defendants' property unless an exception delineated in the act applies.

II

The plaintiff claims that the court erred in finding that the act extinguished the right-of-way despite visible evidence of the right-of-way. Specifically, the plaintiff argues that the court erroneously concluded that merestones, the remnants of a fence, and the remnants of a cart path did not constitute physical evidence excepted by the nonexclusive list contained in § 47-33h. Essentially, the plaintiff argues that the statute allows for any physical evidence of an easement. The defendants counter that the statute does not include merestones, fence posts, or car tracks, but is limited to "large industrial equipment typically used by public service companies . . . ." Although we disagree with both interpretations advanced by the parties, we conclude that the statutory exception contained in § 47-33h does not apply to preserve the right-of-way claimed by the plaintiff.

[15] We have also reviewed the 1986 and 1990 deeds conveying the defendants' property to them and Paul Ward. The defendants first purchased their property with Paul Ward as tenants in common from John Sepowitz as set forth in a deed recorded on the Montville town records on June 30, 1986. Paul Ward then conveyed his interest in the property to the defendants by a quitclaim deed recorded on May 24, 1990. The 1986 and 1990 deeds each contain a reference to the "Plan of the Sepowitz Property Jerome Road, Montville, Connecticut Date July, 1982 Scale: 1" = 50'," which was recorded on the Montville town records. That plan, however, does not depict any alleged right-of-way for the benefit of the plaintiff's property.

We begin by setting forth the applicable standards of review. "The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, presents a question of law over which our review is plenary." *Johnson* v. *Sourignamath*, supra, 90 Conn. App. 393–94. Whether certain physical markers and conditions such as a fence, cart path, or merestones existed on the property are questions of fact to which we apply a clearly erroneous standard of review. See *Reiner*, *Reiner & Bendett, P.C.* v. *Cadle Co.*, 278 Conn. 92, 107, 897 A.2d 58 (2006) ("Questions of fact are subject to 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. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." [Internal quotation marks omitted.]).

Section 47-33h,[16] which codifies certain exceptions to the act, provides in relevant part that the act "shall not be applied to . . . extinguish any easement or interest in the nature of an easement, or any rights

[16] General Statutes § 47-33h provides: "Sections 47-33b to 47-33l, inclusive, shall not be applied to bar any lessor or successor of the lessor as a reversioner of the right to possession on the expiration of any lease or to bar or extinguish any easement or interest in the nature of an easement, or any rights granted, excepted or reserved by the instrument creating such easement or interest, including any right for future use, if (1) the existence of such easement or interest is evidenced by the location beneath, upon or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, hole, tower or *other physical facility* and whether or not the existence of such facility is observable, or to bar, extinguish or otherwise affect any interest of the United States, of this state or any political subdivision thereof, of any public service company as defined in section 16-1 or of any natural gas company, or (2) such easement or interest is a conservation restriction, as defined in section 47-42a, that is held by a land trust or nonprofit organization." (Emphasis added.)

granted, excepted or reserved by the instrument creating such easement or interest, including any right for future use, if (1) the existence of such easement or interest is evidenced by the location beneath, upon or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, hole, tower or *other physical facility* and whether or not the existence of such facility is observable . . . .'' (Emphasis added.)

In the present case, the plaintiff argues that a cart path, fence, and merestones constitute ''other physical evidence'' of the easement. The court found that there were no physical signs of a ''cart path'' running over the contested property, and the evidence presented does not demonstrate that this conclusion was clearly erroneous. We must determine then, whether merestones and fences, as a matter of law, can be evidence of an apparent easement under § 47-33h that may have preserved the right-of-way and, specifically, whether either of these items is included as an ''other physical facility.''

Our state courts have not expounded on the meaning and application of the term ''other physical facility'' as used in § 47-33h, and, therefore, its interpretation is an issue of first impression. ''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.) *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 586, 119 A.3d 570 (2015).

Because of the ambiguity of the statutory term "other physical facility," the doctrine of ejusdem generis is useful in determining its meaning. "[T]he rule of ejusdem generis, which explains that where a particular enumeration is followed by general descriptive words, the latter will be understood as limited in their scope to . . . things of the same general kind or character as those specified in the particular enumeration." (Internal quotation marks omitted.) *Stratford* v. *Jacobelli*, 317 Conn. 863, 871–72, 120 A.3d 500 (2015). "The principle of ejusdem generis applies when '(1) the [clause] contains an enumeration by specific words; (2) the members of the enumeration suggest a specific class; (3) the class is not exhausted by the enumeration; (4) a general reference [supplements] the enumeration . . . and (5) there is [no] clearly manifested intent that the general term be given a broader meaning than the doctrine requires.' 2A J. Sutherland, Statutory Construction (5th Ed. Singer 1992) § 47.18. Thus, '[t]he doctrine of ejusdem generis calls for more than . . . an abstract exercise in semantics and formal logic. It rests on particular insights about everyday language usage. When people list a number of particulars and add a general reference like "and so forth" they mean to include by use of the general reference not everything else but only others of like kind. The problem is to determine what unmentioned particulars are sufficiently like those mentioned to be made subject to the [clause's] provisions by force of general reference.' Id." *24 Leggett Street, Ltd. Partnership* v. *Beacon Industries, Inc.*, 239 Conn. 284, 297, 685 A.2d 305 (1996).

In the present case, the doctrine of ejusdem generis limits the definition of "other physical facility" to the

relationship of the preceding class of terms. The defendants argue that the class is limited to the large industrial equipment of public utilities. The list includes however "road," "track," and "hole" as physical facilities that may evidence an easement. Although the facilities pipe, valve, cable, conduit, duct, sewer, and tower connote a class of public utility items, road, track, and hole are not limited to such uses. This court has applied the § 47-33h exception for roads to cases not involving uses by utility companies. See *Simonds* v. *Shaw*, 44 Conn. App. 683, 684–85, 689–90, 691 A.2d 1102 (1997) (holding § 47-33h excepted easement in roadway from prohibition of act). Additionally, § 47-33d clarifies that this portion of § 47-33h applies to apparent easements and interests in the nature of easements. Section 47-33h protects the interest of "the United States, of this state or any political subdivision thereof, of any public service company as defined in section 16-1 or of any natural gas company" apart from the enumeration herein described. Accordingly, the class enumerated in the statute cannot be limited to public utility uses.

Defining the class as "those physical objects that evidence an easement that themselves effectuate the easement itself" includes all of the items enumerated in § 47-33h, but not dissimilar items. For example, the location of a sewer beneath a property would evidence a sewer easement, whereas the location of poles and wires traversing the property would evidence an easement to a telephone company or electrical company for such use. Stated this way, the class does not include items that may be found on a property that are not set forth in § 47-33h or otherwise within the class of those items, which are only, at best, mere indirect, possible indicators of an easement.[17]

[17] Thus, by way of example, fences, merestones, trees, and shrubs, standing alone, in the absence of specific evidence of a road or track running between them, do not satisfy the requirements for a § 47-33h exception.

After setting forth the proper class, it is clear that merestones and fences are not a part of the class of other physical facilities creating an exemption from the application of the act. Merestones are defined as markers of a boundary, but not necessarily of an easement in the form of a right-of-way within or across a parcel of land. A fence also is not necessarily a marker of an easement in the form of a right-of-way. It is common knowledge that a fence can have many uses aside from marking a boundary of a parcel of land; for example, it can separate one interior parcel of land from another, it can restrict pets or livestock to a certain area within a parcel of land, it can surround and protect against access to a hazardous condition, or it can be purely decorative. A fence or a merestone, even if visible on part on the defendants' property, is not necessary or integral to the definition, use, existence, or identification of the plaintiff's claimed right-of-way in this case in the way that a road, sewer, or pipe would identify and carry out the purposes of an easement excepted by § 47-33h.

Moreover, although this court and the plaintiff might be able to imagine other physical evidence that could suggest the possibility, or even probability, of an easement, our legislature made its choice in creating a list of indicators of an apparent easement to achieve its goal of "simplify[ing] land title transactions through making it possible to determine marketability by limited title searches over some reasonable period of the immediate past and thus avoid the necessity of examining the record back into distant time for each new transaction." (Internal quotation marks omitted.) *Il Giardino, LLC* v. *Belle Haven Land Co.*, supra, 254 Conn. 537. To expand the excepted list of items contained in § 47-33h to include dissimilar items, such as fences and merestones, could expose landowners to stale claims

against their properties and, thus, counteract the broad remedial purposes of the act.

Accordingly, fences and merestones are not included as a matter of law within the definition of "other physical facility," and, therefore, the court did not err in concluding that the presence of a fence and merestones on the defendants' property did not except the plaintiff's claims to a right-of-way from application of the act.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN D'AMATO *v.* DIANNE HART-D'AMATO (AC 36849)

Beach, Keller and Bear, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving her marriage to the plaintiff and making certain orders regarding custody, visitation, and the parties' finances. The defendant also filed amended appeals challenging the trial court's denials of various postjudgment motions. *Held*:

1. The defendant could not prevail on her claim that her right to due process was violated when the trial court denied, without a hearing, her motions for a continuance, to open and set aside the judgment and for a new trial, to reargue, and for clarification; pursuant to the applicable rule of practice (§ 11-18 [a]), the defendant was not entitled to oral argument as of right on her motions, there was nothing in the record to indicate that the trial court abused its discretion in ruling on the motions without a hearing, and although the defendant claimed that certain testimony at trial was fraudulent, that claim lacked merit in the absence of newly discovered evidence documenting her assertions of perjury by a witness.
2. The trial court did not abuse its discretion in granting sole legal custody of the parties' minor child to the plaintiff: the court found credible the testimony of the children's guardian ad litem concerning the defendant's abuse of alcohol and the best interests of the children, the court did not credit the testimony of the defendant and her family that her issues with alcohol were a short term reaction to circumstances, and this court would not reassess the credibility of the witnesses; moreover, it was clear that the court, in making its order, carefully examined all of the

evidence, analyzed the statutory (§ 46b-56) factors, and determined that it was in the children's best interest to award sole custody to the plaintiff.

3. The trial court did not abuse its discretion in its distribution of the marital assets; contrary to the defendant's claim, she was not ordered to pay child support twice, and this court could not consider the defendant's argument that the amount that she was required to pay exceeded her current income, as the claim referred to facts that were not in evidence.

4. The defendant could not prevail on her claim that the trial court abused its discretion in denying her motion for recusal; the fact that the trial court made rulings adverse to the defendant did not demonstrate a personal bias against her, and the record showed that the defendant was afforded fair and reasonable consideration by the court and that no appearance of impropriety existed.

Argued September 9—officially released December 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 Fairfield, where the court, *Klatt*, *J.*, declared a mistrial; thereafter, the matter was transferred to the Regional Family Trial Docket at Middletown; subsequently, the court, *Adelman*, *J.*, denied the defendant's motion for a continuance; thereafter, the matter was tried to the court, *Adelman*, *J.*; judgment dissolving the marriage and granting certain other relief; subsequently, the court, *Adelman*, *J.*, denied the defendant's motions to reargue, for an articulation and to disqualify, and the defendant appealed to this court; thereafter, the court, *Adelman*, *J.*, denied the defendant's motions to open the judgment and for clarification, and the defendant filed amended appeals with this court. *Affirmed.*

Dianne Hart, self-represented, the appellant (defendant).

Patrice A. Cohan, with whom was *Jeanmarie A. Riccio*, for the appellee (plaintiff).

Opinion

BEACH, J. The defendant, Dianne Hart-D'Amato, appeals from the judgment of the trial court dissolving

her marriage to the plaintiff, John D'Amato, and entering related custody and financial orders. The defendant claims that the trial court (1) violated her right to due process when it denied certain motions without a hearing, (2) erred in granting sole legal custody of the minor children to the plaintiff, (3) issued inequitable financial orders, and (4) erred in denying her motions for disqualification of the trial judge. We disagree and affirm the judgment of the trial court.

The following facts, as found by the trial court in a comprehensive memorandum of decision, are relevant. The parties were married in 1989. At the time of trial in 2014, the plaintiff was fifty years old and working as a letter carrier for the United States Postal Service. The defendant was forty-nine years old and working as a juvenile probation officer. The plaintiff's work schedule was inflexible. The defendant's schedule was comparatively flexible and she historically had been the primary parental figure in the children's lives. The parties have two children, the first born in 1998 and the second in 2002. At the time of trial, the defendant was residing alone at the marital home in Fairfield and the plaintiff was residing in a condominium in Monroe with the two children.

Following a trial, the court issued a memorandum of decision on March 17, 2014. A principal issue in the trial was the defendant's use of alcohol. The court did not credit the defendant's testimony that she did not drink much, although she said that she did use alcohol to cope with an emotionally abusive husband. The court, rather, found that the defendant had abused alcohol for a long period of time, at least since 2006. John Mager, the children's guardian ad litem, testified that the children had reported to him that the defendant had driven while intoxicated with them in the car on more than one occasion. On December 31, 2011, the defendant became intoxicated and was hospitalized.

Mager testified that the hospital records indicated that the defendant's blood alcohol level was .448 when she was admitted and that the defendant reported to intake staff that she routinely drank large amounts of vodka daily for the majority of her adult life. Michael Reitman, who was licensed as a clinical social worker and an alcohol and drug counselor, had treated the defendant since January, 2012. The defendant refused any other form of treatment and Reitman continually had urged the defendant to reconsider her refusal. Since December 31, 2011, the defendant had been successful in maintaining her sobriety, but continued to minimize her difficulty with alcohol.

The defendant's abuse of alcohol had a significant impact on the children. The plaintiff influenced to some extent the children's attitudes toward the defendant, but, in any event, the children's alignment with their father grew and they reported negative feelings toward the defendant even during the time from January, 2012, to October, 2012, when the defendant had primary care of the children and the plaintiff did not interfere with her activities with the children. After October, 2012, the children and the plaintiff moved out of the marital home in order to reduce the strife to which the children were being exposed. Mager testified that the defendant's unwillingness to accept responsibility for her actions without placing blame elsewhere prevented healing between her and the children.

The children preferred to have very little or no contact with the defendant. The court found that the best interests of the children required orders granting sole legal and physical custody to the plaintiff, that the defendant maintain her sobriety, and that the children maintain a relationship with both parents. The court so ordered and further specified that on a three week rotating basis the defendant was to have visitation with the younger child for three hours the first week, the older child for three hours the second week, and both

children for three hours the third week. The court ordered that the children, the plaintiff and, at an appropriate time, the defendant, were to engage in counseling with the "goal and expectation that the parental access between the defendant and the minor children shall increase over time." The court also ordered that the defendant refrain from alcoholic beverages and submit to random alcohol testing; either a positive test or a failure to take a test would result in cancellation of that week's visitation.

The court further ordered the defendant to pay $252 weekly in child support to the plaintiff and ordered that the parties share unreimbursed medical, dental and child care expenses. The plaintiff was to pay 53 percent and the defendant 47 percent. The court ordered that the parties' deferred income was subject to equitable distribution. The court did not order alimony. This appeal followed.

I

The defendant first claims that her right to due process was violated when the court denied without a hearing her motion for a continuance, her "motion to open and set aside judgment and for new trial," her motion to reargue or reconsider, and her motion for clarification.[1] We disagree.

[1] The defendant seeks review of these claims under the plain error doctrine. This doctrine, codified at Practice Book § 60-5, is an extraordinary remedy. "[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." (Internal quotation marks omitted.) *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009).

The present claim, however, is reviewable without resort to doctrines reserved for unpreserved claims of error. We will review the merits of this claim under the abuse of discretion standard.

Prior to the start of trial, and almost two years after the plaintiff initiated the action, the defendant filed a motion for a continuance in which she argued that her attorney failed to prepare adequately for trial because she "can no longer pay him." The court denied the motion without elaboration. In the course of a hearing on a postjudgment motion to disqualify the trial court, the defendant mentioned the court's previous denial of her pretrial motion for a continuance. The court at that time explained that "issues relating to the custody of children are priority issues. This case has been pending for a long time. The matter was scheduled in advance. I don't continue custody trials absent extraordinary circumstances like illness or death."

After the memorandum of decision was issued, the defendant filed several motions. One was entitled "motion to open and set aside judgment and for new trial." In that motion she argued that a new trial was warranted because her trial counsel was "ineffective" in that he failed to prepare adequately for trial and engaged in "threatening behaviors." She further claimed that Mager, the guardian ad litem, "provided dishonest testimony throughout the trial." With respect to this issue, the defendant argued that Mager falsely had testified that he had spoken with Reitman. The defendant highlighted the court's finding that "[Mager] testified that in his discussion with Reitman, the therapist had reported that he had recommended more intensive type treatments and that he had recommended that [the defendant] attend [Alcoholics Anonymous]. The defendant refused any other form of treatment and Reitman reported to [Mager] that he had continued to urge her to reconsider that decision." The defendant attached to the motion an affidavit by Reitman averring that he had neither spoken to nor met with Mager. She also noted the court's finding that "[i]t was only through the efforts of [Mager] . . . that vital information from the

St. Vincent's Hospital records were brought to the court's attention." She argued that the hospital records were not introduced into evidence and Mager "testified to the contents of the record that were completely made up and false. Another willful act of perjury . . . ." The court denied the motion for clarification.

The defendant also filed a motion to reargue, which claimed "ineffective counsel and fraudulent testimony" by Mager. This motion was denied.

The defendant filed a motion for clarification in which she stated that the court denied her "motion to open and set aside judgment and for new trial" without a hearing, and asked the court to clarify the legal basis upon which the court denied that motion. The court also denied this motion.

The defendant argues that "[a]s a matter of law, the trial court's . . . failure to afford a hearing on the defendant's motion for a continuance, motion to reopen judgment for a new trial based on perjury and ineffective counsel, motion to reargue/reconsider, and motion for clarification deprived the [defendant of her due process right] to be heard." Pursuant to Practice Book § 11-18 (a), however, whether to hear oral argument on motions in civil matters is a matter within the discretion of the court, except in limited circumstances, not relevant here, in which argument is a matter of right. Section 11-18 (a) provides in relevant part: "Oral argument is at the discretion of the judicial authority except as to motions to dismiss, motions to strike, motions for summary judgment, motions for judgment of foreclosure, and motions for judgment on the report of an attorney trial referee and/or hearing on any objections thereto. . . ." We review the claim of error in not hearing oral argument under an abuse of discretion standard. See *Brochard* v. *Brochard*, 165 Conn. App. 626, 638, 140 A.3d 254 (2016).

It is clear, then, that the defendant was not entitled to oral argument as of right on her motion for a continuance, her "motion to open and set aside judgment and for new trial," her motion to reargue or reconsider, and her motion for clarification. The trial court's decisions not to hold evidentiary hearings with respect to these motions were, by the rules of practice and case authority, within its discretion. There is nothing in the record to indicate that the court abused its discretion in ruling on the motions without a hearing.[2]

The defendant focuses her substantive argument regarding the disposition of her motions on her motion to open. She argues that Mager's "testimony throughout the trial, while being under oath, was deceitful and wilfully dishonest. That the defendant's counsel did not properly cross-examine [Mager] despite the defendant asking him to do so. In addition, the defendant's hospital records were never introduced as evidence. Yet, [Mager] dishonestly testified as to the contents of the record. Said testimony was completely fraudulent and deceitful. The trial court . . . relied on [Mager's] false testimony. This resulted in significant harm being done to the defendant and her minor children. . . . It is clear in the memorandum of decision that the court based its recommendation on the testimony of [Mager]. However the new evidence clearly shows the court that a new trial would produce a different outcome, in light of the fact that a key witness for the plaintiff has committed acts of perjury."

The defendant presents two grounds for her argument that Mager's testimony was "fraudulent." First,

[2] Although notions of due process include the opportunity to be heard; see *Barros* v. *Barros*, 309 Conn. 499, 507–508, 72 A.3d 367 (2013); the defendant patently was afforded the opportunity to present her points of view in writing. Such opportunity satisfies due process. See *Bojila* v. *Shramko*, 80 Conn. App. 508, 518, 836 A.2d 1207 (2003) (absence of hearing on motion to open not violation of procedural due process where hearing not required under Practice Book § 11-18 [a]).

she points to the court's statement in its memorandum of decision regarding Mager's testimony during trial. The court stated that Mager had testified that, during a discussion he had had with Reitman, Reitman indicated that he had urged the defendant to attend Alcoholics Anonymous and had also suggested that the defendant needed more treatment than what was being provided, but she refused. The statement, deemed fraudulent by the defendant, was never made. Although Mager testified about the underlying facts, he did not testify that he learned about the facts through a conversation with Reitman. That the court apparently incorrectly attributed the information in its memorandum of decision does not necessarily undermine the judgment; the manner in which Mager obtained this information is not a fact material to this case, and, thus, the finding as to attribution is harmless.[3] See *Lambert* v. *Donahue*, 78 Conn. App. 493, 507, 827 A.2d 729 (2003) ("Where . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's fact finding process, a new hearing is required." [Internal quotation marks omitted.]).

Second, the defendant states that Mager's testimony as to the contents of the hospital records regarding the defendant's treatment for detoxification at St. Vincent's Hospital was intentionally inaccurate. Mager's testimony as to the content of the records was admitted into evidence without objection, however, and was not inconsistent with the testimony of the defendant's witness, Reitman; we note, however, that Reitman's testimony regarding the contents of the hospital records

[3] We also note that the evidence regarding the defendant's difficulties with alcohol was overwhelming and was provided by several sources.

was less comprehensive than that of Mager. Further, the defendant herself presumably could have introduced the hospital records themselves into evidence in order to contest Mager's version of events.[4] In this respect, because any discrepancies could have been discovered at trial, the evidence could not have been newly discovered for purposes of a motion to open. *Worth* v. *Korta*, 132 Conn. App. 154, 160–61, 31 A.3d 804 (2011) (evidence "newly discovered" for purposes of motion to open if "it could not have been discovered earlier by the exercise of due diligence" [emphasis omitted; internal quotation marks omitted]), cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012). It was clear from the motion to open itself that the defendant's assertions of perjury, in the absence of newly discovered documentation, lacked merit. The court did not abuse its discretion in denying the motion to open without an evidentiary hearing.

II

The defendant next claims that the court erred in granting sole legal custody of the minor child to the plaintiff.[5] We disagree.

"It is statutorily incumbent upon a court entering orders concerning custody or visitation or a modification of such order to be guided by the best interests of the child. . . . In reaching a decision as to what is in the best interests of a child, the court is vested with broad discretion and its ruling will be reversed only upon a showing that some legal principle or right has been violated or that the discretion has been abused." (Citation omitted; internal quotation marks omitted.)

[4] We have examined the exhibits, and do not find the St. Vincent's Hospital records to be among those submitted into evidence.

[5] The older child has reached the age of majority. We address the claims only as they relate to the younger child, who is a minor at the time of this appeal.

Stahl v. *Bayliss*, 98 Conn. App. 63, 68, 907 A.2d 139, cert. denied, 280 Conn. 945, 912 A.2d 477 (2006).

General Statutes § 46b-56 provides in relevant part: "(a) In any controversy before the Superior Court as to the custody or care of minor children . . . the court may make . . . any proper order regarding the custody, care, education, visitation and support of the children . . . [and] the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . .

"(b) In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. Such orders may include, but shall not be limited to . . . (3) the award of sole custody to one parent with appropriate parenting time for the noncustodial parent where sole custody is in the best interests of the child; or (4) any other custody arrangements as the court may determine to be in the best interests of the child.

"(c) In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the

child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision. . . ."

The defendant argues that Mager's testimony relevant to the child's best interests was erroneous and should not have been relied on by the court. She claims he was mistaken in testifying, inter alia, that she had been drinking during the majority of her adult life, including large amounts of vodka daily, and in reporting that the children had no desire to have contact with her.[6] She also contends that the court ignored evidence favorable to her with respect to the "best interest" factors under § 46b-56. Most of her argument regarding these factors refers to abusive behavior on the part of the plaintiff and the claim that the children had stronger ties to the defendant than to the plaintiff.

The defendant essentially requests us to reassess the credibility of witnesses. "[I]t is well established that the evaluation of a witness' testimony and credibility are wholly within the province of the trier of fact. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of

[6] In her statement of issues regarding this claim the defendant also includes an argument that the trial court erred in failing to establish a holiday, vacation, and birthday visitation schedule that included her. Our Supreme Court "has consistently held in matters involving child custody, and, by implication, visitation rights, that while the rights, wishes and desires of the parents must be considered it is nevertheless the ultimate welfare of the child which must control the decision of the court." (Internal quotation marks omitted.) *Ridgeway* v. *Ridgeway*, 180 Conn. 533, 541, 429 A.2d 801 (1980). The court's holiday visitation schedule included visitation on Christmas and Mother's Day. The court found that the children's expressed desire was to have no contact with the defendant, but the court nonetheless found that it was in the children's best interest to try to develop a meaningful relationship with defendant; it ordered therapy for the children in an effort to try to mend their relationship with the defendant. The court expressed the "goal and expectation that the parental access between the defendant and the minor children shall increase over time . . . ." The court further ordered that the children were free to contact the defendant any time and the plaintiff was not to interfere, except incident to legitimate discipline. We conclude that the court did not abuse its discretion in fashioning its visitation orders.

the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Citation omitted; internal quotation marks omitted.) *Schoenborn* v. *Schoenborn*, 144 Conn. App. 846, 851, 74 A.3d 482 (2013). The court found the testimony of Mager credible and the testimony of the defendant and her family, to the effect that her issues with alcohol were recent phenomena and were caused by the behavior of the plaintiff, not credible. We decline to second-guess this determination.

The court found that the defendant had been successful in maintaining her sobriety since January, 2012, but she continued to minimize the significance and extent of her alcohol related difficulty. The court noted that it did not credit the testimony of the defendant or her family that her issues with alcohol were a short term reaction to circumstances. The court stated that it was not ignoring emotional abuse by the plaintiff, but that the defendant's placing blame elsewhere for her alcohol issues only placed her and the children at greater risk and prevented healing between the defendant and the children.[7] The court, on the other hand, noted that the plaintiff encouraged the children's negative attitude toward the defendant and contributed to the breakdown of the marriage. The court nevertheless found that the children reported their feelings about the defendant in very negative terms, even when the defendant was the primary parent and the plaintiff was not interfering. The court found that the children considered the defendant's actions to be harmful to them. The court stated that the "strong and consistent preference" of the children was to have "very limited contact with the defendant."

[7] The court also noted that much of the emotional abuse described by the defendant occurred after the filing of the complaint and after her hospitalization.

The court concluded that, despite the children's preference, "the best interests of the children are served here by having a meaningful relationship with both parents." The court discussed the difficulty in achieving that goal in light of the strong views of the children and the facts that at least one child was almost sixteen at the time of trial and the children had not experienced helpful therapy during the pendency of trial. The court concluded by noting that "the defendant's request for joint legal custody is shocking based on the reality of this case and truly demonstrates the defendant's total lack of insight into her children and the impact her alcoholism has had on them. . . . She and the plaintiff have not been able to communicate on any meaningful level for a very long period of time. While such a lack of coparenting communication is not completely her fault under any sense of the concept it is simply not a viable path for protecting the minor children and promoting their best interests at this time." Although the court ordered that the defendant's visitation with the children was set at three hours per week, contingent upon the defendant refraining from alcoholic beverages, the court also ordered that the children engage in therapy with the goal of increasing the defendant's access to them.

It is clear that the court carefully examined all of the evidence, analyzed the § 46b-56 factors, and determined that it was in the children's best interest to award sole custody to the plaintiff. "The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child." (Internal quotation marks omitted.) *Ford* v. *Ford*, 68 Conn. App. 173, 187, 789 A.2d 1104, cert. denied, 260 Conn. 910, 796 A.2d 556 (2002). We cannot conclude that the court's conclusion in this regard was an abuse of discretion.

III

The defendant next claims that the court erred in its distribution of the marital assets. We disagree.

"[T]his court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . [T]he foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . 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." (Citation omitted; internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 366–67, 999 A.2d 721 (2010).

The defendant argues essentially that she is unable to comply with the financial orders that she pay $252 weekly in child support, 47 percent of all unreimbursed/uncovered medical/dental expenses, 47 percent of all reasonably necessary child care, and her share of the expenses required to place the marital home on the market.[8] She contends that she has been ordered to pay "child support twice" because, in addition to the $252 weekly child support, she would expect to spend additional money on the children during visitations. She further argues that her recent retirement[9] caused a decrease in her income and that she is unable to pay the amount required under the financial orders.[10]

[8] The court ordered that the defendant pay for any improvements or minor repairs costing less than $500 that might be recommended by the realtor or required by the buyer's lender. The cost of major items exceeding $500 were to be shared equally by the parties.

[9] Her retirement occurred after the court's judgment and while this appeal was pending. Evidence regarding it is not part of the record in this appeal.

[10] The defendant argues consistently throughout her discussion of this claim that the court failed to use a "mosaic approach" in crafting its financial orders. It is true that "financial orders are entirely interwoven. The rendering of judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other." (Internal quotation marks omitted.) *Watrous* v. *Watrous*, 108 Conn. App. 813, 818, 949 A.2d 557 (2008). This statement refers to the practical impossibility of reversing only one financial order when the entirety of the financial orders are interwoven. The concept of the mosaic does not specifically apply to the defendant's claims.

The defendant has not supplied a persuasive reason to disturb the court's exercise of discretion in fashioning its orders.[11] She was not required to pay child support twice: courts routinely order a parent who enjoys visitation also to pay a share of child support.[12] The defendant's argument that the amount that she was required to pay exceeded her current income refers to facts not in the record before the trial court at the time of the decision and, as such, we cannot consider it. "[W]e cannot consider evidence not available to the trial court to find adjudicative facts for the first time on appeal. . . . It is well established that this court does not find facts." (Footnote omitted.) *State* v. *Edwards*, 314 Conn. 465, 478, 102 A.3d 52 (2014).

IV

The defendant last claims that the court abused its discretion in denying her motions for recusal. We disagree.

"Canon 3 (c) of the Code of Judicial Conduct governs judicial disqualification. That canon provides in relevant part that (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (A) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . . Canon 3 (c) thus encompasses two distinct grounds for disqualification: actual bias and the appearance of partiality. The appearance and the

[11] The defendant also argues that the court's order that she transfer a percentage of her pension to the plaintiff, while not requiring him to transfer a portion of his pension to her, was punitive, and that the court's order requiring her to maintain life insurance naming the plaintiff as beneficiary is "encouraging the plaintiff to have the defendant murdered." The plaintiff's arguments are without merit.

[12] The duty to support is, however, wholly independent of the right of visitation. *Raymond* v. *Raymond*, 165 Conn. 735, 742, 345 A.2d 48 (1974).

existence of impartiality are both essential elements of a fair trial. . . . As such, [t]o prevail on its claim of a violation of this canon, [a party] need not show actual bias. The [party] has met its burden if it can prove that the conduct in question gave rise to a reasonable appearance of impropriety." (Internal quotation marks omitted.) *McKenna* v. *Delente*, 123 Conn. App. 137, 143, 1 A.3d 260 (2010). "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." (Internal quotation marks omitted.) *In re Christopher C.*, 134 Conn. App. 464, 471–72, 39 A.3d 1122 (2012).

The defendant asked Judge Adelman several times to recuse himself. At a hearing held on February 13, 2015, regarding the plaintiff's motion to vacate the appellate stay, the defendant requested Judge Adelman to "permanently recuse [himself] from my case." After hearing from the defendant, the court stated: "[Y]ou've repeatedly made claims that I'm biased against you, primarily because I've ruled against you, although I have also entered rulings in your favor. . . . If someone rules against you or does something that is adverse to your position you immediately assume that person is biased against you. I certainly regret that you have that opinion. I've certainly done everything I can to give you a fair hearing on every motion that you've raised. Your motion for me to recuse myself is denied, as it has been in the past."

The defendant argues on appeal that the court engaged in behaviors showing bias against her, such as transferring the case to Bridgeport when he was

assigned to Bridgeport, denying her rights to due process, relying on the testimony of Mager, making certain comments at a July 11, 2014 hearing held on various postjudgment motions,[13] and engaging in retaliation against her for expressing her concerns about the

[13] At the hearing, Mager testified that, despite his efforts, he was unable to find a therapist for the minor children by the date specified in the court's orders. He stated that he was unable to find a therapist in the immediate geographical area with a Ph.D. because some declined to provide services after hearing about the file and the others declined after reviewing the memorandum of decision. Mager testified that there seemed to be a trend that therapists refuse to take on high conflict divorce cases. The defendant, who was self-represented at the hearing, questioned Mager regarding whether he was adverse to the children engaging in therapy and about her concerns regarding Mager as the children's guardian ad litem. The court sustained the objections of the plaintiff's attorney as to these questions and then stated that "the attack on the therapeutic community by litigants who have not been successful in court has, obviously, made many of these therapists adverse to getting involved in these cases. They're getting sued and there's plenty of therapy work for people who are not involved in litigation. . . . That's tragic because you and these girls need some therapeutic assistance . . . ." The court explained, "I'm going to have to go down the stream to other therapeutic individuals because you and others like you have created a hostile environment . . . ." The defendant argues that this statement by the court indicated bias and that the court's orders were punitive. We do not agree.

In the course of its remarks, the court was restating Mager's testimony regarding a trend in the provision of care by therapists in high conflict divorce cases, such as the current case. The court's statements at a postjudgment hearing, in which an issue was whether orders in the memorandum of decision had been executed, do not reflect bias in crafting orders months earlier in its memorandum of decision. The court's statements reflect its findings in the memorandum of decision that the defendant refused to authorize communications between the family relations counselor and one of the therapists, that the selection of a coparenting counselor was unduly delayed at least in part due to the defendant's procrastination, that, when therapists were found, the defendant ended therapy more than once, claiming that the therapist was not working well with the children or the parties, and that the children blamed the defendant for undermining their therapy and were unwilling to engage in more therapy.

The court, then, expressed factual findings leading to a conclusion that the defendant was making progress difficult; the court further noted, essentially, that such behavior extrapolated over a larger population caused difficulty for many people. These statements were not in themselves indicative of a personal bias. See *Barca* v. *Barca*, 15 Conn. App. 604, 613, 546 A.2d

guardian ad litem system. The citations to the record referenced in her brief and the motions for disqualification to which the defendant directs our attention suggest that the defendant's argument of bias stems largely from the court's rulings that were adverse to her.[14] "[T]he fact that a trial court rules adversely to a litigant . . . does not demonstrate personal bias." (Internal quotation marks omitted.) *Burns* v. *Quinnipiac University*, 120 Conn. App. 311, 317, 991 A.2d 666, cert. denied, 297 Conn. 906, 995 A.2d 634 (2010). The defendant has offered no valid reason why a reasonable observer would suspect partiality. *McKenna* v. *Delente*, supra, 123 Conn. App. 143 ("[i]f an objective observer, in view of all of the facts would reasonably doubt the court's impartiality, the court's discretion would be abused if a motion to recuse were not granted" [internal quotation marks omitted]). We have carefully examined the record, including the court's decision, and find that the defendant was accorded fair and reasonable consideration. We see absolutely no appearance of impropriety and, indeed, the record reflects nothing other than a conscientious effort to resolve a contentious case. We, therefore, reject the assertion that the court abused

887 ("[t]he alleged bias and prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his [or her] participation in the case" [emphasis omitted; internal quotation marks omitted]), cert. denied, 209 Conn. 824, 552 A.2d 430 (1988).

[14] We note that not all of the court's rulings were adverse to the defendant. For example, the court decided several contempt motions in favor of the defendant and, perhaps more markedly, awarded no alimony, despite finding that the defendant's income was greater than that of the plaintiff.

At least one of the defendant's complaints, however, is not grounded in an adverse ruling. When Judge Adelman was transferred from the regional family docket in Middletown to an assignment in Bridgeport, he retained this case. The defendant argues that his retaining the case indicated an animus toward her. The argument overlooks the more obvious motive of judicial efficiency and, indeed, the parties resided in Monroe and Fairfield, far closer to Bridgeport than to Middletown. We do not draw an inference of animus from a neutral act.

its discretion in denying the motion to recuse in this matter.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MAURICE BEVERLEY (AC 38432)

Lavine, Sheldon and Mullins, Js.

Syllabus

The defendant was convicted of the crimes of felony murder, robbery in the first degree, and criminal possession of a firearm arising out of a drug transaction between his cousin, P, and the victim, during which the defendant shot the victim and took his drugs and jewelry. In addition to P, the incident was witnessed by certain unknown people who were on the first floor porch of the three-story building where P's aunt resided on the third floor. On appeal, the defendant claimed that the trial court failed to conduct an adequate investigation into alleged juror bias, and improperly limited his cross-examination of P. *Held*:

1. This court declined to review the defendant's unpreserved claim that the trial court failed to conduct an adequate investigation into any alleged juror bias arising out of a phone call that a juror had received at home during jury deliberations requesting information about the case, the defendant having waived that claim: the trial court, sua sponte, conducted an individual voir dire of each juror as to whether he or she could remain fair and impartial after learning of the phone call, and defense counsel declined to question any of the jurors individually following the court's voir dire, did not ask that the juror who received the call be removed from the panel, did not request that any other specific action be taken, and stated that the jury should proceed with its deliberations; furthermore, although defense counsel made a nonspecific request for a "quick" investigation into the circumstances surrounding the phone call, considering defense counsel's actions under the totality of the circumstances, the defendant consented to and expressed satisfaction with the trial court's resolution of the issue and thereby waived any claim arising from it.
2. The trial court did not abuse its discretion in sustaining the state's relevancy objection to defense counsel's question regarding whether P knew if her aunt had a dispute with the first floor tenants of the building: defense counsel failed to demonstrate that the testimony he sought to elicit from P was relevant to demonstrating her motive to lie about who was responsible for the murder, as P had testified that she did not know

the people who lived on the first floor nor any of the other people on the porch that night, and the question as to whether P's aunt had a dispute with the first floor tenants did not have a logical tendency to aid the jury in determining P's own motive or credibility; moreover, because the trial court did not abuse its discretion with respect to this evidentiary ruling, the defendant could not prevail on his claim that his right to confrontation guaranteed by the sixth amendment to the United States constitution was violated.

Argued September 23—officially released December 13, 2016

Procedural History

Substitute information charging the defendant with the crimes of felony murder, robbery in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Vitale, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, with whom, on the brief, was *Lauren Weisfeld*, chief of legal services, for the appellant (defendant).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Michael Dearington*, former state's attorney, and *Stacey Haupt Miranda*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Maurice Beverley, appeals from the judgment of conviction, rendered after a jury trial, of one count of felony murder in violation of General Statutes § 53a-54c; one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2); and one count of criminal possession of a firearm in violation of General Statutes § 53a-217 (a). On appeal, the defendant claims that the trial court abused its discretion in (1) failing to conduct an adequate investigation into alleged juror bias, and (2) limiting the defendant's cross-examination of the state's key witness. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On March 31, 2010, the defendant told Eric Brooks, a codefendant, that he wanted to rob "somebody with money." On the night of April 2, 2010, the defendant and Eric Brooks met with Mary Pearson, their cousin, on the front porch of her aunt's home. Pearson was staying with her aunt, Mary Brooks, on the third floor of a three-story house, but another family lived on the first floor. The porch, which was in front of the first floor, was a small "community porch" where people from around the neighborhood gathered. On that night, there were "other"[1] people on the porch with the defendant, Eric Brooks, and Pearson. When Pearson went to meet the defendant, he was already on the porch and had the victim, Kenneth Bagley, who was a known drug dealer, on his cell phone. In front of the "other" people, the defendant asked Pearson if she would talk to Bagley to buy drugs for him. An hour later, Bagley arrived in his car and parked a couple of houses down from her aunt's house, in full view of the people on the porch. As Pearson and Bagley began to engage in a drug transaction in Bagley's car, the defendant opened the front driver's door, grabbed Bagley by the neck, and put a gun to his head. As a struggle ensued, the defendant shot Bagley in the upper body, which later caused his death. After the defendant shot Bagley, the defendant and Eric Brooks took Bagley's drugs and jewelry.

The defendant was charged with felony murder, robbery in the first degree, and criminal possession of a firearm. At trial, Pearson testified that she was unfamiliar with the family that lived on the first floor and with the "other" people on the front porch the night of the murder. During an extensive cross-examination about

[1] In the transcript, apart from the defendant, Eric Brooks, and Pearson, the people on the porch the night of the murder were referred to as the "other" people.

the tenants who lived on the first floor and about the "other" people, defense counsel asked whether Pearson knew of "*any disputes between the people on the first floor and* [*her*] *aunt*." The state objected to the question on the ground of relevancy. After arguments before the court, the court sustained the objection "based on numerous claims."

On November 20, 2013, the jury found the defendant guilty on all counts. The defendant was sentenced to a total effective sentence of seventy-five years imprisonment. This appeal followed. Additional facts will be set forth as needed.

I

First, the defendant claims that the trial court abused its discretion in failing to conduct an adequate investigation into alleged juror bias, which violated his right to an impartial jury guaranteed by the sixth and fourteenth amendments to the United States constitution. The defendant asserts that his claim is preserved, but if this court determines that it is not preserved, it is nevertheless reviewable either pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or under the plain error doctrine. The state argues that the defendant's claim is not reviewable because he waived his right to raise the claim on appeal. We agree with the state.

The following additional facts are relevant to this claim. The jury began its deliberations on November 18, 2013. On November 20, 2013, the trial court was notified that juror R.A.'s wife[2] received a phone call the night before and that when R.A. took the phone from her, the caller asked R.A. about the case. R.A. reported the call to the court, telling the court that the caller told him that "they" understood that R.A. was a juror

[2] To protect the privacy of the juror, we refer to him by his initials. See *State* v. *Newsome*, 238 Conn. 588, 624 n.12, 682 A.2d 972 (1996).

on this case and that they needed information regarding the case. R.A. told the caller that he was prohibited from talking about the case, and he hung up the phone.[3] R.A. also told the court that he asked some of the other jurors earlier that morning whether any of them had received phone calls about the case. The court asked R.A. whether the phone call would prevent him from being a fair and impartial juror, and R.A. responded that it would not affect him. The court then gave both the state and the defense the opportunity to question R.A., but defense counsel declined to ask R.A. any questions. Defense counsel did not ask the court to dismiss R.A. as a juror, and the court did not dismiss R.A.

After questioning R.A., the trial court, sua sponte, proposed that it conduct an individualized voir dire of the remaining eleven jurors. Defense counsel did not object to the procedure or suggest that any other action be taken. During the voir dire, one juror stated that she had heard that some "people were nervous about [the call]." All of the jurors, however, told the court that the phone call did not affect their ability to be fair and impartial. At the end of each voir dire, the trial court gave both the state and the defense the opportunity to question the juror. Defense counsel declined to question any of the jurors.

After the court interviewed the last juror, it gave the state and the defense the opportunity to be heard on the record.[4] Defense counsel stated that he was "concerned" that some of the jurors were nervous, but he

[3] The record is silent as to who made the call and what the caller's objective was.

[4] The following colloquy ensued:

"[Defense Counsel]: No, Your Honor, other than I guess I am—I mean, we heard from the last juror . . . that there was some follow-up conversations, which is not surprising. We heard from [one of the jurors] that people were nervous. Obviously, I'm concerned about that, but I'm not too concerned about any of these individuals being affected. They all said [they] weren't. I don't know if there's any way that a very quick investigation could be done, and that's just the only thought I had."

acknowledged that he was "not concerned" about any jury bias. Defense counsel then stated, "I don't know if there's any way that a very quick investigation could be done and that's just the only thought I had." When asked by the trial court, however, who should conduct the investigation, defense counsel admitted that he did not know. Defense counsel then stated that the jury should proceed with its deliberations.

The court concluded that it was satisfied with the jurors' answers that each of them could be fair and impartial and that there was no indication that anything that had happened had "endanger[ed] the fairness of the proceedings . . . ." The court also stated that it had "inquired appropriately under the law" and that it did not think that "there's any further action required of the [c]ourt and counsel is not asking for any further action." Defense counsel did not voice any disagreement with this assessment.

On appeal, the defendant argues that the court abused its discretion when it declined "to ascertain how much the jurors' feelings of nervousness or fear . . . impact[ed] their deliberations and verdict." Particularly with regard to the court's voir dire of R.A., the defendant argues that the court should have asked R.A. whether the phone call had "emotionally impacted him" instead of just asking him whether, in spite of the call, he could

"The Court: Investigation by who[m]?

"[Defense Counsel]: Well, I don't know.

"The Court: And to what end? . . . There may be an investigation when this is all over.

"[Defense Counsel]: Yeah. Yeah. I just—it would be nice if we could—but I guess we can't indicate that it was no one who had anything to do with this case.

"The Court: I have no idea.

"[Defense Counsel]: Right, I understand.

"The Court: And neither do you and neither does [the state].

"[Defense Counsel]: I understand and I—other than that, the jurors have indicated that they can proceed and I think they should."

be a fair and impartial juror. The defendant also contends that defense counsel's "comments did not constitute a waiver of the jury misconduct issue." We do not agree.

We set forth the applicable standard of review. "[T]he right to a trial by jury guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." (Internal quotation marks omitted.) *State* v. *Roman*, 320 Conn. 400, 408, 133 A.3d 441 (2016). "[W]e have adopted the definition of a valid waiver of a constitutional right as the intentional relinquishment or abandonment of a known right. . . . This strict standard precludes a court from presuming a waiver of the right to a trial by jury from a silent record. . . . In determining whether this strict standard has been met, a court must inquire into the totality of the circumstances of each case. . . . When such a claim is first raised on appeal, our focus is on compliance with these constitutional requirements rather than on observance of analogous procedural rules prescribed by statute or by the Practice Book." (Citations omitted; internal quotation marks omitted.) *State* v. *Ouellette*, 271 Conn. 740, 752, 859 A.2d 907 (2004).

"[A]lthough there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. . . . As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney. . . . Thus, decisions by counsel are generally given effect as to what arguments to pursue . . . what evidentiary objections to raise . . . and what agreements to conclude regarding the admission of evidence . . . . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last."

(Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 467–68, 10 A.3d 942 (2011); see *State* v. *Hampton*, 293 Conn. 435, 449, 988 A.2d 167 (2009) ("[w]aiver may be effected by action of counsel" [internal quotation marks omitted]). "The mechanism by which a right may be waived . . . varies according to the right at stake. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal." (Internal quotation marks omitted.) *State* v. *Foster*, 293 Conn. 327, 337, 977 A.2d 199 (2009).

In the present case, we conclude that the defendant waived his claim, and, therefore, we decline to review it. A defendant's claim that the trial court did not conduct an adequate investigation into alleged jury bias is one which can be waived by the actions of counsel. See id., 337–39. The trial court gave defense counsel the opportunity to question R.A. about the phone call after it conducted its own voir dire, but defense counsel declined to do so. The court proposed to the parties that it conduct an individualized voir dire of each juror about whether any jury bias existed, and defense counsel did not object or request that any further action be taken. See id., 337 (defense counsel requested that trial court conduct general inquiry of jury after trial court dismissed juror for juror misconduct). After the individualized voir dire of each of the remaining eleven jurors, the court afforded defense counsel the opportunity to question the juror, but defense counsel again declined to ask any additional questions. Most importantly, defense counsel expressly acknowledged that he was "not too concerned about any of [the jurors] being affected [because] [t]hey all said [they] weren't" and that "the jurors have indicated that they can proceed and [he] [thought that] they should." Considering

defense counsel's actions under the totality of the circumstances, we conclude that he consented to and expressed satisfaction with the issue. See *State* v. *Foster*, supra, 293 Conn. 338–39 (wherein counsel waived claim by consenting to and expressing satisfaction with issue); see also *State* v. *Hampton*, supra, 293 Conn. 449–50 (defense counsel assented to jury charge given by trial court when he failed to object to charge and stated more than once that he was satisfied with charge). Accordingly, we conclude that defense counsel waived any claim that the trial court did not conduct an adequate hearing as to alleged jury bias.

Apart from the individualized voir dire of each juror, defense counsel waived any claim that the court should have conducted an "investigation"[5] of the call to R.A.'s home. After stating that he thought "a quick investigation could be done," defense counsel expressly acknowledged that "the jurors have indicated [that] they can proceed and I think they should." Thus, again, defense counsel consented to and expressed satisfaction with the issue. See *State* v. *Foster*, supra, 293 Conn. 337.

Because defense counsel waived any claim that the trial court failed to conduct an adequate investigation of alleged jury bias, we will not entertain the defendant's request to review his claim pursuant to *Golding*.[6] "[I]n

[5] At no time did defense counsel articulate (1) what type of investigation he sought, (2) who he thought should conduct the investigation, or (3) when he thought the investigation should take place.

[6] The defendant also asks that we review the claim under the plain error doctrine. "[J]ust as a valid waiver calls into question the existence of a constitutional violation depriving the defendant of a fair trial for the purpose of *Golding* review, a valid waiver also thwarts plain error review of a claim. . . . [T]he [p]lain [e]rror [r]ule 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. . . . The distinction between a forfeiture of a right (to which the [p]lain [e]rror [r]ule may be applied) and a waiver of that right (to which the [p]lain [e]rror [r]ule cannot be applied) is that [w]hereas forfeiture is the failure to make the timely assertion of a right,

the usual *Golding* situation, the defendant raises a claim on appeal [that], while not preserved at trial, at least was not waived at trial. . . . We generally do not review unpreserved, waived claims." (Citation omitted; internal quotation marks omitted.) Id. "Therefore, a defendant cannot prevail under *Golding* on a claim that he implicitly waived at trial." (Internal quotation marks omitted.) *State* v. *Fabricatore*, 281 Conn. 469, 479, 915 A.2d 872 (2007). "To reach a contrary conclusion would result in an ambush of the trial court by permitting the defendant to raise a claim on appeal that his or her counsel expressly had abandoned in the trial court." (Internal quotation marks omitted.) *State* v. *Foster*, supra, 293 Conn. 337.

We conclude that the defendant waived his claim, and, therefore, we decline to review it.

II

The defendant's second claim is that the trial court abused its discretion when it sustained the state's objection that the proposed question of whether Pearson knew of "*any disputes between the people on the first floor and* [*her*] *aunt*" was irrelevant. In response, the state argues that the court did not abuse its discretion in sustaining the objection because defense counsel failed to show that the testimony he sought to elicit was relevant to demonstrating Pearson's motive to lie about who was responsible for the murder. We agree with the state.

The following additional facts are relevant to this claim. After the state objected to defense counsel's question on the ground of relevancy, the court excused

waiver is the intentional relinquishment or abandonment of a known right." (Citation omitted; internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 70–71, 967 A.2d 41 (2009) (declining to review petitioner's claim under either *Golding* or the plain error doctrine because petitioner waived his claim).

the jury from the courtroom. Defense counsel argued before the court that the question of whether Pearson was aware of any disputes between Mary Brooks and the tenants on the first floor was relevant because it went to Pearson's state of mind, in that it tended to show that she was "falsely implicating [the defendant] because she [was] afraid of the other people who [lived] on the first floor." The state argued that because Pearson testified that she knew neither the people who lived on the first floor nor the "other" people who were on the porch the night of the murder, there was no evidence in the record to suggest that she would be afraid of anyone present that night or of anyone living on the first floor, rendering the question irrelevant. The court sustained the objection "based on numerous claims." The court noted, however, that it was not foreclosing defense counsel from "developing motive, interest, or bias."

The defendant argues on appeal that the court abused its discretion in determining that the question was irrelevant. The defendant contends that the question of whether Pearson was aware of any disputes between Mary Brooks and the first floor tenants was relevant because it tended to show that Pearson was afraid of the first floor tenants. Her fear of the first floor tenants, the defendant argues, was relevant to the defendant's defense because it explained why Pearson continuously lied to the police throughout the investigation. He contends that it also tended to explain why Pearson may have lied on cross-examination about not knowing who the people on the front porch were or who the people who lived on the first floor were. The defendant argues that she may have lied for a number of reasons, including the possibility that one of the people on the porch that night or a tenant of the first floor may have given testimony that was inconsistent with hers or that she was afraid of those alleged to be the real perpetrators,

namely, the first floor tenants. In short, the defendant argues that "[d]eveloping information as to Pearson's fears because of the alleged disputes was entirely relevant to her bias, prejudice, and interest in the outcome of the case." We do not agree.

"In analyzing the defendant's claim, we first review the trial court's evidentiary [ruling]. Our standard of review for evidentiary claims is well settled. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail. . . . If, however, we conclude that the trial court improperly excluded certain evidence, we will proceed to analyze [w]hether [the] limitations on impeachment, including cross-examination, [were] so severe as to violate [the defendant's rights under] the confrontation clause of the sixth amendment . . . ."[7] (Internal quotation marks omitted.) *State* v. *Annulli*, 130 Conn. App. 571, 579–80, 23 A.3d 808 (2011), aff'd, 309 Conn. 482, 71 A.3d 530 (2013). "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

[7] As the state correctly notes, in some cases, the reviewing court will first determine whether the trial court's limitation on cross-examination violated the defendant's constitutional rights before considering whether the trial court abused its discretion in its evidentiary ruling. In accordance with our Supreme Court's precedent, we "may address the claims in whichever order most readily addresses the matter at hand." *State* v. *Annulli*, 309 Conn. 482, 492 n.6, 71 A.3d 530 (2013); cf. *State* v. *Davis*, 298 Conn. 1, 10–11, 1 A.3d 76 (2010). We choose to address the evidentiary ruling first.

appears to have been done." (Internal quotation marks omitted.) *State* v. *Lyons*, 43 Conn. App. 704, 710, 686 A.2d 128 (1996), cert. denied, 240 Conn. 906, 688 A.2d 335 (1997).

"The sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . 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. . . . However, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . Thus, [t]he confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Andrews*, 248 Conn. 1, 11, 726 A.2d 104 (1999).

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter." (Internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010). "The trial court has wide

discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Reeves*, 57 Conn. App. 337, 345, 748 A.2d 357 (2000).

In the present case, we conclude that the trial court did not abuse its discretion in ruling that defense counsel's inquiry was irrelevant and precluding it on that basis.[8] An abuse of discretion was not manifest when the trial court ruled that defense counsel failed to establish a visible connection between the proffered question and the principal facts in the record. See *State* v. *Davis*,

[8] Even if we were to conclude that the trial court abused its discretion, which we do not, the limitation on cross-examination was not so severe as to deprive the defendant of his right to confront witnesses guaranteed to him by the sixth amendment. *State* v. *Annulli*, supra, 130 Conn. App. 580. The defendant argues that he was precluded from fully exploring Pearson's credibility. Defense counsel, however, was able to elicit through Pearson on cross-examination, and subsequently argue in summations, that (1) she claimed to not know the people who were on the porch that night even though she "hung out" with them on the porch numerous times prior to the shooting, (2) she saw the "other" people on the porch purchase drugs in front of Mary Brooks' house prior to the night of the murder, (3) she did not see who called Bagley that night, (4) she was the last person to use the defendant's phone, (5) she lied to police on two separate occasions, (6) she spoke with Bagley about purchasing drugs that night in front of people whom she claimed to not know, (7) she avoided speaking with detectives for a number of weeks, (8) she knew that the detectives wanted her to identify the defendant and Eric Brooks when she identified them at the police station, and (9) she had charges pending against her in relation to the murder and was testifying for the prosecution because she wanted to return home to see her son. In short, there was significant evidence on the record to support defense counsel's arguments in summation that Pearson had a "bias, prejudice and interest" in the outcome of the case and that she lied because she was afraid of someone else. See *State* v. *Kehayias*, 162 Conn. App. 310, 328, 131 A.3d 1200 (2016) ("[b]ecause the court in the present case merely limited, and did not preclude, inquiry into a specific motive that already had been robustly developed on cross-examination, the defendant's right of confrontation was not violated").

supra, 298 Conn. 23. Defense counsel presented no evidence that Pearson knew the people on the front porch, that the tenants of the first floor were the people on the porch, or that Pearson even knew the people who lived on the first floor. Therefore, any disputes that Mary Brooks may have had with the first floor tenants would be irrelevant in establishing that Pearson lied because she was afraid of the first floor tenants or of anyone present the night of the murder. After an examination of the facts on the record, we do not quarrel with the trial court's conclusion that the question did not have a logical tendency to aid the jury in determining Pearson's motive or credibility, rendering the question irrelevant. See id.

Because we conclude that the court reasonably could have found that the evidence was not relevant, we conclude that the court did not abuse its discretion when it precluded defense counsel from questioning Pearson about whether she knew of any disputes between Mary Brooks and the first floor tenants. Because we find that the court did not abuse its discretion on the evidentiary issue, the defendant's claim that the trial court's restriction on his cross-examination of Pearson violated his constitutional right to confrontation also fails. See *State* v. *Annulli*, supra, 130 Conn. App. 582.

The judgment is affirmed.

In this opinion the other judges concurred.

FRANCISCO JIMENEZ *v.* COMMISSIONER OF CORRECTION
(AC 37860)

Keller, Prescott and Bear, Js.

Syllabus

The petitioner appealed to this court from the judgment of the habeas court denying his second petition for a writ of habeas corpus alleging

ineffective assistance of trial, appellate and habeas counsel. *Held* that the habeas court properly denied the petition for a writ of habeas corpus in a thoughtful and well reasoned memorandum of decision.

Argued September 21—officially released December 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, *Cobb, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Douglas H. Butler, assigned counsel, for the appellant (petitioner).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Kelly Masi*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Francisco Jimenez, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his second petition for a writ of habeas corpus. He sets forth claims of constitutional violations because of the actions of trial counsel, and he claims deficient performance of trial counsel, appellate counsel, and first habeas counsel. The petitioner bases these claims on trial counsel's (1) allegedly discriminatory and improper statements during closing argument; (2) failure to pursue a motion to suppress a purportedly inculpatory statement by the petitioner; and (3) failure to call a witness. Following a trial, the habeas court denied the petitioner's second petition for a writ of habeas corpus.

After careful review of the record and the parties' appellate briefs, their oral arguments before this court, and the habeas court's thoughtful and well reasoned

memorandum of decision, we conclude that the court properly denied the petition for a writ of habeas corpus. See *Harris* v. *Commissioner of Correction*, 126 Conn. App. 453, 458, 11 A.3d 730, cert. denied, 300 Conn. 932, 17 A.3d 69 (2011). There is no error.

The judgment is affirmed.

ROBERT M. BLOCH *v.* BARBARA CALLAGHAN ET AL.
(AC 38100)

Alvord, Sheldon and Prescott, Js.

Syllabus

The plaintiff brought an action against the defendants, C and two attorneys, B and L, who allegedly had represented C. B moved to dismiss the action against him on the grounds of lack of personal jurisdiction and the failure of the plaintiff to post a recognizance bond. The trial court granted B's motion to dismiss on the ground of insufficient service of process and rendered judgment for B, from which the plaintiff appealed to this court. The plaintiff asserted that the trial court should not have dismissed his claim against B on the basis of his failure to provide a recognizance. *Held* that the plaintiff's appeal was dismissed as moot because he failed to challenge on appeal the trial court's stated basis for the dismissal of his claim against B, which was his failure to properly serve B, and, thus, there was no relief that this court could provide him.

Argued October 24—officially released December 13, 2016

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *B. Fischer*, *J.*, granted the motion to dismiss filed by the defendant Gregory Bachand and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed.*

Robert M. Bloch, self-represented, the appellant (plaintiff).

Opinion

PER CURIAM. On October 24, 2014, the plaintiff, Robert M. Bloch, filed this action sounding in tort against Barbara Callaghan and against two attorneys who the plaintiff claimed had represented her, Gregory Bachand and Frank Lieto. On December 1, 2014, Bachand moved that the action be dismissed as to him for lack of personal jurisdiction on the grounds that (1) the plaintiff did not post a recognizance bond, as required by General Statutes § 52-185 and Practice Book § 8-3, and (2) the plaintiff did not serve him in hand or at his place of abode, as required by General Statutes § 52-54.

The trial court held a hearing on Bachand's motion on April 27, 2015. By order dated May 6, 2015, the court granted the motion to dismiss on the ground that "there was insufficient service of process upon him." In his brief to this court, the plaintiff fails to challenge the basis upon which the trial court dismissed his claim against Bachand. Instead, the plaintiff argues that his claim against Bachand should not have been dismissed on the basis of his failure to provide a recognizance. Even if the plaintiff is correct in this regard, we can provide him no relief because he has failed to challenge the trial court's stated basis for dismissing his claim, namely, his failure to properly serve Bachand. His claim is therefore moot. See *In re Jorden R.*, 293 Conn. 539, 556–57, 979 A.2d 469 (2009).

The appeal is dismissed.

ANGEL ALVARADO *v.* COMMISSIONER OF CORRECTION
(AC 38005)

Lavine, Sheldon and Mullins, Js.

Syllabus

The petitioner sought a writ of habeas corpus challenging his disciplinary designation as a member of a security risk group by the respondent,

the Commissioner of Correction. The habeas court dismissed the petition on the ground that it failed to state a cause of action upon which relief could be granted, and denied the petition for certification to appeal. On appeal to this court, *held* that the habeas court did not err in denying the petition for certification to appeal, as jurists of reason could not disagree that the petitioner's classification as a security risk group member did not implicate a liberty interest sufficient to invoke the subject matter jurisdiction of the habeas court.

Argued September 23—officially released December 13, 2016

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, dismissed the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Angel Alvarado, self-represented, the appellant (petitioner).

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Angel Alvarado, appeals following the denial of his petition for certification to appeal from the judgment of dismissal of his petition for a writ of habeas corpus, in which he challenged his disciplinary designation as a member of a security risk group by the respondent, the Commissioner of Correction. The habeas court dismissed his petition for a writ of habeas corpus pursuant to Practice Book § 23-29 (2) on the ground that it failed to state a cause of action upon which relief could be granted. Because a "petitioner's classification as a security risk group member does not implicate a liberty interest" that is "sufficient to invoke the subject matter jurisdiction of the habeas court"; (internal quotation marks omitted)

Rodriguez v. *Commissioner of Correction*, 159 Conn. App. 162, 166, 122 A.3d 709 (2015); we conclude that the habeas court properly dismissed the petition for a writ of habeas corpus. On this point, jurists of reason cannot differ. Accordingly, we further conclude that the habeas court did not err in denying the petitioner's petition for certification to appeal. See id.

The appeal is dismissed.

IN RE LILYANA P.*
(AC 39348)

Lavine, Alvord and Schaller, Js.

Syllabus

The respondent mother appealed from the judgment of the trial court terminating her parental rights with respect to her minor child. She claimed that the petitioner, the Commissioner of Children and Families, did not prove the adjudicatory ground to terminate her parental rights by clear and convincing evidence as required by statute (§ 17a-112 [j] [3] [B] [i]). Specifically, she argued that the trial court improperly based its determination that she had failed to achieve a sufficient degree of personal rehabilitation on obsolete information, as the court emphasized her failure to enroll in a recommended pain management program to address her psychological and substance abuse issues, but did not account for the fact that her pain had been alleviated by leg amputation surgery so as to make her compliance unnecessary. She also claimed, in the alternative, that her constitutional right to substantive due process was violated. *Held*:

1. The trial court did not err in terminating the respondent mother's parental rights, that court having properly determined that the petitioner proved by clear and convincing evidence that she had failed to achieve a sufficient degree of personal rehabilitation necessary to encourage a belief that she could assume a responsible position in the child's life within a reasonable period of time as required by § 17a-112 (j) (3) (B) (i); although the respondent implied that there was no risk for her to resume abusing drugs because her level of pain had improved since she had

* 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.

surgery, the trial court's findings supported its determination that she had failed to achieve a sufficient degree of rehabilitation, including that she had medical problems other than the pain issues for which she was still receiving medication and treatment, that her substance abuse and significant mental health issues predated the pain issues, that she was resistant to her need for therapy and missed appointments with various service providers, that she brought drug paraphernalia to the courthouse during trial, and that she failed to acknowledge the underlying issues that formed the basis of the petitioner's concerns.

2. This court found unavailing the respondent mother's alternative claim that terminating her parental rights without giving her additional time to comply violated her constitutional rights because she was recovering from a disabling medical condition; the trial court expressly found that giving the respondent additional time would not bring her performance as a parent to an acceptable level, and the court's determination that she failed to achieve a sufficient degree of rehabilitation was in accord with applicable legal principles.

Argued November 14—officially released December 9, 2016**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights as to their minor child, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, and tried to the court, *Olear*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

David J. Reich, for the appellant (respondent mother).

Daniel M. Salton, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

ALVORD, J. The respondent mother, Laura F., appeals from the judgment of the trial court, rendered

** December 9, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her daughter, Lilyana P.[1] On appeal, the respondent claims that the court (1) improperly determined, in accordance with General Statutes § 17a-112 (j) (3) (B) (i), that the petitioner had proven by clear and convincing evidence that Lilyana previously was adjudicated neglected and that the respondent had failed to achieve a sufficient degree of personal rehabilitation to encourage a belief that she could assume a responsible position in Lilyana's life within a reasonable period of time, and (2) violated her substantive due process rights "because [she] was recovering from a disabling medical condition that had prevented her from rehabilitating as a parent." We affirm the judgment of the trial court.

The record reveals the following relevant facts, which are uncontested or were found by the trial court, and procedural history. The respondent, as a child, suffered from neglect, as well as physical and sexual abuse. Because of the abuse, the respondent was mentally unstable, which led to her three month hospitalization in the fall of 1995. At that time, when the respondent was nine years old, she was diagnosed with impulsive control disorder, mood disorder, obsessive compulsive traits, and attention deficit hyperactivity disorder.

The respondent graduated from high school, but her only reported employment occurred in 2008. She has never been married. In 2005, her first child was born, who is in the care of his paternal aunt and the aunt's mother as coguardians. In 2008, her second child was born, and a transfer of guardianship to that child's maternal aunt and uncle was granted in 2010. The children have different biological fathers.

[1] In the same proceeding, the court also terminated the parental rights of Lilyana's father, Bryan P. He did not timely appeal from that judgment. We therefore refer to Laura F. as the respondent throughout this opinion.

The respondent has a significant history of substance abuse. While she was together with the father of her second child, she and the father used cocaine. They spent between $40,000 and $50,000 on cocaine and alcohol, which depleted her grandmother's savings account and his trust fund. The respondent stopped using cocaine when she became pregnant with her second child in 2007.

In April, 2009, the respondent suffered multiple injuries in a serious automobile accident. While hospitalized, she was exposed to and became a carrier of Methicillin-resistant Staphylococcus Aureus (MRSA). She weighed more than 225 pounds when she was released from the hospital, and has had mobility issues as a result of her injuries and the loss of her calf muscle due to MRSA. Additionally, the respondent is prone to kidney infections, herniated discs, and migraine headaches.

In November, 2012, the respondent met Bryan P., the father of her third child, Lilyana. She became pregnant shortly after they met, and Lilyana was born in August, 2013. At the time of her birth, Lilyana had benzodiazepines and opiates in her system and was experiencing withdrawal symptoms. When the respondent indicated that she was going to remove Lilyana from the hospital against medical advice, a call was placed to the Department of Children and Families (department). Lilyana was released to her parents' care, however, after they agreed to cooperate with the department.

In April, 2014, the petitioner filed for an order of temporary custody because of ongoing concerns about the parents' substance abuse, their refusal to allow the department access to Lilyana, and their revocation of the releases they previously had signed allowing the department to communicate with service providers for them and Lilyana. Among the department's concerns, the respondent had visited various emergency rooms,

which were not affiliated with her health care providers, seeking opiates. She also has a history of abusing prescription medications. On the scheduled date of the hearing on the petitioner's application, the parties reached an agreement, and Lilyana was returned to her parents. Specific steps were approved by the court on April 30, 2014, which included orders that the respondent was to have supervised contact only with Lilyana, and the parents were to enroll Lilyana in a child care facility at the department's expense.

In July, 2014, the respondent participated in a court-ordered psychological evaluation by Edward Rabe, M.D., Ph.D., who is an expert in child and adolescent psychiatry. Having missed her first scheduled appointment with Dr. Rabe, the respondent arrived an hour late for the second appointment. Her diagnosis at that time was mood disorder, post-traumatic stress disorder, and opiate abuse in remission. Dr. Rabe noted the respondent's history of substance abuse, including use of cocaine, and her intermittent use of opiates that had been prescribed during emergency room visits. He found her mental status evaluation to be "unremarkable, with the exception of her relative lack of insight and judgment related to her minimization of the significance of obtaining pain medications from prescribers who are not members of her treatment team, and her failure to recognize the consequences of withholding [department] access to her provider records." Dr. Rabe opined that the respondent's "problem list consists of psychiatric issues, substance abuse issues, and medical issues."

In his concluding remarks in the psychiatric evaluation, Dr. Rabe stated that the respondent currently was refraining from seeking and using supplementary opiates prescribed by clinicians who were not members of her treatment team, but that a risk of relapse was likely in the absence of monitoring, due to her limited

judgment and insight. Accordingly, Dr. Rabe made the following recommendation: "Improved pain management could help [the respondent] reduce her episodic drug seeking and use. Re-referral to a pain clinic that specializes in management of pain syndromes in medically complex patients would be helpful in developing a treatment plan that renders this behavior unnecessary. Her [primary care physician], mental health prescriber, and pain management team should be in communication to develop a comprehensive understanding of her needs. A written treatment contract shared by all caregivers and signed by [the respondent] would be critical to developing a successful treatment plan."

The department provided the respondent with information for her to self-refer to Bristol Hospital and the University of Connecticut for their pain management programs.[2] She failed to engage with either program. Further, during an unannounced visit, the department found the respondent alone with Lilyana despite the court order that her contact be supervised. Additionally, the parents failed to enroll Lilyana in a child care facility. In November, 2014, Lilyana was removed pursuant to a subsequent order of temporary custody and placed in foster care, where she has remained. Following Lilyana's removal, the respondent was hospitalized following a suicide attempt.

In February, 2015, the respondent's left leg was amputated, and, thereafter, she was discharged to Silver Springs Care Center (Silver Springs) for rehabilitation. She remained at Silver Springs for approximately six months and then moved into a handicapped accessible apartment that the Department of Mental Health and

[2] At the termination of parental rights trial, the social worker testified that the department wanted the respondent to self-refer to show her willingness to participate in the program.

Addiction Services helped her to obtain. She continues to reside in that apartment, receiving in-home assistance with everyday living, and she supports herself with social security benefits that she collects due to her mental health and medical issues. Additionally, she receives cash assistance from the Department of Social Services in connection with its Supplemental Nutrition Assistance Program.

On May 29, 2015, the petitioner filed a petition to terminate the parental rights of Bryan P. and the respondent with respect to Lilyana. The termination of parental rights trial was held on April 6 and 11, 2016. Although the trial was scheduled to resume on April 12, 2016, the respondent, on that date, brought a backpack with drug paraphernalia into the courthouse. The state police were called, and she was issued an infraction for possession of drug paraphernalia. The trial then was continued to April 20, 2016, at which time it concluded. The respondent was represented by counsel during the trial, and she testified at trial. Several witnesses testified at trial, including Dr. Rabe, and multiple exhibits were admitted into evidence in this fully contested case.

The court issued its memorandum of decision on May 16, 2016, in which it made the following determinations: (1) the respondent's testimony at trial that she had no knowledge that the drug paraphernalia was in the backpack when she entered the courthouse on April 12, 2016, was not credible; (2) the respondent has "a significant history of substance abuse"; (3) prior to her pregnancy in 2007, the respondent and the father of her second child used cocaine and spent between $40,000 and $50,000 on cocaine and alcohol; (4) the respondent is prone to kidney infections and herniated discs; (5) Dr. Rabe opined that the respondent suffered from medical conditions that need to be treated in conjunction with her psychiatric problems and that enhanced pain and dietary management could reduce her need to seek

narcotics to manage her distress; (6) Dr. Rabe recommended that the respondent be re-referred to a pain clinic and credibly testified that the respondent likely would not improve unless she received such pain management treatment; (7) the respondent's "attendance and compliance with service providers is spotty"; (8) the respondent was "resistant to and did not see the need for therapy, and she attended appointments, at least until recently, only at the insistence of her primary care physician"; (9) the respondent's "need for mental health treatment is also evidenced by her suicide attempts"; (10) although the respondent was provided with information to self-refer to the University of Connecticut pain clinic, she made one telephone call, was told there was a waiting list, did not put her name on the waiting list, and never again contacted the pain clinic to enroll; (11) the respondent "has a history of abusing prescription medications"; (12) Lilyana was adjudicated neglected on April 30, 2014; (13) Lilyana has remained committed to the care of the petitioner since February 5, 2015; (14) as of the time of trial, Lilyana was almost thirty-three months old and, considering both removals on the orders for temporary custody, had been in the care of the petitioner for more than seventeen months; (15) the respondent has limited insight and judgment as to the potential gains she could make if she engaged in adequate treatment for her mental health issues and physical maladies; (16) the respondent has not attended a pain clinic and, therefore, "has not taken the step to address the interaction between her medical problems and her psychiatric and psychological problems"; (17) "[t]he failure to acknowledge the underlying personal issues that form the basis for the department's concerns indicates a failure to achieve a sufficient degree of personal rehabilitation" (internal quotation marks omitted); (18) the petitioner proved by clear and convincing evidence that the respondent

has failed to achieve such a degree of rehabilitation so as to encourage the belief that she could resume a role as a parent for Lilyana within a reasonable period of time; and (19) giving the respondent "a reasonable period of additional time would certainly not bring her performance as a parent to an acceptable level." The court also determined that termination of the respondent's parental rights as to Lilyana was in the best interest of the child. See General Statutes § 17a-112 (k). Accordingly, the court terminated the respondent's parental rights and appointed the petitioner the statutory parent for Lilyana. This appeal followed.[3]

I

The respondent claims that the court improperly concluded that termination of her parental rights was warranted in accordance with § 17a-112 (j) (3) (B) (i) because Lilyana previously had been adjudicated neglected and, in light of her age and needs, the respondent had failed to achieve a sufficient degree of personal rehabilitation necessary to encourage a belief that she could assume a responsible position in Lilyana's life within a reasonable period of time. The respondent argues that "[t]he trial court stressed the fact that [the respondent] did not engage in a pain clinic. The court does not acknowledge that [the respondent's] pain is now significantly reduced so that she no longer needs to attend a pain clinic and that she is cooperating with services and improving." According to the respondent, the amputation of the respondent's leg in February, 2015, "greatly ameliorated" her pain and the court's determination "is based on obsolete information." We disagree.[4]

[3] We note that the attorney for the minor child filed a statement pursuant to Practice Book § 67-13 indicating that he adopts the brief submitted by the petitioner.

[4] We note that the respondent has failed to cite any portion of the transcripts to support the general conclusions as to the level of her pain, her compliance with programs, or her addressing her physical and mental health

"We begin by setting forth applicable legal principles, including our standard of review. A hearing on a termination of parental rights petition consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the court must determine whether the [petitioner] has proven, by clear and convincing evidence, a proper ground for termination of parental rights. . . . In the dispositional phase, once a ground for termination has been proven, the court must determine whether termination is in the best interest of the child. . . .

"Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. [See General Statutes § 17a-112 (j) (3) (B) (i).] That ground exists when a parent of a child whom the court has found to be neglected fails to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child. . . .

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level

needs. On that basis alone, this court could decline to review her claim. See *In re Sena W.*, 147 Conn. App. 435, 441–42 n.5, 82 A.3d 684 (2013).

of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue. . . .

"A conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Leilah W.*, 166 Conn. App. 48, 66–68, 141 A.3d 1000 (2016).

The gravamen of the respondent's claim is that the trial court improperly based its determination that she failed to rehabilitate on the fact that she failed to enroll in a pain clinic, as recommended in Dr. Rabe's 2014 report, when the amputation of her leg in 2015 so decreased her pain as to make compliance with that recommendation unnecessary. She claims that the basis for the court's conclusion that she failed to address her issues was obsolete information.

We first note that the respondent testified at trial that her level of pain had "gotten a lot better," and that she was "not in as much pain as [she] used to be." She did not testify that she no longer experienced pain or that she no longer required pain medication. In fact, she testified that her primary care physician continued to prescribe pain medication for pain management. Moreover, as previously discussed, the respondent's medical issues also include kidney infections, herniated discs, and migraine headaches. To imply that there is no risk for her to abuse drugs, either prescription or illicit, is to ignore the other findings of the court that she has a history of substance abuse that predates her automobile accident, as well as significant mental health issues that need to be addressed.

The court, while mentioning the respondent's failure to attend the pain clinic as recommended by Dr. Rabe, also stated that Dr. Rabe testified at trial that the respondent was unlikely to improve unless she received such treatment. The court noted her limited insight and judgment as to the potential gains she could make with such treatment, and cited *In re Shane M.*, 318 Conn. 569, 589, 122 A.3d 1247 (2015), for the principle that the "failure to acknowledge the underlying personal issues that form the basis for the department's concerns indicates a failure to achieve a sufficient degree of personal rehabilitation." (Internal quotation marks omitted.) The trial court's conclusion was bolstered by the respondent's recent behavior in bringing drug paraphernalia into the courthouse on a scheduled day for trial.

On the basis of our review of the record, and construing the evidence in a manner most favorable to sustaining the judgment of the trial court, we conclude that the court properly determined that the petitioner proved by clear and convincing evidence that the respondent had failed to achieve a sufficient degree of personal rehabilitation necessary to encourage a belief

that she could assume a responsible position in Lilyana's life within a reasonable period of time. Accordingly, the court did not err in terminating the respondent's parental rights.

II

The respondent's next claim is that the court violated her substantive due process rights "because [she] was recovering from a disabling medical condition[5] that had prevented her from rehabilitating as a parent." As acknowledged by the respondent's counsel during oral argument before this court, this is an "alternative" claim based on the same alleged facts as articulated in her first claim. Our review of the second claim reveals that it is simply repetitive of the respondent's first claim, with the added argument that it "should shock the conscience that the trial court would not give [the respondent] additional time to further progress so that she could care for her daughter."

The respondent cites no case law and provides no substantive detail to support her claim of a substantive due process violation under these circumstances. Further, as we concluded in part I of this opinion, the court's determination that she failed to rehabilitate was in accord with applicable case law and legal principles and, accordingly, did not "shock the conscience." Moreover, in its memorandum of decision, the court expressly stated that giving the respondent "a reasonable period of additional time would certainly not bring her performance as a parent to an acceptable level." The respondent's second claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

[5] We note that the respondent does not mention the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., in her argument. To the extent that she is claiming that the ADA applied to the termination of parental rights proceeding, this court previously has rejected such a claim. "[T]he ADA neither provides a defense to nor creates special obligations in

TROY WESTBERRY *v.* COMMISSIONER OF CORRECTION (AC 37709)

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

Syllabus

The petitioner, who had been convicted of the crime of murder in connection with a shooting incident, sought a second petition for a writ of habeas corpus in which he alleged a violation of his due process rights and a claim of actual innocence. At the petitioner's criminal trial, the state presented testimony from three eyewitnesses, C, S and D, who testified concerning specific details of the shooting that implicated the petitioner. After his conviction, the petitioner filed his first habeas petition, claiming actual innocence and a due process violation based on C's purported perjury at the criminal trial. At the habeas hearing, the petitioner presented the testimony of his investigator who had interviewed C and took a statement in which C recanted the testimony that he had provided at the petitioner's criminal trial and admitted that he had lied while testifying. The first habeas court denied the habeas petition, and this court affirmed the judgment. Thereafter, S participated in a proffer session with federal authorities during which he stated that he had lied at the petitioner's criminal trial. In addition, S recanted his trial testimony and implicated another person, M, as the shooter, providing specific details. S's statements were summarized in a report. The petitioner then filed a second petition for a writ of habeas corpus, alleging actual innocence and a due process violation based on the purported perjury of C and S at his criminal trial. At the habeas hearing, the petitioner presented the testimony of S, who testified that he disagreed with the summary of his statements in the federal report, particularly the details concerning the order of events during the shooting, and that his belief that M was the shooter was based on "street rumors." The petitioner also presented the testimony of D, who corroborated S's statement in the federal report that M was the shooter, and the testimony of a defense investigator, who testified about his interview with an individual, E, who was serving a sentence for killing M. E told the investigator that he had killed M in retaliation for the shooting death of the victim in the petitioner's case. C was not presented as a witness to testify at the habeas hearing. The second habeas court rendered judgment denying the petitioner's second habeas petition, specifically discrediting the testimony and statements of S and D, as well as the statements made by C and E. The court rejected the petitioner's actual innocence claim on

a termination proceeding." *In re Antony B.*, 54 Conn. App. 463, 472, 735 A.2d 893 (1999).

the ground that he failed to prove his claim by clear and convincing evidence and that no reasonable jury would find him guilty, because his claim rested almost entirely on the recantations of the key witnesses at the criminal trial. The court rejected the petitioner's due process claim on the ground that he failed to establish that perjured testimony was used at his criminal trial. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the second habeas court erroneously concluded that his due process rights were not violated by the alleged use of perjured testimony at his criminal trial, the petitioner having failed to establish that any perjured testimony had been used: the petitioner failed to establish that the court's credibility determinations were clearly erroneous, and, therefore, the petitioner's reliance on the recantations of C and S to support his claim was misplaced, as the court reasonably concluded that it could not credit C's alleged recantation because he had not testified before the court at the second habeas trial; moreover, the court had an adequate factual basis for discrediting S's testimony, which was hesitant and equivocal, S having merely stated that he believed that M was the shooter, and S having repeatedly corrected portions of the federal report with respect to the details concerning the order of events during the shooting; furthermore, contrary to the petitioner's assertion that the court's credibility determination of S's recantation was erroneous because it was corroborated by E's statement and D's testimony, the court's determination was amply supported by the evidence and the court's firsthand observation of D.
2. The second habeas court properly rejected the petitioner's claim of actual innocence, the petitioner having failed to meet his burden of demonstrating by affirmative proof that he did not commit the crime pursuant to the first prong of the standard set forth in *Miller* v. *Commissioner of Correction* (242 Conn. 745); the petitioner failed to demonstrate by clear and convincing evidence that he was actually innocent of the murder, as his claim was based on the discredited recantations of C and S, as well as the discredited statement of E, and the petitioner offered no credible or affirmative evidence of his actual innocence.

Argued October 13—officially released December 20, 2016

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and transferred to the judicial district of Hartford, where the petitioner filed an amended petition; thereafter, the matter was tried to the court, *Schuman*, *J.*; judgment denying the petition, from which the petitioner, on the

granting of certification, appealed to this court. *Affirmed.*

Naomi Fetterman, with whom, on the brief, was *Aaron J. Romano*, for the appellant (petitioner).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Troy Westberry, appeals from the judgment of the habeas court denying his second petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court erred by rejecting his claim that perjured testimony was used at his criminal trial, in violation of the fourteenth amendment to the federal constitution, and that he is actually innocent. We disagree and, accordingly, affirm the judgment of the habeas court.

At trial, the jury reasonably could have found the following facts. The events giving rise to the petitioner's conviction were the culmination of a period of animosity between a group of individuals that included the petitioner and Jesse Pope and another group of individuals that included Gerald Jenkins, Dwayne Stewart, and the victim, Anthony Bennefield. That hostility manifested itself in several violent altercations between members of the two groups.

On May 5, 1999, Jenkins unsuccessfully attempted to drive Pope off the road with his Chevrolet Lumina, and, when he was unsuccessful, Jenkins fired shots in Pope's direction as he drove away. Around 8 p.m. that same day, Stewart saw the petitioner driving a gold Chevrolet

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

Monte Carlo along the same street as the victim was walking. He then heard the sound of two gunshots and observed the victim "hit the ground." After the petitioner drove away, the victim approached Stewart and told him that the petitioner had fired the shots in his direction but that he was unsure whether the petitioner was trying to shoot him. Later that night, the victim, Stewart, and others celebrated the victim's birthday at a local night club. At some point that evening, the victim went outside and fell asleep in the Lumina, which was parked in front of the club. At around 1:30 a.m., Stewart, Joseph Smith, and two other men, left in the Lumina with the victim, who was still asleep. Shortly after driving away from the club, Stewart pulled over to the side of Lenox Street, and several of the vehicle's occupants smoked marijuana.

Thereafter, the petitioner pulled very closely along the driver's side of the Lumina in the Monte Carlo and fired four shots in its direction. After the petitioner had driven away, Stewart and the other men in the Lumina realized that the victim had been shot. Police and emergency medical personnel arrived on the scene shortly after one of the men summoned help, but the victim ultimately died from his injuries.

On May 6, 1999, the day after the shooting, the police took a voluntary statement from Smith, who recalled another passenger yelling, "that's Troy," when the Monte Carlo pulled up. On May 8, 1999, the police took a voluntary statement from Stewart, who recalled hearing someone yell, "Yo, that's Troy," and observed someone that appeared to be the petitioner just before shots were fired. On May 13, 1999, the police took a voluntary statement from Jesse Campbell. Campbell explained that just prior to the shooting the petitioner pulled into a Kentucky Fried Chicken restaurant in a Monte Carlo and parked next to him. Campbell stated that he recognized the petitioner because they had lived near each

other for about two years, and they waved to each other while in the parking lot. A short while later, Campbell watched as the Monte Carlo turned off its headlights, proceeded down Lenox Street, and drove alongside the Lumina. He then heard shots being fired and observed flashes coming from the Monte Carlo. The Monte Carlo sped away, and Campbell observed the petitioner as its only occupant. Campbell identified a picture of the Monte Carlo as the vehicle he saw the petitioner driving on night of the shooting, and he identified a photograph of the petitioner from a photographic array.

The petitioner was tried and convicted of murder in violation of General Statutes § 53a-54a in Hartford in 2000. At trial, the state's evidence included the following relevant testimony from Campbell, Smith, and Stewart. Campbell testified about his observation of the Monte Carlo and the petitioner on the night of the shooting. He also identified the petitioner in court, and he identified the photograph of petitioner he selected from a photographic array he was shown when he gave his statement to the police. Smith testified that he was a passenger in the Lumina when the shooting occurred, but he stated that he did not see who fired the shots because he "ducked" down until after the shooter drove away. He also explained that he did not remember much about the night of the shooting because he had consumed about six shots of alcohol and six marijuana joints and had suffered permanent memory loss from a brain injury in August, 1999. Finally, Stewart testified that he was driving the Lumina on the night of the shooting and that he remembered a Monte Carlo pulling up very closely alongside the Lumina. Stewart testified that he looked into the Monte Carlo to see who was driving and, seconds before the shots were fired, shouted, "That's Troy!" Stewart also stated that he recognized the Monte Carlo as being the same vehicle that he had seen the petitioner driving earlier that evening.

After his conviction, the petitioner filed a direct appeal, and this court affirmed the petitioner's conviction on March 19, 2002. *State* v. *Westberry*, 68 Conn. App. 622, 638, 792 A.2d 154, cert. denied, 260 Conn. 923, 797 A.2d 519 (2002).

On December 30, 2003, Campbell and his mother had a conversation over a monitored telephone line while he was incarcerated on unrelated criminal charges. During that conversation, Campbell opined that the prosecutor recently discussed in open court the fact that he testified for the state in the petitioner's criminal trial. In the recorded conversation, Campbell repeatedly expressed his concern that people in jail were going to find out that he testified for the state. At one point during the conversation, Campbell said: "Well of course that I lied; I don't know nothing about that shit, what?" The recording of the conversation between Campbell and his mother subsequently was disclosed to the petitioner.

On January 14, 2003, the petitioner filed his first petition for a writ of habeas corpus, in which he claimed actual innocence and a due process violation based on Campbell's purported perjury. *Westberry* v. *Commissioner of Correction*, Superior Court, judicial district of New Haven, Docket No. CV-03-0473101-S (September 15, 2011), aff'd, 141 Conn. App. 901, 59 A.3d 1205 (2013). On June 7, 2011, the first habeas court, *Zoarski*, *J.*, conducted an evidentiary hearing at which the petitioner presented the testimony of James Ouludsen, the petitioner's investigator, and Assistant State's Attorney Vicki Melchiorre.[2] Ouludsen testified that on June 17, 2007, he interviewed and took a statement from Campbell. In that statement, Campbell denied knowing the

[2] The petitioner attempted to call Campbell as a witness at his first habeas trial, but Campbell invoked his fifth amendment right against self-incrimination.

petitioner or seeing him at the time of the shooting incident and admitted to lying at the petitioner's criminal trial. Melchiorre testified that she was the attorney that prosecuted the petitioner at his criminal trial. She testified that Campbell was reluctant to testify at the petitioner's criminal trial because he was concerned about his safety in prison and because "he didn't want to be labeled as a snitch." On September 15, 2011, the first habeas court denied the petitioner's first habeas petition because the petitioner failed to establish that he was actually innocent of murder or that his conviction was the result of a due process violation. *Westberry* v. *Commissioner of Correction*, supra. In particular, the first habeas court found that it could not "judge the credibility of the alleged recantations of Jesse Campbell in the absence of his testimony under oath and subject to cross-examination." Id. This court summarily affirmed the judgment of the first habeas court. *Westberry* v. *Commissioner of Correction*, 141 Conn. App. 901, 59 A.2d 1205 (2013).

On June 5, 2012, Smith participated in a proffer session[3] with federal authorities in which he stated that he had lied at the petitioner's criminal trial about not remembering anything about the shooting incident. He claimed that when the petitioner pulled alongside the

[3] Under the federal sentencing guidelines, the federal government may file a motion on behalf of a defendant that has "provided substantial assistance in the investigation or prosecution of another person who has committed an offense" in which it asks the court to depart from the sentencing guidelines at sentencing, including a departure below a mandatory minimum sentence. U.S.S.G. § 5K1.1. A "proffer session" is the meeting between federal authorities, the defendant, and his counsel at which the defendant makes a statement concerning his or other individuals' criminal conduct. Depending on the content of the defendant's statement and his credibility, the government may or may not file a § 5K1.1 motion with the court prior to sentencing. At sentencing, when deciding whether to depart from the guidelines based on a § 5K1.1 motion, the court may consider, inter alia, "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." U.S.S.G. § 5K1.1 (a) (2).

Lumina, he observed "Bub," subsequently identified as Lorenza Mack, in the front passenger seat of the Monte Carlo. At the proffer session, Smith stated that he attempted to fire a nine millimeter firearm at the Monte Carlo, but the firearm malfunctioned and did not fire.[4] Smith then claimed that he saw Mack produce a firearm and shoot at the Lumina before he and the petitioner drove away. After the proffer session, a federal agent that participated in the proffer session prepared a written report summarizing Smith's statements (proffer statement). A copy of the proffer statement was subsequently provided to Smith and the petitioner.

On November 19, 2014, the petitioner filed an amended petition for a writ of habeas corpus (second habeas petition), which is the subject of this appeal. In this action, the petitioner alleged actual innocence and a due process violation based on the purported perjury of Campbell and Smith at his criminal trial.[5] On January

[4] During his brief, and reluctant, trial testimony, Smith did not mention that he attempted to shoot at the Monte Carlo. In relevant part, he engaged in the following colloquy with the prosecutor:

"Q. All right. Do you recall seeing whether or not a car pulled up next to you?

"A. Yeah. A car pulled up. Yeah, a car pulled up.

"Q. Okay. Then what happened?

"A. They started shooting. Somebody started shooting.

"Q. Okay. Did you see who started shooting? Is that a no?

"A. No.

"Q. What did you see?

"A. I seen—I just looked. I seen a car, and I ducked. I just ducked.

"Q. You always duck every time a car comes near you? What made you duck?

"A. 'Cause

"Q. 'Cause why?

"A. 'Cause, you know, I just ducked."

[5] The respondent, the Commissioner of Correction, argues that any claim of actual innocence or a due process violation based on Campbell's recantation is barred by the doctrine of res judicata. As we have disposed of the petitioner's claim on other grounds, we need not address this argument. See *Edwards* v. *Commissioner of Correction*, 141 Conn. App. 430, 431 n.1, 63 A.3d 540, cert. denied, 308 Conn. 940, 66 A.3d 882 (2013); *Cole* v. *Commissioner of Correction*, 126 Conn. App. 775, 777 n.1, 12 A.3d 1065 (per curiam), cert. denied, 300 Conn. 937, 17 A.3d 473 (2011).

5, 2015, the second habeas court, *Schuman, J.*, conducted a habeas trial at which the petitioner presented the testimony of the following witnesses.[6]

The first witness presented by the petitioner was Smith, who testified by telephone from a federal correctional facility. During his testimony, Smith stated that he never reviewed the proffer statement, and he disagreed with the federal agent's summary of his statements on multiple occasions, particularly concerning the order of events during the shooting incident.[7] Smith also provided equivocal testimony concerning the shooting

[6] The petitioner attempted to call Campbell and Eugene to testify, but they both invoked their fifth amendment right against self-incrimination.

[7] For example, the following exchange occurred between the petitioner's counsel and Smith during direct examination:

"Q. Okay. Sir, if I read you the portion of the proffer session, would that refresh your recollection as to the order of events?

"A. It might.

"Q. Okay. It says: 'Smith attempted to fire the TEK-9 at [the petitioner's] car but the TEK-9 malfunctioned and didn't fire. Smith then saw Bub [i.e., Mack] produce a firearm and proceed to shoot in the car occupied by Smith.' Does that refresh your recollection?

"A. No, I don't think it happened like that.

"Q. No, you don't think it happened like that?

"A. No.

"Q. All right. This is certainly what you told the [federal] agents.

"A. No.

"Q. At any time with your discussions with your lawyers or [the federal] prosecutors or the [federal] agents, did you ever tell them that you were fired upon first and then you tried to fire?

"A. I'm not sure.

"Q. All right. After—you know that you were ordered to be truthful in this statement. Correct?

"A. Correct.

"Q. And that the 5K [motion] would not be given to you unless you told the truth to the [federal] agents and to the [assistant United States attorney].

"A. That's true.

"Q. And now you're saying that what's in the report is not true.

"A. I'm not saying that. I'm just saying I can't remember if that's how it happened.

"Q. Well, can you not remember?

"A. No, you know, I also had a brain injury.

"Q. Okay. We understand that, but when you spoke to the [federal] agents, you gave them [a] very specific order as to how things happened, isn't that correct, according to this report?

itself. Smith stated on multiple occasions that he "believed" that Mack was the shooter rather than the petitioner[8] because that was the rumor on the street. In particular, Smith explained that "being that I was younger than most of them, I never really knew them [i.e., the petitioner or Mack], but I was in the car that night and that's who everybody believes it was [i.e., Mack]. That was the rumor on the street."

The petitioner then presented the testimony of Jill Therriault, a forensic firearms examiner, and Stewart to corroborate Smith's proffer statement to federal authorities. Therriault testified that she inspected the unfired nine millimeter cartridges that were recovered from the scene of the shooting, but she could not identify or eliminate them as having been cycled through

"A. It could appear like that, but I don't believe that's how it happened.

"Q. All right. Well, did you make any corrections to the [federal] agent's report?

"A. No, I never seen it."

[8] For example, the following exchange occurred between the petitioner's counsel and Smith during direct examination:

"Q. . . . Do you recall a car pulling up alongside the car that you were in?

"A. Yeah.

"Q. Do you recall being able to see the driver of the car?

"A. I mean it was blurry, but yeah.

"Q. Okay. And who was the driver?

"A. Well, *I believe* it was [the petitioner's].

"Q. Okay.

"A. That's what *I believe*.

"Q. All right. Could you see someone else in the front seat passenger of [the petitioner's] car?

"A. Yeah.

"Q. And who was that?

"A. *I believe* that was, um, Bub.

"Q. Okay. Is Bub also known as Lorenz[a] Mack?

"A. Yeah.

* * *

"Q. Okay. And so did you attempt to shoot at [the petitioner's] car?

"A. I think they fired. They already fired."

* * *

"Q. And you reiterated is it true that [the petitioner] did not shoot or fire on the car that you were in. Is that correct?

"A. Yeah, *I don't believe* it was him." (Emphasis added.)

the type of firearm Smith said he attempted to shoot at the Monte Carlo. Stewart testified that a defense investigator had shown him Smith's proffer statement, but, during the second habeas trial, he gave equivocal testimony concerning its accuracy. On direct examination, Stewart was asked whether Smith's proffer statement said that "Mack was the shooter and that he fired and Troy drove away," and Stewart replied, "Yes." Stewart was then asked, "isn't that true?" and he replied, "Yes." On cross-examination, however, Stewart acknowledged that in his statement to the police on May 8, 1999, two days after the shooting, he never mentioned Mack. He also acknowledged that he never mentioned Mack at trial and that he testified that he yelled, "That's Troy," when the Monte Carlo pulled up next to them. On redirect examination, Stewart was asked again if Smith's proffer statement was "the true version of the events," and he replied, "Sort of, yes." Later, when asked about whether he remembered Smith attempting to shoot at the Monte Carlo, Stewart replied, "I don't know about that," and when he was asked if he wanted to look at Smith's statement again, he replied, "Something ain't right."

The petitioner's final two witnesses were Thomas Davis and Jason Douglas, who were called to establish that Mack shot the victim, not the petitioner. Davis testified that Mack was "jumped" by the victim and two other men three months before the shooting. Douglas, a defense investigator, testified about his interview of Guy Eugene, who is currently serving a sentence for killing Mack. Douglas explained that Eugene told him that he killed Mack in retaliation for the victim's death, and he then prepared a written statement of their discussion. Douglas stated that he gave Eugene an opportunity to look at his notes but that Eugene declined to sign the statement he prepared.

In addition to the testimony of these witnesses, the habeas court admitted several exhibits, including all of the transcripts from the petitioner's criminal trial, the transcripts from the petitioner's first habeas trial, Campbell's telephone conversation with his mother, Campbell's sworn statement,[9] Smith's proffer statement,[10] and the affidavit by Douglas in which he memorialized Eugene's purported statements to him (Eugene's statement).[11]

On February 18, 2015, the second habeas court issued a written memorandum of decision denying the petitioner's second habeas petition. In that memorandum, the court discredited the testimony and statements of Smith and Stewart as well as the statements made by Campbell and Eugene.[12] Concerning Smith, the court found that his testimony at the hearing was not credible because "his testimony at the hearing on the shooting was hesitant, saying he does not 'believe' the shooter was the petitioner and that he 'believes' the shooter was Lorenza Mack. He also admitted that some of his proffer, particularly concerning the order of events during the shooting incident, was wrong." The court observed: "It is hard to see how he could have remembered so little in 2000, one year after the shooting, perhaps understandably because he was under the influence of alcohol and drugs, and yet recant and identify the shooter twelve and fourteen years after the incident."

[9] A transcript and recording of Campbell's phone conversation and Campbell's sworn statement were admitted as statements against penal interest.

[10] The petitioner offered and the court admitted Smith's proffer statement as a prior inconsistent statement.

[11] When Eugene invoked his fifth amendment right against self-incrimination, the court admitted Douglas' affidavit about their meeting into evidence only for nonhearsay purposes, i.e., for establishing that Eugene's motive for killing Mack was his belief, based on street rumors, that Mack killed the victim.

[12] The court credited the testimony of Davis and Therriault, but ultimately concluded that their testimony did not support the petitioner's claim.

Concerning Stewart, the court noted that Stewart's testimony was "extremely hesitant" and that "[h]e provided only reluctant answers in response to leading questions." The court observed: "There was no mention in [Stewart's] virtually contemporaneous [sworn] statement [to the police two days after the shooting] of Lorenza Mack or Bub, thus casting grave doubt on the veracity of Stewart's testimony at the habeas trial over fourteen years later."

Concerning Campbell, the court found that, after reviewing Campbell's phone call and sworn statement, "it cannot put any weight on his alleged recantations in the absence of seeing Campbell in person and having him face cross-examination."

Finally, the court "attach[ed] no weight to Eugene's statement" because "[t]he affidavit consisted of the investigator's rendition of Eugene's oral statements," "Eugene himself declined to sign a written statement," and the affidavit stated that Eugene would be willing to testify in court, which was untrue. The court also observed: "Eugene's motive or state of mind as to why he would kill Mack is essentially irrelevant and does not in any way constitute reliable evidence as to who killed [the victim]."[13]

In its memorandum of decision, the second habeas court also rejected the petitioner's actual innocence and due process claims. The court articulated several bases for its conclusion. In relevant part, the court rejected the petitioner's actual innocence claim on the merits because he "failed to prove by clear and convincing evidence that he is actually innocent of murder

[13] The court emphasized that the investigator's description of Eugene's claim that " 'it is well known on the street' " that Mack killed the victim was not admitted "for the truth of the matter but rather it [was admitted] only for the nonhearsay purpose of showing Eugene's motive or state of mind, to the extent that the latter was relevant."

and that no reasonable jury would find him guilty." In particular, the court observed that "[t]he petitioner's case instead rested almost entirely on the recantations of the key witnesses," and "[o]ur law views such recantations with skepticism." Furthermore, the court explained that "there are good reasons to remain highly skeptical of the recantations in this case. In addition to those specific reasons, there is the more general concern that the petitioner did not offer any valid explanation, such as a mistaken identification, why the recanting witnesses would all proceed to provide false testimony at the criminal trial and, with the exception of Smith, implicate the petitioner."

The court also rejected the petitioner's due process claim on the merits. The court first explained that the petitioner had withdrawn the claim in his petition that the state knew or should have known that false testimony was presented at the criminal trial. Nonetheless, the court explained that the petitioner, relying on *Ortega* v. *Duncan*, 333 F.3d 102 (2d Cir. 2003), claimed that "the court should grant habeas relief because the jury relied on perjured, material testimony, even if the state did not know . . . of the perjury." Although the court observed that "Connecticut . . . has not adopted the *Ortega* rule," it nonetheless held that, regardless, the defendant could not prevail under the *Ortega* standard because he failed to establish that "the witnesses presented false testimony at trial and that their recantations are true."

I

We first address the petitioner's claim that the habeas court erroneously concluded that his due process rights were not violated by the use of perjured testimony at his criminal trial. The petitioner has withdrawn any claim that the state knew or should have known that it was presenting purportedly perjured testimony, and,

instead, he argues that "the use of perjured testimony [in his criminal trial], even absent the [s]tate's knowledge, is a violation of due process." It remains an open question in Connecticut whether the state's *unknowing* use of perjured testimony at trial can violate due process. *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 570–71 and n.18, 22 A.3d 1196 (2011). The majority of jurisdictions require a habeas petitioner to prove that the state knew or should have known that it was presenting false testimony to raise a due process claim. Id., 570 n.18. However, a minority of jurisdictions, including the United States Court of Appeals for the Second Circuit, have held that the use of perjured testimony at trial by itself, even without the state's knowledge of its falsity, can give rise to a due process claim. Id.; see, e.g., *Ortega* v. *Duncan*, supra, 333 F.3d 108. We conclude that it is unnecessary for us to resolve whether Connecticut recognizes a due process claim based on the state's unknowing use of perjured testimony because we agree with the second habeas court that the petitioner failed to establish that perjured testimony was used at his criminal trial.

To support his claim that his conviction was based on the use of perjured testimony, the petitioner relies on Campbell's and Smith's recantations. However, the habeas court explicitly discredited these recantations. It is well established that "[t]his court does not retry the case or evaluate the credibility of witnesses. Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 711, 89 A.3d 426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278 (2016) (certification improvidently granted). We cannot disturb the underlying credibility determinations or facts found by the habeas court unless they

are clearly erroneous. *State* v. *Buhl*, 321 Conn. 688, 708, 138 A.3d 868 (2016). The petitioner has failed to establish that the second habeas court's credibility determinations were clearly erroneous.

Concerning Campbell, the court reasonably concluded that "it [could not] put any weight on [Campbell's] alleged recantations in the absence of seeing Campbell in person and having him face cross-examination." The petitioner maintains that the court could have, and should have, credited Campbell's recantation because Campbell invoked his fifth amendment right against self-incrimination and his statements were admitted as statements against penal interest, which requires "a judicial determination of trustworthiness" and "must be accorded equivalent consideration as testimony . . . ."[14] We disagree. The court acted well within its discretion by declining to speculate as to why Campbell invoked his fifth amendment right not to testify. See *Skakel* v. *State*, 295 Conn. 447, 500, 991 A.2d 414 (2010). The petitioner also erroneously conflates admissibility with weight. When the habeas court determined that Campbell's statements were admissible, it was engaging in a gatekeeping function. See id. The court simply determined that the evidence met the threshold that would allow it to *consider* the evidence. It was not acting in its capacity as the trier of fact to determine whether it would find the evidence credible.

[14] Section 8-6 (4) of the Connecticut Code of Evidence provides: "Statement against penal interest. A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest."

See id., 479.[15] The mere fact that a court determines that evidence is admissible under the Connecticut Code of Evidence does not mean that the trier of fact must ultimately credit that evidence.

The court also had an adequate factual basis for discrediting Smith. Smith's testimony was hesitant and equivocal, and he merely stated that he "believes" that Mack was the shooter, not that he *knows* that Mack was the shooter. Additionally, Smith repeatedly corrected portions of the proffer statement, particularly the details concerning the order of events during the shooting. The petitioner maintains that the court clearly erred in its credibility determination because Smith's recantation was corroborated by Eugene's statement and Stewart's and Theriault's testimony. However, the court discredited Eugene's statement because it was neither written nor signed by him and the investigator's affidavit contained an incorrect assertion that Eugene was willing to testify at the habeas trial. Additionally, Eugene's

[15] We note that the petitioner argues in his brief that *Skakel* supports his argument that "the only adverse inference that may be logically inferred [from Campbell's invocation of his fifth amendment right], is that Jesse Campbell's trial testimony was perjured." In particular, he quotes a portion of the Supreme Court's summary of the trial court's memorandum of decision, without attribution, to support his assertion that "[b]y refusing to testify as to the veracity of his testimony at the [p]etitioner's criminal trial, Mr. Campbell is acknowledging criminal liability [from his trial testimony]." We observe that *Skakel* is squarely adverse to the petitioner's position with respect to Campbell. In *Skakel*, the defendant sought a new trial based on statements by Gitano Bryant that inculpated two other persons in the victim's murder. *Skakel* v. *State*, supra, 295 Conn. 468. While the court admitted Bryant's statement as a statement against penal interest after Bryant invoked his fifth amendment right against self-incrimination, it ultimately did not credit Bryant's statement. Id., 473–77. In affirming the trial court's decision, the Supreme Court not only "decline[d] to speculate as to why Bryant invoked his fifth amendment right not to testify," but also held that the court did not abuse its discretion by "concluding that Bryant's account, while sufficiently trustworthy to be admissible, 'is absent any genuine corroboration . . . lacks credibility, and therefore, would not produce a different result in a new trial.' " Id., 500–501.

statement merely addressed his purported reason for killing Mack. The court also discredited Stewart's recantation because his testimony about the night of the shooting was "extremely hesitant" and he was reluctant to answer even leading questions. Finally, although the court credited Theriault's testimony, that testimony merely established that two nine millimeter bullets were recovered from the Lumina and that they would fit in Smith's firearm, not that Smith saw Mack during the shooting incident.

Therefore, we conclude that the second habeas court did not err in rejecting the petitioner's due process claim.

II

We now turn to the petitioner's claim that he is actually innocent. We begin our analysis by setting forth the relevant legal principles and standard of review that governs our analysis. In *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 791–92, 700 A.2d 1108 (1997), our Supreme Court articulated the standard of proof that a habeas corpus petitioner must satisfy in order to prevail on a claim of actual innocence: "First, taking into account both the evidence produced in the original criminal trial and the evidence produced in the habeas hearing, the petitioner must persuade the habeas court by clear and convincing evidence, as that standard is properly understood and applied in the context of such a claim,[16] that the petitioner is actually

[16] "The clear and convincing standard of proof is substantially greater than the usual civil standard of a preponderance of the evidence, but less than the highest legal standard of proof beyond a reasonable doubt. It is sustained if the evidence induces in the mind of the trier a reasonable belief that the facts asserted are *highly probably* true, that the probability that they are true or exist is *substantially greater* than the probability that they are false or do not exist. . . . [T]he clear and convincing evidence standard should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 794–95.

innocent of the crime of which he stands convicted. Second, the petitioner must establish that, after considering all of that evidence and the inferences drawn therefrom . . . no reasonable fact finder would find the petitioner guilty."[17] (Footnote added.) Id., 791–92.

Under the first *Miller* prong, actual innocence means "factual innocence," not "legal innocence," and must be "demonstrated by *affirmative proof* that the petitioner did not commit the crime." (Emphasis added.)

[17] "There are two types of actual innocence claims: Gateway and freestanding. In a freestanding claim of actual innocence, 'there is no claim of an antecedent constitutional violation that affected the result of [the] criminal trial. Such a freestanding claim is to be contrasted with what has come to be known in federal habeas jurisprudence as a "gateway" claim of actual innocence. Such a claim serves as a gateway to permit federal habeas review of an otherwise procedurally barred state conviction that the petitioner asserts is constitutionally flawed'; *Miller* v. *Commissioner of Correction*, [supra, 242 Conn. 788 n.28]; it is '[a] claim based on an antecedent constitutional violation that affected the result of his criminal trial . . . .' Id., 813 n.7 (*Berdon*, *J.*, concurring and dissenting)." *Rivera* v. *Commissioner of Correction*, 70 Conn. App. 452, 461 n.2, 800 A.2d 1194, cert. denied, 261 Conn. 921, 806 A.2d 1061 (2002).

The petitioner contends that he has asserted a "gateway" claim of actual innocence and that the habeas court erred in failing to apply the federal standard for review of gateway claims of actual innocence set forth by the United States Supreme Court in *Schlup* v. *Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). We disagree. "Neither this court nor our Supreme Court has expressly recognized the viability of a gateway claim of actual innocence in this state. In the federal courts, a habeas petitioner may assert a claim of actual innocence to circumvent a procedural obstacle [under federal statutory law] that would otherwise operate to bar review of a claim of constitutional error affecting the criminal trial. See [*Schlup* v. *Delo*, supra] 314. Such an actual innocence claim is thus 'a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.' *Herrera* v. *Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 112 L. Ed. 2d 203 (1993)." *Rivera* v. *Commissioner of Correction*, supra, 70 Conn. App. 461; see also *Rivas* v. *Fischer*, 687 F.3d 514, 541 (2d Cir. 2012) ("A claim of actual innocence under *Schlup* is therefore procedural, not substantive. . . . The petitioner raising such a claim does not seek to have his conviction vacated on grounds of innocence; rather, he seeks to create sufficient doubt about his guilt that the habeas court will permit him to pursue his accompanying constitutional claims notwithstanding an otherwise applicable procedural bar." [Citation omitted.]). In the present case, the petitioner was not confronted with any procedural impediments to review of his actual innocence claim, and, indeed, the habeas court and this

Gould v. *Commissioner of Correction*, supra, 301 Conn. 560–61. "Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though it is unknown who committed the crime, that a *third party* committed the crime or that *no* crime actually occurred." (Emphasis in original.) Id., 563. "Recantations of inculpatory criminal trial testimony undoubtedly are relevant to a determination of innocence. But evidence of that nature must be accompanied by *affirmative* evidence of innocence to meet *Miller*'s standard of clear and convincing evidence . . . ."[18] (Emphasis in original.) Id., 564.

court have fully addressed the merits of that claim. The petitioner was therefore in no need of a "gateway."

[18] Our Supreme Court has not addressed whether a habeas petitioner must support his claim of actual innocence with newly discovered evidence. "This court, nevertheless, has held that a claim of actual innocence must be based on newly discovered evidence. [A] writ of habeas corpus cannot issue unless the petitioner first demonstrates that the evidence put forth in support of his claim of actual innocence is newly discovered. . . . This evidentiary burden is satisfied if a petitioner can demonstrate, by a preponderance of the evidence, that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, supra, 149 Conn. App. 707–708.

In the present case, the second habeas court concluded that the recantation and Eugene's statement were not newly discovered evidence because none of it "negates the fact that the petitioner was driving the car at the time of the shooting." Therefore, the petitioner certainly would have known at the time of trial that Mack was the real shooter, and he might have known who saw him and Mack together at the time of the shooting. We have held that information that the petitioner "had personal knowledge of from his own experience and activities . . . is not, as a matter of law, newly discovered evidence." *Morant* v. *State*, 68 Conn. App. 137, 147, 802 A.2d 93, cert. denied, 260 Conn. 914, 796 A.2d 558 (2002), overruled in part on other grounds by *Shabbaz* v. *State*, 259 Conn. 811, 830 n.13, 792 A.2d 797 (2002); see, e.g., *State* v. *White*, 76 Conn. App. 509, 513, 819 A.2d 932 (2003) (victim's recantation did not constitute newly discovered evidence where defendant knew at time of plea hearing that victim, who had resumed a relationship with the defendant, was uncooperative with police, and wanted to avoid his incarceration). The petitioner maintains, however, that "[t]he newly discovered evidence is not Mr. Mack's culpability, but rather the recantations of three of the [s]tate's witnesses: Jesse Campbell, Joseph Smith, and Dwayne Stewart."

Our standard of review for claims of actual innocence is twofold. "The appropriate scope of review [for the first *Miller* prong] is whether, after an independent and scrupulous examination of the entire record, we are convinced that the finding of the habeas court . . . is supported by substantial evidence." *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 803. In contrast, the plenary standard of review applies to the second *Miller* prong. Id., 805.

In the present case, the petitioner's claim of actual innocence is based on Campbell's and Smith's *discredited recantations* as well as Eugene's *discredited statement*. The petitioner offers no credible or affirmative evidence of his actual innocence. The only nonrecantation evidence offered at the second habeas trial was evidence that (1) two nine millimeter bullets were recovered from the Lumina, (2) Mack was "jumped" by the victim and two other men three months before the shooting, and (3) Eugene shot Mack because he believed, based on street rumors, that Mack shot the victim. Even if this evidence were accepted as true, none of it constitutes affirmative evidence of the petitioner's actual, factual innocence. "[I]t is important to underscore that courts universally view recantation evidence with a healthy dose of skepticism." *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 568. One of the reasons that reviewing courts are highly skeptical of recantations is that recantations can often be out of sympathy for the petitioner rather than a desire to "come clean" about prior perjury. Id., 568 n.17. Our review of the record reveals that the impetus for the witnesses' recantations might well be the *street rumors*

Even if we assume, without deciding, that the recantations and Eugene's statement constitute newly discovered evidence, however, the petitioner's actual innocence claim fails on the merits.

that Mack was the shooter, rather than personal knowledge that Mack was in the Monte Carlo the night of the shooting and that Mack shot the victim.[19]

We conclude for the foregoing reasons and after an independent and scrupulous examination of the entire record that the habeas court did not err in denying the petitioner's actual innocence claim because the petitioner did not meet his burden under the first prong of *Miller*.[20]

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID BRIDGES *v.* COMMISSIONER OF CORRECTION (AC 37549)

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

Syllabus

The petitioner, who had been convicted of, inter alia, sexual assault in the first degree following a guilty plea under the *Alford* doctrine, sought a writ of habeas corpus. The petitioner claimed that his prior habeas counsel rendered ineffective assistance by failing to raise certain claims that his trial attorney had rendered ineffective assistance during the plea process. After the petitioner had pleaded guilty, the trial court granted his motion to appoint new counsel and denied his motion to withdraw his guilty pleas. The court concluded that there was nothing in the record to indicate that the petitioner's prior attorney had rendered ineffective assistance, and also concluded that the petitioner had heard,

[19] "They say" is often a great liar, according to the Irish proverb. Accord Conn. Code Evid. § 8-2.

[20] Accordingly, we need not address whether the petitioner has satisfied *Miller*'s second prong. See *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 559 n.14 ("That examination [of the *Miller* test] suggests to us that there may not be any case in which the first prong [of the *Miller* test] is not dispositive of the petition. . . . Indeed . . . the first prong of *Miller* sets forth the heart of an actual innocence claim."); see also, e.g., *Jackson* v. *Commissioner of Correction*, supra, 149 Conn. App. 713–14.

understood, and responded to the plea canvass voluntarily and intelligently. The petitioner subsequently was sentenced to a period of incarceration followed by special parole. The petitioner then filed his first petition for a writ of habeas corpus, claiming ineffective assistance of trial counsel during the plea process. Following the denial of that petition, the petitioner filed a second habeas petition, claiming that his first habeas counsel had rendered ineffective assistance by failing to raise claims that his trial counsel was ineffective for failing to properly explain the terms, conditions, and consequences of special parole, and by failing to properly investigate the petitioner's cases. The second habeas court denied the petition, concluding that both the petitioner's trial counsel and his habeas counsel had provided effective representation. The habeas court then denied his petition for certification to appeal, and the petitioner appealed to this court. On appeal, the petitioner claimed that the habeas court abused its discretion by denying the petition for certification to appeal, and erred in finding that his trial counsel and habeas counsel had not rendered ineffective assistance. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to establish that the issues he raised regarding his ineffective assistance of counsel claims were debatable among jurists of reason, that a court could resolve his claims in a different manner, or that the issues he raised were adequate to cause this court to consider them: the petitioner failed to meet his burden of showing that his trial counsel had rendered ineffective assistance by allegedly failing to ensure that he understood the consequences of pleading guilty to a term of special parole or by allegedly failing to investigate certain evidence, as the only evidence supporting the petitioner's claims was his own testimony, and this court deferred to the habeas court's assessment that his testimony was not credible; furthermore, because there was nothing in the record to suggest that the petitioner's first habeas counsel was ineffective for failing to raise the claims of ineffective assistance of his trial counsel, the habeas court properly denied the habeas petition.

Argued September 7—officially released December 20, 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.*

David B. Rozwaski, assigned counsel, for the appellant (petitioner).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, former state's attorney, *Leon F. Dalbec, Jr.*, former senior assistant state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, David Bridges, appeals following the denial of his petition for certification to appeal from the judgment denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court, *Fuger, J.*, (1) abused its discretion by denying his petition for certification to appeal, and (2) improperly denied his petition for a writ of habeas corpus. Specifically, the petitioner claims that the habeas court erred in finding that his criminal trial attorney and his previous habeas attorney did not render ineffective assistance. We disagree, and dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of this appeal. On March 8, 2001, the petitioner entered guilty pleas pursuant to the *Alford* doctrine[1] in two separate cases that were pending in the New Haven judicial district. In the first case, Docket No. CR-95-423523, the petitioner pleaded guilty to

[1] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 167 Conn. App. 233, 234 n.1, 143 A.3d 630, cert. denied, 323 Conn. 929, 150 A.3d 231 (2016); *Misenti* v. *Commissioner of Correction*, 165 Conn. App. 548, 551 n.2, 140 A.3d 222, cert. denied, 322 Conn. 902, 138 A.3d 932 (2016).

attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-70 (a), and unlawful restraint in the first degree in violation of General Statutes § 53a-95. In the second case, Docket No. CR-99-484012, the petitioner pleaded guilty to aiding aggravated sexual assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-70a (a) (4), aggravated sexual assault in the first degree in violation of § 53a-70a (a) (4), conspiracy to commit sexual assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-70 (a) (1), aiding sexual assault in the third degree in violation of General Statutes §§ 53a-8 and 53a-72a (a) (1), and aiding burglary in the first degree in violation of General Statutes §§ 53a-8 and 53a-101 (a) (2). During the plea process, the petitioner was represented by his trial attorney.

Prior to sentencing, the petitioner filed motions as a self-represented party to withdraw his guilty pleas and for the appointment of new counsel. On May 2, 2001, the trial court, *Fasano*, *J.*, granted his motion to dismiss his trial attorney. After the court appointed a new attorney to represent the petitioner, the petitioner filed a formal motion to withdraw his pleas on the basis of ineffective assistance of counsel.

The trial court denied the motion to withdraw on June 7, 2001, following an evidentiary hearing. Both the petitioner and his trial attorney testified at the hearing. The court specifically found that there was nothing in the record to indicate that the petitioner's trial attorney had rendered anything less than effective assistance. In addition, the court found that the petitioner heard, understood, and responded to the plea canvassing voluntarily and intelligently, and that there was no visible effort to disrupt the proceeding. After the denial of his motion to withdraw the guilty pleas, the court sentenced the petitioner on September 7, 2001, to fifteen years imprisonment and ten years of special parole.

The petitioner appealed the denial of his motion to vacate his pleas, and this court affirmed the judgment. *State* v. *Bridges*, 80 Conn. App. 903, 833 A.2d 948, cert. denied, 267 Conn. 907, 840 A.2d 1171 (2003).

On November 14, 2002, the petitioner filed an amended petition for a writ of habeas corpus (first habeas) claiming in a single count that his trial attorney provided ineffective assistance during the plea process. Both the petitioner and his trial attorney testified during the first habeas trial. In an oral decision rendered on August 10, 2004, the first habeas court, *White*, *J.*, denied the petition for a writ of habeas corpus, ruling that the petitioner failed to meet his burden of demonstrating that his trial attorney's performance was deficient or that the petitioner suffered any prejudice. The petitioner appealed the first habeas court's judgment on October 14, 2004, and this court dismissed the appeal on August 15, 2006. *Bridges* v. *Commissioner of Correction*, 97 Conn. App. 119, 122, 905 A.2d 103 (2006).

On November 10, 2014, the petitioner filed his amended second petition for a writ of habeas corpus. In a single count, the petitioner alleged that the attorney who represented him during his first habeas trial (first habeas attorney) provided ineffective assistance by failing to raise claims that his trial attorney performed deficiently by (1) failing to properly explain to the petitioner the terms, conditions, and consequences of special parole; and (2) failing to properly investigate each of the petitioner's cases. In addition, the petitioner alleged that his first habeas attorney performed deficiently by failing to "present testimony or evidence from witnesses who would have supported or aided possible defense claims with respect to each case . . . ."

Following a trial, the habeas court, *Fuger*, *J.*, denied the petitioner's second habeas petition on November 17, 2014, on the basis of the petitioner's failure to show

that either his trial attorney or first habeas attorney performed deficiently. The petitioner filed a petition for certification to appeal, and the habeas court denied certification to appeal on November 25, 2014. This appeal from the habeas court's judgment regarding the second habeas petition followed.

On appeal, the petitioner claims that the habeas court improperly determined that his trial attorney's alleged failure (1) to ensure that the petitioner understood the consequences of pleading guilty to a term of special parole, and (2) to investigate the petitioner's defense, were not deficient performance or prejudicial to the petitioner. In addition, the petitioner claims that the habeas court improperly concluded that the petitioner's first habeas counsel was not ineffective in failing to properly raise these claims regarding his trial attorney's ineffectiveness.

It is well established that "[w]hen the habeas court denies certification to appeal, a petitioner faces a formidable challenge, as we will not consider the merits of a habeas appeal unless the petitioner establishes that the denial of certification to appeal amounts to an abuse of discretion. . . . An abuse of discretion exists only when the petitioner can show that the issues 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. . . . [For this task] 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 order to establish an ineffective assistance of counsel claim, a petitioner must meet the two-prong 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." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Jefferson* v. *Commissioner of Correction*, 144 Conn. App. 767, 772–73, 73 A.3d 840, cert. denied, 310 Conn. 929, 78 A.3d 856 (2013).

On the basis of our review of the record, the briefs, and the oral arguments of the parties before this court, we conclude that the second habeas court did not abuse its discretion in denying the petition for certification to appeal. We agree with the habeas court that the petitioner failed to meet his burden of showing that trial counsel rendered ineffective assistance by failing to ensure that the petitioner understood the consequences of pleading guilty to a term of special parole and by failing to investigate certain evidence. We also agree that the petitioner's first habeas attorney was not ineffective for failing to raise these two claims.

The following additional facts are relevant to our resolution of the petitioner's claims regarding his trial attorney's effectiveness. During the second habeas trial, the petitioner testified that he had never heard of the concept of special parole at the time he entered his guilty pleas. The petitioner further testified that his trial attorney never explained to him what a prison term that included special parole might entail. The petitioner also claimed in his brief to this court that his trial attorney failed "to investigate or discover evidence that would lead an attorney to change his recommendation regarding a plea . . . ." The petitioner testified during the second habeas trial that he had told his trial attorney

prior to entering his pleas that a codefendant from one of the pending sexual assault cases might have been able to provide helpful testimony for his defense. Although the petitioner's trial attorney did not testify during the second habeas trial, he did provide testimony during the first habeas trial. In the transcript of his testimony, which was entered into evidence at the second habeas trial, the trial attorney testified that none of the codefendants could have been compelled to testify in support of the petitioner at the time his pleas were entered.

Upon the conclusion of the evidence, the second habeas court found that the petitioner's claims regarding his trial attorney's effectiveness lacked merit. In its oral decision, the second habeas court, *Fuger*, *J.*, stated that the claim of not understanding special parole was a "red herring," and specifically found the petitioner's testimony to be "self-serving and unworthy of belief." In addition, the second habeas court concluded that "there is no doubt in this court's mind that [the petitioner] . . . received effective, adequate, and appropriate representation . . . at the trial level," and further stated that "[a]ny attack upon [the petitioner's trial attorney] cannot be made directly because that issue has been resolved by Judge White [in the first habeas trial] and affirmed on appeal."

Based on our review of the record, the only evidence supporting the petitioner's claims regarding the deficiencies of his trial attorney was the petitioner's own testimony, which the second habeas court explicitly rejected as not credible. "[T]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . 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.) *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741, 937 A.2d 656 (2007). There was no credible evidence presented showing that the petitioner's trial attorney did not properly investigate or advise the petitioner in accordance with his obligations. Accordingly, the petitioner has failed to show that the habeas court's findings were clearly erroneous.

Finally, the petitioner also claims that his first habeas attorney provided ineffective assistance by failing to raise the two aforementioned claims regarding the petitioner's trial attorney. The second habeas court emphatically concluded that "[t]his court has heard zero evidence that would allow it to conclude that [the petitioner's first habeas attorney] did anything other than a fully professional, appropriate job as representative of [the petitioner] in his first habeas." Because there is nothing in the record to suggest that the petitioner's first habeas attorney was ineffective, this court concludes that the habeas court properly denied the habeas petition.

After our review of the record as a whole, we conclude that the petitioner has failed to establish that the issues he has raised are debatable among jurists of reason, that a court could resolve his claims in a different manner, or that the issues raised by the petitioner are adequate to cause this court to proceed to consider them. See *Simms* v. *Warden*, 230 Conn. 608, 618, 646 A.2d 126 (1994). Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

ROLANDO ROBLES *v.* COMMISSIONER OF CORRECTION (AC 37686)

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

Syllabus

The petitioner, who had pleaded guilty under the *Alford* doctrine to kidnapping in the first degree, attempted kidnapping in the first degree, and sexual assault in the first degree, sought a writ of habeas corpus in which he alleged illegal confinement because his conviction for the kidnapping offenses was unconstitutional. The factual bases underlying the charges against the petitioner arose from two separate incidents in which he had physical contact with two female victims that was intended to be sexual contact, and he then attempted to pull the victims to a secluded area. After the petitioner had been convicted following his guilty pleas, our Supreme Court in *State* v. *Salamon* (287 Conn. 509) interpreted the intent element of our kidnapping statutes to require that a defendant who committed a kidnapping in conjunction with another crime intended 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. The petitioner claimed that *Salamon* was retroactively applicable to his case and, therefore, no reasonable interpretation of the factual basis for his pleas could have formed the basis of a kidnapping conviction. The habeas court denied the petition, concluding that at least one juror, properly instructed, would have voted to convict the petitioner of the kidnapping charges. On appeal, the petitioner claimed that the habeas court improperly denied his petition because his guilty pleas were not made knowingly, intelligently, and voluntarily, as the retroactive application of *Salamon* required a factual basis that he had intended to prevent the liberation of the victims for a longer period of time or to a greater degree than that which was necessary to commit the sexual assault. *Held* that this court declined to review the petitioner's claim on appeal because his specific challenge to the knowing and intelligent nature of his guilty pleas was not presented to or decided by the habeas court: this court was not bound to consider any claimed error by the petitioner unless it appeared on the record that the question was distinctly raised at the habeas trial, ruled upon, and decided adversely to his claim, and, therefore, the petitioner's failure to raise the claim that his pleas were not knowing and voluntary before the habeas court was fatal to this appeal; moreover, the habeas petition did not include a distinct allegation that the petitioner's plea was not knowing, intelligent, and voluntary as a result of our Supreme Court's interpretation of the kidnapping statutes in *Salamon*, the petitioner did not notify or advise the habeas court that this claim was imbedded within

the allegations of his petition, and this claim was not addressed at any point during the habeas trial.

Argued September 12—officially released December 20, 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; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Naomi T. Fetterman, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Rolando Robles, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner argues that the habeas court improperly denied his petition because his guilty pleas, made pursuant to the *Alford* doctrine,[1] were not made knowingly, intelligently and voluntarily as a result of the new interpretation of our kidnapping statutes as detailed in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), and

[1] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Robles*, 169 Conn. App. 127, 128 n.1, 150 A.3d 687 (2016). A defendant often pleads guilty under the *Alford* doctrine "to avoid the imposition of a possibly more serious punishment after trial." (Internal quotation marks omitted.) *State* v. *Peterson*, 51 Conn. App. 645, 647 n.1, 725 A.2d 333, cert. denied, 248 Conn. 905, 731 A.2d 310 (1999).

its progeny. We conclude that the petitioner's specific claim regarding the knowing and intelligent nature of his pleas was not raised to or decided by the habeas court. Accordingly, we decline to review his appellate claim and affirm the judgment of the habeas court.

The following facts and procedural history underlie our discussion. The state charged the petitioner with kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), attempt to commit kidnapping in the first degree in violation of General Statutes §§ 53a-49 and 53a-92 (a) (2) (A) (kidnapping offenses) and sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (2). See *State* v. *Robles*, 169 Conn. App. 127, 128–29, 150 A.3d 687 (2016). On August 29, 2007, the petitioner appeared before the trial court, *Miano*, *J.*, to enter guilty pleas to these charges. Id., 129. After some discussion, the court accepted the petitioner's guilty pleas pursuant to the *Alford* doctrine. Id., 129–30.

During the plea proceeding, the prosecutor set forth the following factual bases underlying the charges against the petitioner. "[T]hat's an incident that happened on December 15, 2005, and it was in the area of Sigourney Street and Russ Street. The complainant, the victim, was a seventeen year old female. She was on her way to school at Hartford Public High School when [the petitioner] came up from behind her. He grabbed her and had sexual contact placing his hand on her buttocks area and genital area and that was over her clothing. She was able to push him away.

"He followed her. A short distance later he pulled her by the jacket. He attempted to pull her back behind the apartment building, and these were her words, she was able to break free. Her jacket did rip. And she was able to gain freedom. A later identification was made after she filed this complaint and told family members.

One family member had seen him. And she ultimately positively identified the [petitioner] as the person who had done this to her.

"The next incident . . . that happened five days later on December 20, 2005, in the morning hours, 8:40 in the a.m., near the intersection of Capitol Avenue and Laurel Street. This [incident] involved a sixteen year old female. She was walking to school. She observed the [petitioner] following her. He did catch up with her in that area of Capitol Avenue and Laurel Street. He grabbed her from behind and attempted to pull her or drag her into a fenced area. She also fought back and freed herself after a short scuffle with him." (Internal quotation marks omitted.) Id., 129 n.2. Following his conviction, the court sentenced the petitioner to fifteen years incarceration, execution suspended after time served, and twenty years of probation.[2] Id., 130.

Following the petitioner's conviction, our Supreme Court reinterpreted the intent element of our kidnapping statutes. In *State* v. *Salamon*, supra, 287 Conn. 542, it stated: "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."

[2] At the time of sentencing, the petitioner had been incarcerated for approximately twenty months.

Our Supreme Court further noted that "[w]hen that confinement or movement is merely incidental to the commission of another crime, however, the confinement or movement must have exceeded that which was necessary to commit the other crime. [T]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that the substantive crime could not have been committed without such acts . . . . In other words, the test . . . to determine whether [the] confinements or movements involved [were] such that kidnapping may also be charged and prosecuted when an offense separate from kidnapping has occurred asks whether the confinement, movement, or detention was merely incidental to the accompanying felony or whether it was significant enough, in and of itself, to warrant independent prosecution. . . . Conversely, a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime." (Citations omitted; internal quotation marks omitted.) Id., 546–47.

In January, 2012, the petitioner commenced the present action. On February 21, 2014, the petitioner filed an amended petition for a writ of habeas corpus (operative petition). In count one, he alleged illegal confinement because his conviction for the kidnapping offenses was unconstitutional. Specifically, he argued that § 53a-92 was unconstitutional under both the federal and state constitutions and that our Supreme Court's decisions in *Salamon* and its progeny[3] were subject to retroactive

[3] See *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, 969 A.2d 710 (2009).

application as set forth in *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011).[4] The petitioner then iterated the general claim that his conviction for the kidnapping offenses was based on a violation of the federal and state constitutions. In count two of the operative petition, the petitioner alleged ineffective assistance of his counsel, Attorney Robert Meredith. There was no allegation in this count that his pleas were not knowing, intelligent and voluntary.

The habeas court conducted a trial on June 30, 2014. Meredith and the petitioner were the only witnesses to testify at the trial. The parties filed posttrial briefs on August 6, 2014. On December 16, 2014, the habeas court, *Oliver*, *J.*, issued a written memorandum of decision denying the petition for a writ of habeas corpus. With respect to the claim of illegal confinement, the court rejected the special defense of procedural default advanced by the respondent, the Commissioner of Correction. The court noted that *Salamon*'s reinterpretation of our kidnapping jurisprudence arose in the context of an improper jury instruction. In an attempt to reconcile the posture of that case with that of the petitioner's guilty pleas, the court determined that "the petitioner would need to establish the probability that not a single reasonable juror, properly instructed as to the elements of kidnapping under *Salamon*, would have

[4] In *Luurtsema*, our Supreme Court held that "*Salamon* should be afforded fully retroactive effect in this particular case" as a matter of state common law. *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 751. The retroactivity rule of *Luurtsema*, however, does not apply necessarily in every case: "We . . . conclude that, when an appellate court provides a new interpretation of a substantive criminal statute, an inmate convicted under a prior, more expansive reading of the statute presumptively will be entitled to the benefit of the new interpretation on collateral attack. *We decline*, *however*, *the petitioner's invitation to adopt a per se rule in favor of full retroactivity.* We do so because a review of the diverse contexts in which such challenges have arisen persuades us that there are various situations in which to deny retroactive relief may be neither arbitrary nor unjust." (Emphasis added.) Id., 760.

voted to find him guilty of the challenged charges had the case gone to trial."[5] The court, after reviewing the

[5] The habeas court cited to *United States* v. *Scruggs*, 916 F. Supp. 2d 670, 672 (N.D. Miss. 2012), aff'd, 714 F.3d 258 (5th Cir. 2013), where the defendant, Richard F. Scruggs, filed a motion to vacate and set aside his conviction following his guilty plea. Scruggs claimed that, following the United States Supreme Court's decision in *Skilling* v. *United States*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010), he was "actually innocent of the crime to which he pled guilty." *United States* v. *Scruggs*, supra, 674. The District Court concluded that Scruggs bore a heavy burden to overcome procedural default and prevail on this motion to set aside the verdict. Id., 675. It noted that Scruggs had to prove his actual innocence of the crime that he had pleaded guilty to, as well as the charges dismissed in the original indictment. Id. "To establish actual innocence, [a] petitioner must demonstrate that, in light of all of the evidence, it is more likely than not that no reasonable juror would have convicted him. . . . The actual innocence standard does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. . . . The standard is not satisfied where at least one juror, acting reasonably and properly instructed, would vote to convict the petitioner." (Citations omitted; internal quotation marks omitted.) Id., 675–76.

In *Barile* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-10-4003798, 2013 WL 4873478, *5 (August 13, 2013), also cited by the habeas court in the present case, the court used the "actual innocence" standard from *Scruggs*. In *Barile*, the petitioner pleaded guilty to, inter alia, six counts of kidnapping in the first degree. In count two of his habeas petition, he alleged that his kidnapping conviction was obtained in violation of his right to due process because it was based on conduct that subsequently was determined not to be a crime in *Salamon*. He also alleged that his plea was not knowing, intelligent and voluntary "as a result of the substantive narrowing of the definition of kidnapping by the *Salamon* case." Id., *2.

The respondent in *Barile* argued that the petitioner's claim that his plea was not knowingly, intelligently and voluntarily made was essentially a sufficiency challenge and had been waived as a result of his guilty plea. The petitioner countered that his claim was not a sufficiency challenge, but rather one of actual innocence. The habeas court in *Barile* agreed with the petitioner and applied the "actual innocence" standard from *Scruggs*. Id., *5.

In his brief to this court, the petitioner claims that the habeas court's use of the actual innocence standard was improper. We conclude that the petitioner did not make a claim of actual innocence before either the habeas court or this court. After a thorough review of the record, it appears that the petitioner challenged the sufficiency of the evidence before the habeas court. Specifically, he argued that there was nothing in the record to support the intent element for the kidnapping offenses following *Salamon*, and therefore his pleas were not valid.

record, and discrediting the petitioner's testimony,[6] concluded that at least one juror, properly instructed, would have voted to convict him of the kidnapping charges. The court also rejected the petitioner's ineffective assistance of counsel claim, and denied the petition for a writ of habeas corpus.[7] On December 23, 2014, the court granted the petition for certification to appeal.

On appeal, the petitioner claims that his pleas to the kidnapping charges were invalid. Specifically, he argues that his pleas were not knowing, intelligent and voluntary because the retroactive application of *Salamon* required a factual basis,[8] absent from the record in this case, that he had intended to prevent the liberation of the victims for a longer period of time, or to a greater degree, than that which was necessary to commit the sexual assault. In turn, the respondent argues that, to the extent that the petitioner had raised a due process challenge based on the sufficiency of the evidence, this claim was waived by operation of his guilty plea. The respondent further contends that, to the extent that the petitioner had raised an actual innocence claim, the habeas court properly rejected it.

On appeal, the petitioner unquestionably raises a due process challenge with respect to his pleas to the kidnapping offenses. As we explain in this opinion, this claim raised on appeal was not presented to the habeas court. As a result of our conclusion that the petitioner failed to raise his specific challenge that his pleas were not made knowingly and voluntarily as a result of the *Salamon* and *Luurtsema* decisions, and therefore we need not address it on the merits, we decline to discuss the propriety of the use of the actual innocence standard by the habeas court.

[6] Specifically, the habeas court found "the petitioner's testimony [to be] self-serving, equivocal and utterly lacking in credibility."

[7] The petitioner has not appealed from the denial of his ineffective assistance of counsel claim.

[8] "A factual basis exists where the facts before the court are sufficient to establish each and every element of the crime charged. . . . In determining whether a factual basis exists, the court may consider the facts recited by the state's attorney as well as any other facts properly submitted to the court which supports a conviction." (Citation omitted; internal quotation marks omitted.) *State* v. *Turner*, 91 Conn. App. 17, 21, 879 A.2d 471, cert. denied, 276 Conn. 910, 886 A.2d 424 (2005).

We conclude that the respondent has misidentified or misinterpreted the petitioner's appellate claim. We further conclude, however, that the claim raised in this appeal was not presented to or decided by the habeas court. As a result, we decline to consider its merits. Accordingly, we affirm the judgment of the habeas court.

A brief discussion of the relevant law on whether a plea was made knowingly, intelligently and voluntarily will facilitate our discussion. "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." (Internal quotation marks omitted.) *Paulsen* v. *Manson*, 203 Conn. 484, 489, 525 A.2d 1315 (1987); see also *State* v. *Niblack*, 220 Conn. 270, 278, 596 A.2d 407 (1991). A determination of whether a plea was knowingly and voluntarily made requires an examination of all the relevant circumstances. *State* v. *Wright*, 207 Conn. 276, 287, 542 A.2d 299 (1988); *State* v. *Velez*, 30 Conn. App. 9, 21, 618 A.2d 1362, cert. denied, 225 Conn. 907, 621 A.2d 289 (1993). "In choosing to plead guilty, the defendant is waiving several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers." (Internal quotation marks omitted.) *State* v. *Greene*, 274 Conn. 134, 144, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006); see also *Boykin* v. *Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State* v. *Carter*, 243 Conn. 392, 397, 703 A.2d 763 (1997).

In *State* v. *Niblack*, supra, 220 Conn. 281, our Supreme Court iterated that "our state courts are under no constitutionally imposed duty to establish a factual basis for a guilty plea prior to its acceptance unless the judge is put on notice that there may be some need for such an inquiry." See also *State* v. *Greene*, supra, 274 Conn. 149; *State* v. *Velez*, supra, 30 Conn. App. 21. This rule was

applied in the context of an *Alford* plea in *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 14–15, 761 A.2d 740 (2000); see also *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 730, 789 A.2d 1046 (2002) (our procedural rules do not require factual basis for court to accept *Alford* plea).[9] Put another way, a factual basis is but one way of satisfying the requirement that a plea be knowing and voluntary. *Paulsen* v. *Manson*, supra, 203 Conn. 491.

In the present case, the operative petition alleged a broad claim of illegal confinement as a result of the petitioner's conviction for the kidnapping offenses that was obtained in violation of his federal and state constitutional rights. The petitioner, however, failed to include a specific claim that his pleas were not made knowingly, intelligently and voluntarily as a result of the subsequent modification to the intent requirement for kidnapping charges as set forth in *Salamon*. "In a writ of habeas corpus alleging illegal confinement the application must set forth specific grounds for the issuance of the writ including the basis for the claim of illegal confinement. . . . [T]he 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. . . . 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.) *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 125, 111 A.3d 829 (2015); *Zuberi* v. *Commissioner of Correction*, 140 Conn. App. 839, 844–45, 60 A.3d 337, cert. denied, 308 Conn. 931, 64 A.3d 330 (2013).

During the habeas trial, the petitioner's counsel asked Meredith if he was aware that cases regarding the kidnapping statutes were before our Supreme Court at

[9] It was recognized, however, that "[a] court may nevertheless, in its discretion, require a factual basis before accepting a nolo contendere or *Alford* plea." *Baillargeon* v. *Commissioner of Correction*, supra, 67 Conn. App. 730 n.10.

the time he had advised the petitioner and when the petitioner entered his pleas. Meredith responded in the negative. The petitioner testified that he questioned Meredith as to how his conduct could have fallen within the statutory parameters of kidnapping. The petitioner further stated that he was willing to challenge the law and file an appeal if necessary. He indicated that as a result of Meredith's indifference to his circumstances, the petitioner felt "helpless [and] powerless . . . ." After further testimony, the petitioner indicated that he had agreed to the *Alford* pleas because he "believed at the time that [his] conduct constituted the charge of kidnapping."

The issue of whether the petitioner's pleas were not knowingly and voluntarily entered and, therefore, a violation of due process, was not addressed at any point during the habeas trial.[10] There was no indication at the

[10] The habeas court's memorandum of decision stated: "The petitioner alleges that his guilty plea was not knowing, intelligent and voluntary as a result of the substantive narrowing of the definition of kidnapping by the *Salamon* case." Despite this statement by the habeas court, the habeas court did not conduct an analysis of this due process claim. Instead, the court first rejected the respondent's defense of procedural default. It then applied the actual innocence standard and found "that there [was] a probability that at least one reasonable juror, properly instructed under *Salamon*, could have concluded that the petitioner's restraint, and attempted restraint, of the victims was not merely incidental to the sexual assault and voted to convict him at trial." It did not discuss whether a due process violation resulting from pleas that were not made knowingly and voluntarily had occurred.

As noted in footnote 5 of this opinion, the habeas court cited to *Barile* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-10-4003798, 2013 WL 4873478 (August 13, 2013), a case in which the petitioner had alleged that his plea was not knowing, intelligent and voluntary as a result of the substantive narrowing, in *Salamon*, of the definition of kidnapping. In response to the respondent's special defense of waiver in that case, the petitioner argued that his claim was one of actual innocence. The habeas court in *Barile* agreed with the petitioner and decided that case on the basis of whether the petitioner had satisfied that actual innocence standard. Id., *5. In other words, the court in that case focused its analysis on the claim of actual innocence, despite mentioning the issue of whether the plea was constitutionally valid. Similarly, in the present case, although

habeas trial that the petitioner raised the specific legal claim that his *Alford* pleas were not knowing, intelligent and voluntary, and therefore a violation of due process. At no point did the petitioner raise the issue of the need for an inquiry into the factual basis of the pleas. The petitioner did indicate that, if he had known of the pending cases before our Supreme Court at the time of his pleas, he would have insisted on going to trial even if he had been sentenced to more than eight decades of incarceration. This statement, however, applied to his claim of ineffective assistance of counsel and did not alert the habeas court to the due process claim that he subsequently has raised in this appeal.

In his posttrial brief, the petitioner argued that § 53a-92 was held to be unconstitutional by our Supreme Court in *State* v. *Salamon*, supra, 287 Conn. 509, and its progeny, and that those decisions could be applied retroactively pursuant to *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740. He then asserted that "[u]nder the *Salamon-Sanseverino* interpretation of the kidnapping statute, and the following case law, no reasonable interpretation of the facts alleged here can constitute the basis of a kidnapping conviction under current law, and as such the convictions for kidnapping [in the first degree], and [attempt to commit kidnapping in the first degree] should be vacated, and the petitioner argues, dismissed a matter of law." Essentially, the posttrial brief clarified his argument to the habeas court that there was insufficient evidence, following *Salamon*, to sustain his conviction of the kidnapping offenses.

the court mentioned, in an isolated statement, that the petitioner's claim was that his plea was not knowing, intelligent and voluntary, we conclude that it considered the claim to be one of actual innocence. But see footnote 5 of this opinion (petitioner did not make claim of actual innocence). The substance of the court's reasoning supports this conclusion. We further iterate that the petitioner did not specifically plead a due process claim based on a plea that was not knowing and voluntary, nor did he mention this specific issue during the habeas trial.

The failure of the petitioner to raise the due process claim that his pleas were not knowing and voluntary before the habeas court is fatal to his appeal. It is well established that "this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . It is equally well settled that a party cannot submit a case to the trial court on one theory and then seek a reversal in the reviewing court on another." (Citations omitted; internal quotation marks omitted.) *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 408–409, 114 A.3d 168, cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015); see also *Greene* v. *Commissioner of Correction*, 131 Conn. App. 820, 822, 29 A.3d 171 (2011) (having not raised issue before habeas court petitioner was barred from raising it on appeal), cert. denied, 303 Conn. 936, 36 A.3d 695 (2012); *Lewis* v. *Commissioner of Correction*, 117 Conn. App. 120, 126, 977 A.2d 772 (to review claim not raised before and decided by habeas court adversely to appellant would amount to ambuscade of habeas judge), cert. denied, 294 Conn. 904, 982 A.2d 647 (2009); see generally *Thiersaint* v. *Commissioner of Correction*, supra, 316 Conn. 126–28.

In the present case, the petitioner alleged in the operative petition a broad claim of a constitutional violation but did not include a distinct allegation that his pleas were not knowing, intelligent and voluntary as a result of *Salamon*. See, e.g., *Davis* v. *Commissioner of Correction*, 160 Conn. App. 444, 451, 124 A.3d 992, cert. denied, 319 Conn. 957, 125 A.3d 1012 (2015). The ambiguity of the pleading failed to place the habeas court on notice of this specific claim. Id., 452–53; see also *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 678–79, 142 A.3d 1095 (2016) (habeas petition contained no allegation of claim raised on appeal and petitioner never attempted to amend petition to include

such allegation pursuant to Practice Book § 23-32). Further, during the trial, the petitioner did not notify or advise the habeas court that his due process claim of pleas that were not knowing, intelligent and voluntary was imbedded within the allegations of the operative petition. See *Davis* v. *Commissioner of Correction*, supra, 453–54. Simply put, the claim raised in this appeal was not distinctly raised before the habeas court. On that basis, we are unable to review it. See, e.g., *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 198, 19 A.3d 705, cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011).

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MARK HAYWARD (AC 36257)

Lavine, Mullins and Mihalakos, Js.

Syllabus

Convicted of the crime of larceny in the first degree, the defendant appealed to this court. The defendant's conviction stemmed from his conduct in fraudulently obtaining $50,100 from the victim in connection with a business venture. He claimed that the evidence was insufficient to prove beyond a reasonable doubt that he intended to permanently deprive the victim of that money, which was based on his claim that the state failed to offer evidence showing that he did not intend to repay the victim from profits generated by the business. *Held* that the evidence was sufficient to support the defendant's conviction of larceny in the first degree, as the jury reasonably could have found that he intended to permanently deprive the victim of his property: the defendant having admitted that he fraudulently obtained the money from the victim by using deceptive means, which included presenting the victim with three false letters from a bank indicating that the defendant had a balance of more than one million dollars, the jury reasonably could have concluded that, by falsely indicating through the letters that he had substantial funds, the defendant suggested that he could repay the victim, thereby convincing the victim to transfer the money, and in light of that pattern of deception and the defendant's failure to repay the victim, the jury

reasonably could have found that the defendant gained control of the victim's money with the intent to deprive the victim of it permanently; moreover, the jury could have found that the defendant's empty promises to repay the victim once the business was successful were further circumstantial evidence supporting the conclusion that the defendant did not intend to repay the victim.

Argued September 7—officially released December 20, 2016

Procedural History

Information charging the defendant with the crimes of larceny in the first degree and forgery in the third degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Blawie*, *J.*, granted the defendant's motion to dismiss the charge of forgery in the third degree; thereafter, the matter was tried to the jury; verdict and judgment of guilty of larceny in the first degree, from which the defendant appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, with whom were *Michael S. Taylor*, assigned counsel, and, on the brief, *James P. Sexton*, 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 *Cornelius P. Kelly*, supervisory assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Mark Hayward, appeals from the judgment of conviction, rendered after a jury trial, of larceny in the first degree in violation of General Statutes §§ 53a-119 and 53a-122 (a) (2). On appeal, the defendant claims that there was insufficient evidence to prove beyond a reasonable doubt that he intended to permanently deprive the victim of his property. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The victim, Ronald Runk, met the defendant in September, 2008. After the victim told the defendant that he had written two books and recorded music, the defendant claimed that he was in the business of marketing and distributing books like those of the victim and that he was interested in selling records. Consequently, the defendant and the victim entered into a written agreement whereby the defendant agreed to market one of the victim's books. The defendant also became involved in selling the victim's record.

In December, 2008, the defendant and the victim discussed the defendant's limited liability company, Mark I Group, which was in the business of marketing corporate gifts. Following these discussions, the victim agreed to invest $34,000 in the Mark I Group.

Shortly thereafter, the defendant met with the president of Steiner Direct, a nationwide sports memorabilia company. In September, 2009, after developing a prototype of a keychain filled with dirt from Yankee Stadium, the defendant and Steiner Direct entered into a formal agreement for the manufacturing and selling of keychains. The defendant informed the victim of the agreement.

Beginning in February, 2009, the defendant began to ask the victim for money beyond the $34,000 investment.[1] In an e-mail dated February 12, 2009, the defendant asked the victim for $2500 to market the victim's book. The victim wired $2500 to the defendant's Mark I Group account. In an e-mail dated February 19, 2009, the defendant asked the victim for $6500, which he claimed was needed to pay backdated taxes on his Barclays Bank account containing over $1.2 million and

[1] The $34,000 investment was distinct from the subsequent $50,100 loaned to the defendant. The investment was not the basis for the larceny and is not at issue in this appeal.

to pay for airfare so that the defendant could travel to London to access the funds. The defendant stated that the $6500 loan would be a repayable loan against the Barclays Bank funds. The victim wired $6500 to the Mark I Group account. In an e-mail dated February 25, 2009, the defendant asked the victim for $3200, claiming that the bank gave the defendant the wrong details and that the amount needed to pay the taxes was $6700. The victim wired $3200 to the Mark I Group account.

Sometime after the February 25, 2009 e-mail, the defendant showed the victim a letter purporting to be from Carl Hynes, the Premier Operations Director of International Accounts at Barclays Bank. Dated April 4, 2009, the letter stated that the Barclays Bank account contained $1,223,000 and that an advance of $30,000 was to be wired to the Mark I Group account on May 2, 2009.

On April 11, 2009, the defendant informed the victim that he needed $2750 because the defendant had miscalculated the mold cost of the keychains, and, therefore, he was short $2750. The defendant stated that he would give the victim a check for $2750, dated May 3, 2009, when he expected the $30,000 from his Barclays Bank account to clear. The victim wired $2750 to the Mark I Group account. On April 16, 2009, the defendant asked the victim for $3850, stating that the defendant had not accounted for the gift box for the keychains. The victim wired $3850 to the Mark I Group account. On April 23, 2009, the defendant asked the victim for $6000, stating that he needed the money to start promoting the keychains and to eat until funds arrived. The defendant also promised the victim a further 5 percent in the keychain deal because of the support the victim had given him. The victim wired $6000 to the Mark I Group account.

Sometime before May 7, 2009, the victim asked the defendant for collateral for the money lent. In response,

the defendant gave the victim a pearl necklace, five paintings, and a clock. A jeweler appraised the pearl necklace at $1200. Although not appraised, the paintings were examined by an employee of a New York City gallery and were determined to be worth approximately $2000. Sotheby's, Inc. determined that the clock, which the defendant stated was from Prince Juan Carlos of Germany and potentially quite valuable, was worthless.

On May 7, 2009, the defendant asked the victim for $7000, stating that he needed the funds for a business trip. The defendant also stated that he would cover the amount loaned as soon as he returned from his trip. The victim wired $7000 into the defendant's personal bank account. On the same day as the e-mail, the defendant purported to receive a second letter from Hynes at Barclays Bank. The letter stated that the $30,000 transfer from the Barclays Bank account was delayed. The defendant showed the victim the letter.

On June 9, 2009, the defendant asked the victim for $3600, stating that he needed the money to close the Barclays Bank account. The defendant also stated that this would be the last loan for which he would ask, and that he was aware of his obligation to the victim and would repay him. The victim wired $3600 into the defendant's personal bank account. On July 20, 2009, the defendant asked the victim for $7500, stating that he needed the money for working capital. In this e-mail, the defendant also reassured the victim that he would bring a Barclays Bank check for 35,000 British pounds sterling, the equivalent of $57,750. The victim wired $7500 to an account for Field of Dreams, LLC, of which the defendant was the chief operating officer. Thereafter, the defendant gave the victim a check for 35,000 British pounds, dated August 8, 2009, on Barclays Bank stationary. In addition, the defendant showed the victim another letter from Barclays Bank, dated July 17, 2009, stating that the defendant could access the funds.

The victim lent the defendant a total of $50,100. By late November, 2009, the victim had become suspicious and called Barclays Bank in London. He was put in touch with the bank's fraud investigation group, which determined that Barclays Bank never sent the three letters and that Hynes did not author them.[2] Moreover, Barclays Bank determined that the check for 35,000 British pounds was not genuine. The victim told the defendant that he had learned that the letters were false.

The victim attempted to collect on the loan of $50,100; on more than one occasion, the defendant agreed to repay part of the loan by a certain date, but the defendant never made any payment. On February 4, 2010, the defendant proposed a three stage repayment plan starting on March 5, 2010, but, again, no payment was made. Yet, in February, 2010, the defendant, through Field of Dreams, LLC, purchased $13,750 worth of keychains. At the end of 2010, after not receiving any repayment, the victim went to the Fairfield Police Department.

The defendant was arrested on January 14, 2012, and charged with larceny in the first degree in violation of §§ 53a-119[3] and 53a-122 (a) (2),[4] and forgery in the third

[2] It was further determined that Hynes was an employee of Barclays Bank, but that the position of Premier Operations Director of International Affairs ascribed to Hynes in the letters did not exist.

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

[4] General Statutes § 53a-122 (a) provides in relevant part: "A person is guilty of larceny in the first degree when he commits larceny, as defined in section 53a-119, and . . . (2) the value of the property or service exceeds twenty thousand dollars . . . ."

We note that when the defendant began to engage in the conduct that led to his conviction, the threshold for larceny in the first degree was $10,000. The threshold was increased to $20,000 by Public Acts 2009, No. 09-138, § 1 (a). This statutory change is not at issue in this appeal.

degree in violation of General Statutes § 53a-140.[5] With regard to the larceny charge, the defendant was charged specifically on the theories of obtaining property by false pretenses[6] and obtaining property by false promise.[7] Following a jury trial, the defendant was convicted of larceny in the first degree. The trial court sentenced the defendant to seven years incarceration, execution suspended after eighteen months, followed by five years of probation. In addition, the court ordered the defendant to pay the victim restitution in the amount of $50,100, $4975 of which was due within ten days of the order, and the remaining $45,125 of which was to be paid in monthly installments during the probation period. Additional facts will be set forth as necessary.

The defendant claims that there was insufficient evidence to support his conviction of larceny in the first degree. Specifically, he contends that, although he fraudulently obtained $50,100 from the victim, the jury lacked sufficient evidence to find beyond a reasonable doubt that the defendant intended to deprive the victim of his money permanently.[8] In support of his argument, the defendant points to the state's failure to offer evidence that he did not use the money to advance a legitimate business venture and that he did not intend to pay the victim back from the profits generated by the business. We disagree.

[5] On May 14, 2012, the defendant filed a motion to dismiss the count of forgery in the third degree on the ground that the statute of limitations had passed. The court granted the motion to dismiss.

[6] General Statutes § 53a-119 (2) provides in relevant part: "A person obtains property by false pretenses when, by any false token, pretense or device, he obtains from another any property, with intent to defraud him or any other person."

[7] General Statutes § 53a-119 (3) provides in relevant part: "A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he . . . will in the future engage in particular conduct, and when he does not intend to engage in such conduct . . . ."

[8] The defendant does not contest that the jury reasonably could have found that the state met its burden as to the first and third elements of larceny.

We first set forth our standard of review and the relevant law. "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. . . . In conducting our review, we are mindful that the finding of facts, the gauging of witness credibility and the choosing among competing inferences are functions within the exclusive province of the jury, and, therefore, we must afford those determinations great deference. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, 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. . . . In evaluating evidence, the [finder] of fact is not required to accept

as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [as] we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Sam*, 98 Conn. App. 13, 32–34, 907 A.2d 99, cert. denied, 280 Conn. 944, 912 A.2d 478 (2006).

"A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner." General Statutes § 53a-119. "To 'deprive' another of property means (A) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (B) to dispose of the property in such a manner or under such circumstances as to render it unlikely that an owner will recover such property." General Statutes § 53a-118 (3).

"Connecticut courts have interpreted the essential elements of larceny as (1) the wrongful taking or carrying away of the personal property of another; (2) the existence of a felonious intent in the taker to deprive

the owner of [the property] permanently; and (3) the lack of consent of the owner. . . . Because larceny is a specific intent crime, the state must show that the defendant acted with the subjective desire or knowledge that his actions constituted stealing. . . . Larceny involves both taking and retaining. The criminal intent involved in larceny relates to both aspects. The taking must be wrongful, that is, without color of right or excuse for the act . . . and without the knowing consent of the owner. . . . The requisite intent for retention is permanency." (Internal quotation marks omitted.) *State* v. *Flowers*, 161 Conn. App. 747, 752, 129 A.3d 157 (2015), cert. denied, 320 Conn. 917, 131 A.3d 1154 (2016). "Intent may be inferred by the fact finder from the conduct of the defendant." *State* v. *Kimber*, 48 Conn. App. 234, 240, 709 A.2d 570, cert. denied, 245 Conn. 902, 719 A.2d 1164 (1998).

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 committed larceny in the first degree. Specifically, the record reveals sufficient circumstantial evidence that, taken together, strongly supports the finding that the defendant acted with the requisite intent to deprive the victim of his property permanently. The defendant admitted that he fraudulently obtained the money from the victim, stating that he "used deceptive means to secure funds from [the victim]." Such deceptive means included presenting the victim with three false letters from Barclays Bank. These letters indicated that an account at the bank had a balance of $1,223,000. The account, however, did not have any money, but rather had a negative balance due to the fact that the defendant never made any deposits and never paid the maintenance fees charged to the account.[9]

[9] With regard to the Barclays Bank account, the victim testified that the defendant told him that, before he moved to Connecticut, he owned a

The defendant argues that the falsity of the letters confirms only that his finances were not what he said they were, but that they do not touch on his intent. The jury, however, is entitled to bring its common sense and experience into the courtroom. See *State* v. *Flowers*, supra, 161 Conn. App. 757. The jury reasonably and logically could have concluded that, by falsely indicating through the letters that he had substantial funds, the defendant suggested that he could and would repay the victim, and, therefore, convinced the victim to transfer money. In light of this pattern of deception, the jury reasonably could have found that the defendant gained control of the victim's money with the intent to deprive the victim of it permanently.

Moreover, the defendant never repaid the victim any of the $50,100, despite the victim's requests. See *State* v. *Kimber*, supra, 48 Conn. App. 240–41 (withdrawing money from account without permission and ignoring requests to return money is sufficient evidence from which jury could infer that defendant never intended to repay money). Outside of some collateral and a worthless check for 35,000 British pounds, the defendant only spoke of repayment, and mere words are insufficient to support the claim that the defendant actually intended to repay the victim. See *State* v. *Torres*, 111 Conn. App. 575, 587–88, 960 A.2d 573 (2008), cert. denied, 290 Conn. 907, 964 A.2d 543 (2009) (voluntarily offering to repay forged check is not sufficient for jury reasonably to find that defendant acted in good faith).

clothing store in London. The store had cash only sales on Saturdays, and he accumulated over $1.2 million, which he deposited in a Barclays Bank account. The defendant, however, had forgotten about the money until he found old bank statements in the attic of his Connecticut home. Moreover, due to back dated taxes, the funds were temporarily unavailable. Actually, the defendant opened an account at Barclays Bank but never made any deposits, and the account had a negative balance because of monthly maintenance fees being charged.

Furthermore, after the defendant had accrued a loan with the victim and promised repayment, the defendant, through Field of Dreams, LLC, paid $13,750 for keychains. Despite having the means to make such a substantial purchase, the defendant did not attempt any repayment to the victim. In fact, the victim still had not been repaid any part of the $50,100 at the time of trial, which occurred three and one-half years after the victim confronted the defendant about the false letters and demanded repayment. See *State* v. *Pulley*, 46 Conn. App. 414, 418, 699 A.2d 1042 (1997) ("[t]he conduct of the defendant subsequent to [receipt of money from victim] may be taken into consideration by the jury in determining [whether] the defendant had the intent to steal when he received the money from victim"). The jury, therefore, reasonably could have found, on the basis of the defendant's pattern of deceitful conduct and the defendant's lack of effort to repay the victim within three and one-half years, that the defendant intended to deprive the victim of his property permanently.

The defendant further argues, however, that the record indicates that he would repay the victim once the business was successful and profitable. To support his claim, the defendant relies on e-mail communications from the victim to the defendant and on the victim's testimony. Although the evidence indicates that the victim supported the defendant's efforts to make the business successful, these encouraging statements do not indicate that the defendant intended to repay the money. See *State* v. *Vars*, 154 Conn. 255, 261, 224 A.2d 744 (1966) ("the offense is larceny if the owner of goods parts with the possession only, for a particular purpose, and the person who receives the possession avowedly for that purpose has a fraudulent intention to make use of it as the means of converting the goods to his own use, and does so convert them, for in such

case the fraud supplies the place of the trespass in the taking" [internal quotation marks omitted]). Rather, the statements indicate only that the victim fell prey to the defendant's deception. The jury reasonably could have found that the defendant's empty promises to the victim were further circumstantial evidence supporting the conclusion that the defendant did not intend to repay the victim.[10]

We conclude that the evidence, viewed in its entirety, suggests that a jury reasonably could have found that the defendant intended to deprive the victim of $50,100 permanently.

The judgment is affirmed.

In this opinion the other judges concurred.

LUIS F. WILLIAMS *v.* COMMISSIONER OF CORRECTION
(AC 37909)

Alvord, Mullins and Sullivan, Js.

Syllabus

The petitioner, who had been convicted of various drug related offenses, sought a writ of habeas corpus. He claimed that his counsel rendered ineffective assistance both by failing to take curative measures to remedy certain prosecutorial improprieties that occurred during the state's rebuttal argument at trial, and by failing to raise a claim regarding prosecutorial impropriety on direct appeal. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his claims of ineffective assistance of counsel were debatable among

[10] The state also argues, as an alternative ground for affirmance, that the element of intent can be met by an unchallenged theory of intent to appropriate pursuant to § 53a-118 (a) (4), which does not require permanency. In light of our conclusion that the jury reasonably could have found the defendant had the requisite intent to deprive the victim of his property permanently, we need not address this alternative ground for affirmance.

jurists of reason, that a court could resolve them in a different manner or that the questions raised deserved encouragement to proceed further: contrary to the petitioner's claims, trial counsel did not render deficient performance in failing to take curative measures with respect to any alleged prosecutorial impropriety, as no such impropriety occurred, the prosecutor did not present facts that were not in evidence or improperly vouch for the credibility of a state's witness, and the prosecutor's remarks regarding the testimony of the petitioner's brother properly summarized the evidence and asked the jury to draw the reasonable inference that the narcotics did not belong to him; furthermore, there was no reasonable probability that, but for appellate counsel's failure to raise a claim of prosecutorial impropriety, the petitioner would have prevailed in his direct appeal to obtain a reversal of his conviction or the granting of a new trial.

Argued September 15—officially released December 20, 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.*

Stephanie L. Evans, assigned counsel, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

SULLIVAN, J. Following the habeas court's judgment denying his petition for a writ of habeas corpus, the petitioner, Luis Williams, appeals from the habeas court's denial of his petition for certification to appeal. On appeal, the petitioner claims that the habeas court abused its discretion when it denied his petition for certification to appeal from the habeas court's denial of his petition for a writ of habeas corpus, wherein he

alleged that (1) his counsel[1] at trial provided ineffective assistance by failing to take curative measures to remedy prosecutorial impropriety that occurred during closing arguments, and (2) his counsel on direct appeal provided ineffective assistance by failing to raise a claim of prosecutorial impropriety. We conclude that the habeas court properly denied the petition for certification to appeal. We therefore dismiss the appeal.

The following facts, as set forth by this court on direct appeal, and procedural history are relevant to this appeal. "On September 3, 2004, police officers from the New Britain and Waterbury police departments, aided by two United States marshals, executed an arrest warrant for the [petitioner] at an efficiency apartment at 636 Riverside Avenue in Waterbury. The officers entered the apartment and found the [petitioner] sitting on the couch in the living room, which was located directly in front of the door, and the [petitioner's] brother, Josue Williams, lying on the floor next to the couch. The [petitioner] was arrested and handcuffed.

"Detective Mark Santopietro removed the cushions from the couch where the [petitioner] had been sitting and discovered a pistol. Santopietro immediately notified the other officers of the presence of a firearm. Shortly after Santopietro's discovery, Sergeant Harold Setzer noticed a box of what he believed to be ammunition. Concerned that there might be other individuals in the apartment, Setzer moved to do a protective sweep of the apartment.

"Setzer walked six to eight feet from where the [petitioner] was located to a kitchen counter. At the counter, he saw Styrofoam cups filled with numerous bags of a substance he believed to be heroin. He next moved to the bedroom, where he opened a closet door and saw

[1] The same attorney represented the petitioner in his criminal trial and direct appeal. We therefore refer to this attorney simply as counsel.

narcotics packaging and a narcotics sifter. Setzer did not seize any of the items he discovered but instead left them in place for the forensic staff. Setzer's entire sweep took less than one minute." (Footnotes omitted.) *State* v. *Williams*, 110 Conn. App. 329, 331–32, 954 A.2d 878 (2008).

The petitioner subsequently was convicted following a jury trial of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), possession of a controlled substance with intent to sell within 1500 feet of a school in violation of General Statutes § 21a-278a (b), and criminal possession of a firearm in violation of General Statutes § 53a-217. The petitioner thereafter appealed, challenging the denial of his motion to suppress the drugs found on the kitchen counter. Id., 332. This court affirmed his conviction. Id., 334–35.

On September 28, 2009, the petitioner filed a petition for a writ of habeas corpus. In his second amended petition filed at the habeas trial on April 2, 2015, the petitioner claimed, inter alia, that the acts and omissions of counsel at trial denied him his right to effective assistance of counsel. Specifically, he alleged that counsel was ineffective for failing to challenge, inter alia, improper comments made by the prosecutor during closing arguments. Additionally, he claimed that counsel's failure to raise a claim of prosecutorial impropriety in his criminal appeal denied him his right to effective assistance of appellate counsel.[2]

On April 2, 2015, in an oral decision, the habeas court denied the petitioner's habeas petition. On April 7, 2015,

[2] The petitioner also claimed that his constitutional rights to due process and a fair trial were violated by the prosecutor's (1) failure to disclose favorable material evidence; (2) knowing presentation of—and failure to correct—false testimony; and (3) improper comments during closing arguments. The petitioner withdrew the second claim at trial and he does not raise a claim on appeal related to the remaining issues.

the court denied his petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

"We begin by setting 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 its merits." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 166 Conn. App. 22, 30, 140 A.3d 414, cert. denied, 323 Conn. 905, 140 A.3d 414 (2016).

"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. . . . If this burden is not satisfied, then the claim that the judgment of the habeas court should be reversed does not qualify for consideration by this court." (Internal quotation marks omitted.) *Miller* v. *Commissioner of Correction*, 153 Conn. App. 747, 751, 104 A.3d 767 (2014), cert. denied, 315 Conn. 912, 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." (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).

Finally, "[t]he 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, [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. . . . 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 . . . . [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.) *Brewer* v. *Commissioner of Correction*, 162 Conn. App. 8, 13, 130 A.3d 882 (2015).

I

The petitioner first claims that the habeas court improperly denied his petition for certification to appeal because there was merit to his claim that counsel provided ineffective assistance at trial by failing to take curative actions when the prosecutor vouched for the credibility of the state's witness, Setzer, in summation and improperly stated that no evidence existed against the petitioner's brother, Josue Williams (Josue), related to the drugs and firearm found in the apartment.

"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).

The petitioner argues that statements made by the prosecutor in summation constituted prosecutorial impropriety. Specifically, the petitioner cites comments in which the prosecutor contrasted the credibility of Setzer and Josue. He takes issue with the prosecutor's description of Setzer as "a man with twelve years narcotics experience, who doesn't know this [petitioner], doesn't know his brother, has never seen them before, has no interest in this case and was such a trusted person he was a guard on Air Force One for President Reagan." The petitioner argues that through this statement the prosecutor impermissibly vouched for the credibility of Setzer by asserting that he was a trustworthy person because he was a guard on Air Force One for President Reagan.

Although the claim of prosecutorial impropriety regarding the statements about Josue was not explicit

in the petitioner's appellate brief, he clarified at oral argument before this court the nature of his claim.[3] The petitioner argues the following statements made about Josue during rebuttal were improper: "Then you have a two time convicted felon out to protect his brother . . . who knows full well there was no evidence against him but now he can say other things. Now he can say [the drugs are] his because he knows he won't be prosecuted and he shouldn't be prosecuted. There is no true evidence, I submit to you, against Josue." The petitioner claims that these statements offered information to the jury not in evidence that there was "no evidence" or "no true evidence" against Josue. Additionally, he claims that the prosecutor improperly sought to influence the jury by contrasting Josue's motives and testimony with Setzer's impressive credentials rather than contrasting his motives and testimony to the officers as a group.

Before addressing the petitioner's claim, we set forth the standard of review and law governing claims of prosecutorial impropriety. "[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. Put differently, [impropriety] is [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 that

[3] We ordinarily do not address arguments raised for the first time during oral argument. See, e.g., *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). Nevertheless, by interpreting the argument section of the petitioner's brief in conjunction with his oral argument, we have discerned what we believe is his claim on appeal. Further, there is no prejudice to the respondent, the Commissioner of Correction, as he fully briefed the issues pertaining to the statements regarding Josue. See *Calvert* v. *University of Connecticut Health Center*, 142 Conn. App. 738, 742 n.5, 68 A.3d 107 (2013).

may only be resolved in the context of the entire trial . . . .'' (Internal quotation marks omitted.) *State* v. *Sinvil*, 270 Conn. 516, 522–23, 853 A.2d 105 (2004).

''[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed . . . 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. . . . Thus, as the state's advocate, a 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. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

''Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules [that] the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely

narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider. . . .

"Finally . . . the defendant's failure to object at trial to each of the occurrences [raised on appeal] . . . 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn. 604, 611–12, 65 A.3d 503 (2013).

A

In the present case, the petitioner claims that the prosecutor improperly vouched for the credibility of Setzer by stating that he was a "trusted person" because he was a guard on Air Force One for President Ronald Reagan. "A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . Statements as to facts which have not been proven amount to unsworn testimony that is not the subject of proper closing argument." (Internal quotation marks omitted.) *State* v. *Medrano*, 131 Conn. App. 528, 541, 27 A.3d 52 (2011), aff'd, 308 Conn. 604, 65 A.3d 503 (2013). Additionally, "the prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion

are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions. . . . A prosecutor also may not appeal to the emotions, passions and prejudices of the jurors . . . or otherwise inject extraneous issues into the case that divert the jury from its duty to decide the case on the evidence." (Internal quotation marks omitted.) *State* v. *Santiago*, 269 Conn. 726, 735, 850 A.2d 199 (2004).

Nevertheless, "[i]t is not improper for the prosecutor to comment upon 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 [it] 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. The 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. *Ciullo*, 314 Conn. 28, 41, 100 A.3d 779 (2014).

In the present case, the prosecutor was not presenting facts not in evidence or his personal opinion; rather, he was asking the jurors to draw a reasonable inference from facts in the record. In describing his credentials, Setzer testified that he was in the Air Force Security Police, and was assigned to the Elite Guard Unit at Travis Air Force Base and to Air Force One, where he was employed to secure Air Force One and the president. Although Setzer did not testify, nor did

anyone else, to the qualifications required for an assignment to guard Air Force One and the president, it is a reasonable inference that such a position requires a degree of trustworthiness. The prosecutor's statements summarized the evidence and asked the jury to make a reasonable inference therefrom. Moreover, although the prosecutor did not formulate the statement that Setzer was a "trusted person" as a submission, when he raised the inference that Setzer was trustworthy as a guard to the president a second time, he restricted his language stating, "I submit . . . ."[4] Accordingly, the prosecutor did not express his own opinion or provide facts not in evidence, and, thus, the statements regarding the trustworthiness of Setzer were not improper. Consequently, the habeas court correctly concluded that counsel was not ineffective at trial for failing to challenge these statements.

B

The petitioner also argues that the prosecutor improperly introduced facts not in evidence. Essentially, he contends that when the prosecutor stated that there was "no evidence" or "no true evidence" against Josue, he effectively conveyed that the court had dismissed the charges against Josue because there was no evidence against him although the only evidence presented was that the charges against Josue had been dismissed. The following additional facts are relevant to the resolution of this issue.

In a written statement to police read into evidence by the clerk, the petitioner stated that his address was 691 Osgood Avenue, New Britain. He stated that on

[4] The prosecutor stated as follows: "So you got Setzer, twelve year narcotics officer. Doesn't know this defendant, doesn't know his brother. Only goes to that scene, not involved in this overall investigation, no bias, no interest, no ax to grind, former guard for the President. I submit to you, ladies and gentlemen, untrustworthy people are not given that position."

September 3, 2004, "I went out on the back porch of where I had been staying at [636] Riverside Avenue, Apartment 2B, in Waterbury. The next thing I knew was that the cops were yelling at me. I went back into [my][5] apartment and the cops smashed in the front door of the apartment." (Footnote added.) The petitioner also stated, "I have beenstaying in this apartment with a girl named Maria Gonzales. I have been staying with Maria for about three weeks ever since I met her at the Club Blu in Hartford. I knew that I had warrants in New Britain and I wanted to stay out of New Britain."

Josue's testimony at trial conflicted with the petitioner's written statement. Josue testified, inter alia, that he, Josue, was married but had been having a romantic or sexual relationship with Gonzales since meeting her at Club Blu several weeks before the date in question and that the drugs were his and Gonzales'. He also testified that the petitioner had been living with him at 691 Osgood Avenue in New Britain, not at the Waterbury apartment, that the petitioner did not know about the drugs, was not in a relationship with Gonzales, and that the petitioner only came to the apartment with him. Additionally, he testified that, contrary to Setzer's testimony, law enforcement officers did not find the drugs on the kitchen counter but in a bedroom. Josue also testified that law enforcement asked him to "pin" the drugs on the petitioner so that Josue could avoid prosecution.

The state challenged Josue's credibility during cross-examination. Josue admitted that he had two prior felony convictions and that he loved his brother, that he did not want to see anything happen to him, and that he wanted to protect him. Additionally, Josue testified that the charges against him in a related case concerning

[5] A discussion that followed indicates that the clerk misread the statement reading "the apartment" rather than "my apartment."

the drugs found in the apartment had been dismissed and that his attorney had told him that the charges would not come back against him. He later equivocated and testified that his attorney was uncertain about whether the charges could come back.

The prosecutor stated the following, inter alia, about Josue during rebuttal summation:

"Furthermore, [Josue] knows nothing can happen to him because, as he said, the charges were dismissed and he admitted, he didn't want to do it, but he reluctantly admitted [his attorney] told him nothing could happen to him. And I submit to you the charges against Josue were dismissed because there was no evidence [that] pointed to Josue. He didn't live there for three weeks. This [petitioner] lived there.

* * *

"But contrast the credibility of Josue, a man who is a two-time convicted felon, has no reason to believe he'll be charged in this case because none of the evidence points to him, loves and protects—wants to protect his brother and acknowledges he doesn't want anything to happen to him.

"Then you have the two-time convicted felon out to protect his brother, who [would rather] not see anything happen to his brother, who knows full well there was no evidence against him but now he can say other things. Now he can say it's his because he knows he won't be prosecuted and he shouldn't be prosecuted. There's no true evidence, I submit to you, against Josue."

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . Statements as to facts which have not been proven amount to unsworn testimony that is not the subject of proper

closing argument." (Citations omitted.) *State* v. *Williams*, 204 Conn. 523, 544, 529 A.2d 653 (1987). Again, "[i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 41. Where a prosecutor's arguments "[skirt] the boundaries of permissible argument . . . [w]e are mindful . . . that closing arguments of counsel are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial [impropriety], they do suggest that 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 lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (Internal quotation marks omitted.) *State* v. *Haase*, 243 Conn. 324, 335–36, 702 A.2d 1187 (1997), cert. denied, 523 U.S. 1111, 118 S. Ct. 1685, 140 L. Ed. 2d 822 (1998).

"To draw from the realm of statutory interpretation, language is deemed ambiguous when read in context, [it] is susceptible to more than one reasonable interpretation. . . . To be clear, in furtherance of our policy of not assigning ambiguous remarks their most damaging interpretation from an array of less damaging interpretations, in those cases where a prosecutor's allegedly improper statements are genuinely ambiguous, the ambiguity will be construed in favor of the state. Put another way, for the purpose of determining whether a challenged remark is improper, when selecting among multiple, plausible interpretations of the language, this court will assign the remark the less damaging, plausible meaning." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 13, 124 A.3d 871 (2015).

In the present case, the respondent, the Commissioner of Correction, argues that the prosecutor was not testifying to facts not in evidence with respect to Josue's exposure to criminal liability but, instead, was summarizing the evidence and asking the jury to draw reasonable inferences therefrom. We agree.

The petitioner's argument requires one to restrictively isolate the following statements made by the prosecutor: "And I submit to you the charges against Josue were dismissed because there was no evidence [that] pointed to Josue. . . . Then you have the two-time convicted felon . . . who knows full well there was no evidence against him . . . . There's no true evidence, I submit to you, against Josue." Once isolated, the argument would proceed that either the prosecutor was providing unsworn testimony that there was no evidence against Josue or that, because the charges were dismissed, there was no evidence against him. The former would be improper unsworn testimony; the latter would improperly ask the jury to speculate because there are multiple reasons that criminal charges can be dismissed. See Practice Book § 41-8.[6] This overly constrains the prosecutor's statements and removes them from the larger context of his rebuttal summation.

[6] Practice Book § 41-8 provides: "The following defenses or objections, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information:

"(1) Defects in the institution of the prosecution including any grand jury proceedings;

"(2) Defects in the information including failure to charge an offense;

"(3) Statute of limitations;

"(4) Absence of jurisdiction of the court over the defendant or the subject matter;

"(5) Insufficiency of evidence or cause to justify the bringing or continuing of such information or the placing of the defendant on trial;

"(6) Previous prosecution barring the present prosecution;

"(7) Claim that the defendant has been denied a speedy trial;

"(8) Claim that the law defining the offense charged is unconstitutional or otherwise invalid; or

"(9) Any other grounds."

There was ample, and conflicting, evidence in the record concerning Josue leading up to and after law enforcement's entry into the apartment on September 9, 2004, to weigh his potential exposure to criminal liability. Reading the prosecutor's statements about Josue in the full context of the state's rebuttal, the prosecutor summarized the available evidence and asked the jury to draw reasonable inferences from that evidence. Specifically, the prosecutor asked the jury to conclude, based on the evidence presented that conflicted with Josue's testimony, that there was no evidence against Josue and that is why the charges against him were dismissed. Accordingly, the prosecutor's statements regarding Josue were not improper and, consequently, counsel did not render ineffective assistance of counsel at trial by not challenging such statements.[7]

Because the challenged statements of the prosecutor were not improper, there was no prosecutorial impropriety. Curative actions by counsel at trial were not required, and his actions at trial were not deficient.

II

The petitioner next claims that the habeas court improperly denied his petition for certification to appeal because there was merit to his claim that counsel provided ineffective assistance on direct appeal by failing to raise a claim of prosecutorial impropriety. We disagree.

Our standard of review for this claim is similar to the standard set forth in part I of this opinion, with the exception of the second prong of *Strickland*. "In regard

[7] To the extent the petitioner argues that the comparison of Setzer's credentials and Josue's testimony and credibility was improper, this argument is without merit. The petitioner put their testimony in conflict as a theory of his case and in closing arguments by contesting the location of the drugs. Setzer testified that the drugs were in the kitchen, but Josue testified that they were in the bedroom. Consequently, the credibility of the two men was at issue.

to the second prong, our Supreme Court distinguished the standards of review for claims of ineffective trial counsel and ineffective appellate counsel. *Small* v. *Commissioner of Correction*, 286 Conn. 707, 721–24, 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). For claims of ineffective appellate counsel, the second prong considers whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. Id., 722. This requires the reviewing court to [analyze] the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." (Internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 119 Conn. App. 530, 535, 988 A.2d 881, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010).

For all of the reasons previously discussed, there is no reasonable probability that, but for appellate counsel's failure to raise a claim of prosecutorial impropriety, the petitioner would have prevailed in his direct appeal to obtain a reversal of his conviction or the granting of a new trial. See id. The prosecutor's statements during closing arguments regarding Setzer and Josue were not improper. Consequently, counsel was not ineffective for not raising such claims on direct appeal.

On the basis of the foregoing analysis in parts I and II of this opinion, we conclude that the petitioner's claims are not debatable among jurists of reason, that a court could not resolve the issues in a different manner, and that the questions do 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.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSEPH WALKER (AC 38916)

Alvord, Sheldon and Mullins, Js.

Syllabus

The defendant was convicted, after a jury trial, of, inter alia, the crimes of murder, conspiracy to commit murder, robbery in the first degree, and conspiracy to commit robbery in the first degree, in connection with the shooting death of the victim. The defendant and his friend, T, arranged to buy cocaine from the victim for $6150. The defendant and T drove to the victim's house to purchase the cocaine, parking their vehicle in front of the house. The victim left the house and approached the vehicle, carrying the cocaine in a brown paper bag. When the victim leaned into the rear passenger's side of the vehicle, a struggle ensued. The defendant drew a gun and several shots were fired, two of which hit the victim. The defendant and T then drove away, and, thereafter, the victim was transported to a hospital, where he died from his wounds. The victim had approximately $40 in cash on his person when he was transported to the hospital. After leaving the scene of the shooting, the defendant and T drove to house of T's girlfriend. As T and his girlfriend were cleaning the vehicle, T told her that "they were in New Britain, and they started shooting up the car trying to rob them." The defendant then telephoned his friend, W, and told him that he had been shot and that he needed to be driven to a nonlocal hospital. W and another individual drove the defendant to New York, and during the ride, W overheard the defendant say something about being on the news and about "somebody fighting back." The defendant was subsequently arrested, and after a jury trial, was found guilty of all charges against him. On appeal to this court, *held*:

1. The defendant's claim that the evidence was insufficient to support his conviction of robbery in the first degree and conspiracy to commit robbery in the first degree was without merit, as the jury reasonably could have found beyond a reasonable doubt that the defendant and T had robbed the victim of the cocaine and that they had planned and intended to do so: the evidence demonstrated that the defendant arranged to buy cocaine from the victim for $6150, that when the victim leaned into the rear passenger's side of the defendant's vehicle with the cocaine to make the sale, a struggle ensued, that the defendant drew a gun and shot the victim twice, and that when the victim was transported to a hospital, he had only approximately $40 in cash on his person, rather than the agreed upon $6150 purchase price for the cocaine; moreover, the jury reasonably could have found from the testimony at trial that the

"they" to whom T referred when talking to his girlfriend was the defendant and T, and that when W overheard the defendant say that "somebody" had fought back, the defendant was referring to the victim resisting being robbed by the defendant and T.

2. Because the conspiracy to commit robbery in the first degree and the conspiracy to commit murder conviction arose from the same agreement, a double jeopardy violation existed, and, accordingly, the conspiracy to commit robbery conviction was vacated on remand to the trial court.

3. This court rejected the defendant's claim that the trial court committed plain error by failing to instruct the jury on accomplice testimony with respect to T's girlfriend, the defendant having implicitly waived his claim of instructional error: the defendant conceded that he had not preserved his claim due to his failure to request an instruction on accomplice testimony with respect to T's girlfriend and to object to the trial court's charge, and, therefore, the defendant's valid waiver foreclosed review of his claim under the plain error doctrine; moreover, this court declined to exercise its supervisory authority to review the defendant's claim and to adopt a rule, as requested by the defendant, that requires the trial court to give a special credibility instruction in cases where a state's witness has been promised a benefit in exchange for his or her testimony, our Supreme Court having previously rejected such a request.

Argued October 5—officially released December 20, 2016

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, felony murder, robbery in the first degree, 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 of guilty; thereafter, the court vacated the verdict as to the charge of felony murder; judgment of guilty of murder, conspiracy to commit murder, robbery in the first degree, conspiracy to commit robbery in the first degree and criminal possession of a firearm, from which the defendant appealed. *Reversed in part; judgment directed.*

Katherine C. Essington, assigned counsel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Amy L. Sedensky* and *Terence D. Mariani*, senior assistant state's attorneys, for the appellee (state).

Opinion

MULLINS, J. The defendant, Joseph Walker, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of §§ 53a-48 and 53a-134 (a) (2), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).[1] On appeal, the defendant claims (1) there was insufficient evidence to support his conviction for robbery in the first degree and conspiracy to commit robbery in the first degree; (2) the court improperly instructed the jury on the elements of conspiracy to commit robbery in the first degree; and (3) the court committed plain error by failing to instruct the jury on accomplice or informant testimony. We affirm in part and reverse in part the judgment of the trial court.

The following facts reasonably could have been found by the jury. On May 10, 2012, the defendant arranged to purchase $6150 worth of cocaine from the victim, David Caban. Caban lived at 127 Proctor Street in Waterbury with his girlfriend, Lourdes Santana, and Santana's mother. On May 12, 2012, at approximately 9 p.m., the

[1] The defendant also was convicted of felony murder in violation of General Statutes § 53a-54c. The court, however, vacated that conviction on January 9, 2015, pursuant to *State* v. *Miranda*, 317 Conn. 741, 120 A.3d 490 (2015) (holding that vacatur is appropriate remedy for cumulative homicide convictions for murder and felony murder arising from killing of single victim).

victim was inside his home with his close friend and cousin, Angelo Caban (Angelo). Santana and her mother also were present in the home. Another friend, Anthony Jackson, was sitting in a chair on the front porch of the home.

At approximately 9:30 p.m., the defendant, accompanied by his close friend, Solomon Taylor, drove in a white Mitsubishi Gallant (vehicle), which was owned by Taylor's girlfriend, Alexia Bates, to the home of the victim to purchase the cocaine. The defendant parked the vehicle directly in front of the house so that the passenger's side of the vehicle was facing it.

The victim left the house and approached the vehicle. The victim momentarily leaned into the rear passenger's side of the vehicle, and then returned to the inside of his house, where he went into his bedroom. When the victim walked by Angelo as he again exited the house to return to the vehicle, he stated: "Cuz, stand right here and make sure . . . I'm good." Angelo proceeded to stand on the steps outside of the house, where he talked with Jackson. As the victim approached the vehicle, he was carrying the crack cocaine in a brown paper bag, which was tucked in his waistband.

The victim again leaned into the rear passenger's side of the vehicle, with his feet hanging out. Shortly thereafter, a struggle began between the victim and the occupants of the vehicle. One of the occupants of the vehicle had a revolver, and the victim was attempting to hold his arm in an effort to avoid being shot; that occupant then fired a shot through the roof of the vehicle. After hearing the shot, both Angelo and Jackson ran toward the vehicle, but, by the time they reached it, more shots had been fired, and the victim had been hit twice, once in the arm and once in the head. As a

result of his injuries, the victim was slumped over with his body only partially inside the vehicle.[2]

Jackson then began striking the front passenger's side window of the vehicle with a child's Razor scooter that he found near the house. After breaking the window, Jackson fought with the man in the passenger's seat. Meanwhile, Angelo tried to pull the victim out of the vehicle, but, as he did so, more shots were fired. Jackson then retreated from the immediate area by jumping over a fence and hiding behind a building. Angelo then went to the driver's side of the vehicle, where he encountered the defendant, who was pointing a revolver directly at him. The barrel of the revolver was within arm's reach of Angelo's face. Taylor then yelled to the defendant to "forget it," and both men reentered the vehicle and drove away with the rear passenger's side door open and the victim only partially inside the vehicle.

Angelo retrieved his car keys from inside the house, and he and Santana drove after the defendant and Taylor. Within approximately one quarter of a mile, Angelo and Santana saw the victim's body in the street. Angelo stopped the car, and Santana called for help. Santana also dialed the victim's cell phone number. When someone answered her call, she began yelling into the phone, and the person on the other end hung up. The victim was transported to Saint Mary's Hospital, where he died from his wounds. The victim had approximately $40 in cash on his person when he was transported.

Meanwhile, the defendant drove to the home of Taylor's girlfriend, Alexia Bates. Upon his arrival, the defendant went upstairs into Bates' apartment and proceeded to go into the bathroom to treat a gunshot wound to

[2] A bullet recovered from an area near where the vehicle was positioned and the two bullets recovered from the victim's body were fired from the same revolver. The revolver, however, was not recovered.

his hand, which he had suffered during the struggle with the victim. Taylor, who appeared frantic as he was pacing back and forth, encountered Bates and her roommate in the roommate's bedroom. Taylor then asked Bates to go into her bedroom, which she did. Bates could see blood on Taylor's boxer shorts, which later DNA analysis determined belonged to the victim. While they were in Bates' bedroom, a red slide-style cell phone in Taylor's possession began to ring. When Taylor answered the phone, Bates heard a woman screaming on the other end. Taylor quickly hung up the phone; he did not appear to know who was calling him.

Taylor then ordered Bates to go to her vehicle to retrieve the revolver. Bates went to the vehicle, where she saw many different sized pieces of crack cocaine mixed with blood and glass on the floor. She also saw blood on the door, on the front seat, in the middle console, on the dashboard where the airbag is contained, and in the back passenger's seat. She saw broken glass on the floor and on the front seat, and bullet holes in the roof. Bates also discovered the revolver, which she then brought upstairs to Taylor, who put it in his waistband. Taylor then told Bates to gather cleaning supplies to clean the vehicle; Bates grabbed a bucket that she filled with water and "cleaning stuff," "sponges, rags . . . [and] Clorox spray." She also used a bottle of Febreze that already was in the vehicle.

As Bates and Taylor cleaned the vehicle, Taylor told her that "*they were in New Britain, and they started shooting up the car trying to rob them.*" (Emphasis added.) When Bates looked under the seat, she found Taylor's red slide-style cell phone, which looked identical to the cell phone that Taylor had answered while in the house. Taylor then realized that the red slide-style phone he had in his possession was not his phone, and he threw it into a treed area near Bates' driveway, where it later was recovered by police. Bates also took

bags out of the trunk of the vehicle, and she and Taylor then removed all of the items from the inside of the vehicle, which included Bates' makeup, her wallet, her coat, the Febreze bottle, a New York Yankees cap, and other things that she could not remember specifically.

Meanwhile, the defendant telephoned his childhood friend, Julian Warren, asking him to come to Bates' home. When Warren arrived, he saw that the defendant was bleeding from his hand. The defendant told Warren that he needed to go to the hospital because he had been shot, but that he did not want to go to a local hospital because he was on parole. Warren, along with another individual, then took the defendant to Queens, New York. During the ride to Queens, Warren heard the defendant say something about being on the news and about "a dude fighting back" and "somebody fighting back."

On September 12, 2012, the police arrested the defendant in New York. After a jury trial, the defendant was found guilty of all charges against him.[3] See also footnote 1 of this opinion. The court sentenced the defendant as follows: (1) for the charge of murder, sixty

[3] At trial, the defendant testified on his own behalf. He claimed that this incident was a drug deal gone wrong, rather than a robbery, and that he was with an individual he knew only as "Cash" or "Dove," rather than with Taylor.

The defendant testified that, originally, he had made an agreement with the victim to purchase $6150 worth of drugs. When the defense counsel asked him if he gave the victim the money in exchange for the drugs, the defendant responded: "Yeah, not the $6150 because when I got there . . . it was supposed to be coke, 100 grams coke, 50 grams crack. . . . But he told me that he cooked all the coke up and made all crack. . . . So . . . [the victim] took $150 off . . . so, I gave him $6000 . . . ." The defendant explained that $4000 was his money, and Cash supplied the remaining $2000 for the purchase.

The defendant then testified that despite having paid the victim $6000 for 150 grams of crack, the victim only gave them 100 grams. When he and Cash discovered that they had been shorted, they confronted the victim, things got heated between Cash and the victim, and a struggle ensued. Cash had a gun and during the struggle, the gun went off multiple times. He testified that, in the midst of this struggle, he, Cash and the victim all got

years incarceration, twenty-five years of which were mandatory; (2) for the charge of conspiracy to commit murder, twenty years incarceration; (3) for the charge of robbery in the first degree, twenty years incarceration, five years of which were mandatory; (4) for the charge of conspiracy to commit robbery in the first degree, twenty years incarceration, five years of which were mandatory; and (5) for the charge of criminal possession of a firearm, five years incarceration, two years of which were mandatory.[4] The court ordered all sentences to run concurrently, resulting in a total effective sentence of sixty years incarceration, twenty-five years of which were mandatory. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that "[t]here was no evidence from which jurors could reasonably infer that there was a robbery or an agreement to commit robbery." He argues: "[T]he state's evidence proved only that something went wrong during a planned drug deal between the parties that [led] to the shooting of [the victim]. The state did not introduce any evidence at trial from which the jury could reasonably infer that [the defendant] intended to rob [the victim], or that there was an agreement between him and Taylor to rob [the victim]." We disagree.

We employ the following standard in our analysis of the defendant's claim: "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

shot. He further testified that, as this was occurring, Jackson ran toward the vehicle and shot out the front passenger side window with a gun.

The jury was not required to credit this version of events, and, as we explain later in this opinion, the evidence the jury reasonably could have credited established the defendant's guilt beyond a reasonable doubt.

[4] On appeal, the defendant does not challenge the judgment of conviction on the murder count or on the criminal possession of a firearm count.

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. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, [w]here a group of facts are relied upon for proof of an element of the crime it is their cumulative impact that is to be weighed in deciding whether the standard of proof beyond a reasonable doubt has been met and each individual fact need not be proved in accordance with that standard. It is only where a single fact is essential to proof of an element, however, such as identification by means of fingerprint evidence, that such evidence must support the inference of that fact beyond a reasonable doubt. . . .

"As we have often noted, however, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that

supports the jury's verdict of guilty. . . . Furthermore, [i]t is immaterial to the probative force of the evidence that it consists, in whole or in part, of circumstantial rather than direct evidence." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 311 Conn. 408, 419–20, 87 A.3d 1101 (2014).

The defendant argues that the state failed to introduce any evidence that the defendant robbed, or intended to rob, the victim. He contends: "It is undisputed that something went wrong during the [drug] transaction, but there was no evidence presented at trial that [the defendant] agreed or intended to take drugs from [the victim] without paying for them." We disagree.

"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." General Statutes § 53a-133. "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery . . . he or another participant in the crime . . . is armed with a deadly weapon . . . ." General Statutes § 53a-134 (a) (2). "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner." General Statutes § 53a-119.

"To establish the crime of conspiracy under § 53a-48 . . . it must be shown that an agreement was made between two or more persons to engage in conduct

constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed. . . . Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Danforth*, 315 Conn. 518, 531–32, 108 A.3d 1060 (2015).

"[T]he existence of a formal agreement between the conspirators need not be proved [however] because [i]t is only in rare instances that conspiracy may be established by proof of an express agreement to unite to accomplish an unlawful purpose. . . . [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. . . . Finally, [b]ecause direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Citation omitted; internal quotation marks omitted.) Id., 532–33.

Construing the evidence in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence to support the defendant's conviction of the crimes of robbery in the first degree and conspiracy to commit robbery in the first degree. The defendant challenges only the larceny element of these

charges, arguing that there was no evidence that he intended to take drugs from the victim without paying for them or that he agreed to do so.

The evidence in this case demonstrated that the defendant made an agreement to buy cocaine from the victim for the sum of $6150. As the victim approached the defendant's vehicle, the victim was carrying crack cocaine in a brown paper bag, which was tucked in his waistband. He then leaned into the rear passenger's side of the vehicle, with his feet hanging out. A struggle ensued, and the victim attempted to hold the defendant's arm in an effort to avoid being shot. Shots, however, were fired, ultimately resulting in the death of the victim. Jackson and Angelo both ran to help. Jackson grabbed a child's scooter and broke the front passenger's side window of the vehicle, and he engaged Taylor, who was sitting in that seat, in a fight.

In the meantime, Angelo ran to the rear passenger's side of the vehicle to help the victim, but soon more shots were fired. Angelo then went to the driver's side of the vehicle, where he encountered the defendant, who was standing outside of the vehicle, holding a revolver then pointed toward Angelo's face. Taylor indicated to the defendant that they should leave. The defendant and Taylor reentered the vehicle and fled the scene with the crack, with the rear door open, and with the dying victim only partially inside the vehicle. The victim later fell out or was pushed out of the vehicle, and was left to die on the street. When the victim was transported to the hospital, he had approximately $40 on him.

Later, as Bates and Taylor were cleaning the vehicle, which was littered with broken glass, blood, and many different sized pieces of crack cocaine mixed with blood and glass, Taylor specifically told Bates that "*they were in New Britain, and they started shooting up the car*

trying to rob them." (Emphasis added.) Additionally, when Warren was driving the defendant to Queens, the defendant said something about being on the news and about "*somebody fighting back*." (Emphasis added.)

Although Bates' statement that Taylor told her that "*they were in New Britain, and they started shooting up the car trying to rob them*" could be viewed as ambiguous, it is within the province of the jury to ascertain the reasonable meaning of that statement. See, e.g., *State* v. *Leniart*, 166 Conn. App. 142, 172 n.21, 140 A.3d 1026 ("The jury was free to interpret the defendant's statement that he wanted 'to do her' either as an expression of his intent to have sexual intercourse with [the victim] or as an expression of his intent to kill her. In either instance, when considered in light of the defendant's statement that he 'need[ed] a body for the altar,' the jury reasonably could have inferred that his ultimate plan was to kill [the victim]."), cert. granted on other grounds, 323 Conn. 918, 149 A.3d 499, and cert. granted on other grounds, 323 Conn. 918, 150 A.3d 1149 (2016).

Our role on appeal is to "construe the evidence in the light most favorable to sustaining the verdict. . . . [We then] 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 . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Allan*, 311 Conn. 1, 25, 83 A.3d 326 (2014).

Here, it certainly would have been reasonable for the jury to have found that the "they" to whom Bates referred was the defendant and Taylor, especially because it was Taylor who had been speaking to Bates. Furthermore, it would have been reasonable for the jury to have found that when Warren heard the defendant say that "*somebody*" fought back, the defendant was referring to the victim in this case having fought

back an attack. There also was evidence that the victim had only $40 on him when he was transported to the hospital, despite the defendant stating that he had given the victim $6000. Thus, on the basis of this evidence, the jury reasonably could have concluded that the defendant and Taylor coaxed the victim to produce 150 grams of crack cocaine by telling him that they would pay him $6150, and, once he produced the crack, they forcibly took it from him without ever paying him the agreed upon $6150. The victim resisted being robbed and fought back. The defendant and Taylor then killed the victim, dumped his body in the street, and simply drove away.

Our case law is clear: "[I]t 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. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 166 Conn. App. 170.

Viewing the evidence in the light most favorable to sustaining the jury's verdict, as we must, we conclude that the jury reasonably could have found, on the basis of the evidence presented and the reasonable inferences drawn therefrom, that the defendant and Taylor had robbed the victim, who fought back, and that they had planned and intended to do so. Accordingly, we find no merit to the defendant's claim.

II

The defendant next claims that the court improperly instructed the jury on the elements of conspiracy to

commit robbery in the first degree. Specifically, he argues in his principal brief that because the court failed to instruct the jury that the coconspirators had to agree that a firearm would be used, his conviction for conspiracy to commit robbery in the first degree must be vacated. In response, the state agrees that this conviction must be vacated, but for a different reason than the defendant offers. The state argues that because the conspiracy to commit robbery and the conspiracy to commit murder conviction arise from the same agreement, a double jeopardy violation exists. In his reply brief, the defendant agrees with the state. We, too, agree that a double jeopardy violation exists and that the conspiracy to commit robbery conviction and sentence must be vacated.

In this case, the defendant was convicted of both conspiracy to commit murder and conspiracy to commit robbery in the first degree, both crimes that arose from a single agreement with multiple objectives. "[U]nder Connecticut law; see, e.g., *State* v. *Ortiz*, 252 Conn. 533, 559, 747 A.2d 487 (2000); it is a double jeopardy violation to impose cumulative punishments for conspiracy offenses if they arise from a single agreement with multiple criminal objectives. Furthermore, the state recognizes that, pursuant to the United States Supreme Court's decision in *Rutledge* v. *United States*, 517 U.S. 292, 302, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), a cumulative conviction can be a form of punishment in and of itself because it may lead a defendant to suffer adverse collateral consequences." (Footnote omitted.) *State* v. *Wright*, 320 Conn. 781, 828–29, 135 A.3d 1 (2016).

Pursuant to *State* v. *Wright*, supra, 320 Conn. 829, which extended the holding in *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013) (vacatur is appropriate remedy for cumulative conviction in cases involving greater and lesser included offenses), the appropriate

remedy for such a double jeopardy violation is vacatur. Accordingly, the defendant's conviction and accompanying sentence on the charge of conspiracy to commit robbery in the first degree must be vacated. See *State* v. *Mendez*, 154 Conn. App. 271, 281, 105 A.3d 917 (2014); *State* v. *Wright*, 144 Conn. App. 731, 749, 73 A.3d 828 (2013), aff'd, 320 Conn. 781, 135 A.3d 1 (2016).

III

The defendant's final claim is that the court committed plain error by failing to instruct the jury on accomplice or informant testimony with respect to Bates. Specifically, he claims that because Bates had been charged with tampering with evidence for helping to clean the car after the murder of the victim, "she had the same motive to curry favor with the prosecution as an accomplice to the murder." As such, the court was required to tell the jury to scrutinize her testimony carefully. Alternatively, the defendant also requests that we review the claim pursuant to our supervisory authority.

The state argues that the court had no duty to give an instruction on this testimony, sua sponte, and, furthermore, that the claim is not reviewable for plain error because the defendant waived any claim of error. The state also argues that it would be inappropriate for us to review this claim under our supervisory authority.

In his reply brief, the defendant argues that "[o]ur Supreme Court has not, as of the date of this writing, held that plain error review is unavailable even if the court determines that there has been a waiver of a claim pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). See *State* v. *McClain*, 319 Conn. 902, 122 A.3d 637 (2015) ([granting certification to review issue of whether 'Appellate Court properly determine(d) that an implied waiver of a claim of instructional error that satisfies (*Kitchens*) . . . also forecloses plain error

review']).'' He also argues that we would be justified in exercising our supervisory authority in this case. We conclude that the defendant waived this claim, and we also decline to exercise our supervisory authority.

In this case, the defendant concedes that his claim of instructional error is not preserved ''due to his failure to submit a request to charge [on this specific instruction] and to object to the court's charge.'' He also concedes that ''*Golding* review is not available because the issue is not one of constitutional magnitude.'' See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Accordingly, he requests that we consider his claim pursuant to the plain error doctrine or that we exercise our supervisory authority. We conclude that the defendant's claim is not reviewable for plain error, and we decline his invitation to exercise our supervisory authority.

This court repeatedly has held that an implied waiver of a claim of instructional error that satisfies *State* v. *Kitchens*, supra, 299 Conn. 482–83, also forecloses plain error review. See, e.g., *State* v. *Bialowas*, 160 Conn. App. 417, 429, 125 A.3d 642 (2015); *State* v. *Jackson*, 159 Conn. App. 670, 677–79, 123 A.3d 1244 (2015); *State* v. *Fuller*, 158 Conn. App. 378, 390–91, 119 A.3d 589 (2015); *State* v. *McClain*, 154 Conn. App. 281, 291–92, 105 A.3d 924, 931 (2014), cert. granted, 319 Conn. 902, 122 A.3d 637 (2015); *State* v. *Reddick*, 153 Conn. App. 69, 82, 100 A.3d 439, appeal dismissed, 314 Conn. 934, 102 A.3d 85, cert. denied, 315 Conn. 904, 104 A.3d 757 (2014). These decisions, at least in part, relied upon our Supreme Court's observation in *Kitchens* that ''a valid waiver precludes a finding that a jury instruction constitutes plain error because a valid waiver means that there is no error to correct.'' *State* v. *Kitchens*, supra, 474 n.18. Because the defendant waived his right to raise the present claim of instructional error, he is

foreclosed from seeking consideration under the plain error doctrine.

As for the defendant's request that we exercise our supervisory authority to review his claim of instructional error, we decline to do so. "[B]ypass doctrines permitting the review of unpreserved claims such as [*State* v. *Golding*, supra, 213 Conn. 239–40] and plain error, are generally adequate to protect the rights of the defendant and the integrity of the judicial system . . . . [T]he supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. Rather, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, a defendant seeking review of an unpreserved claim under our supervisory authority must demonstrate that his claim is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State* v. *Leach*, 165 Conn. App. 28, 35–36, 138 A.3d 445 (2016).

In the present case, although the defendant asserts that we should adopt a rule that requires the trial court to give a special credibility instruction in cases where a state's witness has been promised a benefit in exchange for his or her testimony, our Supreme Court already has rejected such a request.

In *State* v. *Diaz*, 302 Conn. 93, 113–14, 25 A.2d 594 (2011), our Supreme Court took the "opportunity to

reaffirm the well established common-law rule that it is within the discretion of a trial court to give a cautionary instruction to the jury whenever the court reasonably believes that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel. In determining whether to give such an instruction, the trial court may consider the circumstances under which the witness came forward; the seriousness of the charges with which the witness has been charged or convicted; the extent to which the state is in a position to provide a benefit to the witness and the potential magnitude of any such benefit; the extent to which the witness' testimony is corroborated by other evidence; the importance of the witness' testimony to the state's case; and any other relevant factor. . . . Because the trial courts already have the discretion to give a special credibility instruction under existing case law, there is no need for this court to create a new supervisory rule requiring a special credibility instruction in cases where there is evidence that the witness is particularly unreliable." (Citation omitted.) Pursuant to this precedent, we decline to consider the defendant's request.

The judgment is reversed only with respect to the conviction of conspiracy to commit robbery in the first degree and the case is remanded with direction to vacate that conviction and its accompanying sentence; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

LEON SANDERS *v.* COMMISSIONER OF CORRECTION (AC 37512)

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

Syllabus

The petitioner, who had been convicted of various crimes after a jury trial and sentenced to forty years imprisonment, sought a writ of habeas corpus. He claimed that D, his counsel in a prior habeas proceeding, had rendered ineffective assistance for having failed to allege a claim that B, his criminal trial counsel, rendered ineffective assistance by failing to properly advise him about accessorial liability and an alleged pretrial plea offer by the state of eight years imprisonment. The petitioner also claimed that his rights to due process of law were violated as a result of B's alleged failure to properly advise him about whether to accept or reject the plea offer. The habeas court denied the petition for a writ of habeas corpus, concluding that D and B had provided the petitioner with effective assistance. The court determined, inter alia, that B properly advised the petitioner about the plea offer, but that the petitioner had rejected it and asserted that he wanted to proceed to trial. The court found that B adequately explained the plea offer to the petitioner, and discussed with him the maximum punishments he faced, and the pros and cons of pleading guilty or not guilty, but left to the petitioner the decision as to whether to accept or reject the plea offer. The court also concluded that the petitioner had not met his burden of proving that it was reasonably probable that a trial judge would have accepted the state's plea offer. Subsequently, the court denied the petitioner certification to appeal, and the petitioner appealed to this court. He claimed, inter alia, that the habeas court abused its discretion in denying certification to appeal because it improperly rejected his claims of ineffective assistance as to D and B. *Held*:

1. The habeas court did not abuse its discretion in denying the petitioner certification to appeal with respect to his claim that B rendered ineffective assistance by failing to advise him properly about the state's plea offer and accessorial liability, the petitioner having failed to demonstrate that the issues he raised were debatable among jurists of reason, that a court could have resolved them in a different manner, or that they were adequate to deserve encouragement to proceed further: although the habeas court improperly concluded that B's performance pertaining to the state's plea offer was not deficient, B having failed to provide the petitioner with professional advice, assistance and opinion about whether the state would prevail at trial, and about the petitioner's potential sentence exposure and best course of action in light of the facts of the case, the petitioner failed to demonstrate that he was prejudiced

by B's deficient performance, as the petitioner presented insufficient evidence to show that there was a reasonable probability that a trial judge would have conditionally accepted the state's plea offer, and B testified that he did not know if a judge would have accepted the plea offer; furthermore, the petitioner failed to rebut with credible evidence the strong presumption that B had rendered effective assistance concerning his advice and investigation pertaining to accessorial liability, as the petitioner had claimed that he was innocent throughout his pretrial discussions with B, and throughout the trial and sentencing, and it was not until after the petitioner was sentenced that B received a communication from him that was inconsistent with the prior information.

2. The habeas court did not abuse its discretion in denying the petitioner certification to appeal as to his claim that D had rendered ineffective assistance during the petitioner's first habeas trial by failing to raise the issue of B's alleged ineffectiveness, the petitioner having failed to establish the underlying claim that B rendered ineffective assistance.

Argued September 8—officially released December 20, 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.*

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

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Mary M. Galvin*, former state's attorney, and *Courtney M. Chaplin*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Leon Sanders, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his third postconviction petition for a writ of habeas corpus challenging his conviction on charges of assault in the first degree and being a persistent

dangerous felony offender. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly denied his petition for a writ of habeas corpus in which he claimed that counsel in both his underlying criminal prosecution and his first postconviction habeas corpus proceeding rendered ineffective assistance. Because the petitioner did not demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal, we dismiss the appeal.

The following facts and procedural history are relevant to our decision. The petitioner was charged with two counts of assault in the first degree and with being a persistent dangerous felony offender. These charges stemmed from an incident in Ansonia on May 23, 2001, in which Kente Douglas was shot multiple times in the back. "At the time of the shooting, Douglas was reaching through the back door of a parked automobile to remove a child's car seat. Jackie Garcia, Douglas' girlfriend, was standing near the automobile with the couple's four year old daughter in her arms. An automobile drew up beside Douglas, and the [petitioner] fired a gun at Douglas through the passenger side window. Douglas fell to the ground, and the [petitioner] continued to fire gunshots at him until the automobile left the area. During the shooting, Garcia went inside with her child. After the [petitioner] left, she returned to the street with a cordless telephone. She dialed 911, reported to the operator that her boyfriend had been shot and named the [petitioner] as the shooter. When the police arrived, an officer spoke with Garcia, who told him that the [petitioner] had pulled up in a car and shot Douglas five or six times. A police detective spoke with Douglas, who also stated that the [petitioner] had shot him. Later, as Douglas was transported in an ambulance to a hospital, he told another police officer that

the [petitioner] had shot him. In June, 2001, the [petitioner] was arrested and charged. Following the jury trial, at which he was convicted of two counts of assault, the [petitioner] was tried to the court on the part B information in which he was accused of being a persistent dangerous felony offender and was convicted on that charge as well. Thereafter, the court imposed a sentence of forty years imprisonment." *State* v. *Sanders*, 86 Conn. App. 757, 759, 862 A.2d 857 (2005). On the petitioner's appeal from his conviction, this court affirmed the trial court's judgment. Id.

Following his conviction, the petitioner brought several petitions for writs of habeas corpus. At issue in the present appeal is the petitioner's third such petition, which was filed on December 12, 2012, and amended for a fourth time on September 25, 2014 (operative petition).[1] The petitioner set forth three separate claims. In count one, the petitioner alleged that his first habeas counsel, Sebastian DeSantis, "was ineffective in failing to allege in the prior habeas petition a claim of ineffective assistance of [his criminal defense counsel, Robert Berke] for his failure to properly advise him of the state's offer of eight years incarceration on a guilty plea, and had he been properly advised, he would not have rejected it." In count two, the petitioner alleged that his state and federal rights to due process of law were violated because Berke had not properly advised him whether to accept or reject the state's pretrial offer of

[1] The petitioner filed his first habeas petition alleging ineffective assistance of his defense counsel, Robert Berke, concerning Berke's failure to file a "motion to suppress suggestive identification of prosecution's chief witness" and claiming that the communication between Berke and the petitioner fell below the standard of what a reasonable attorney would have exercised under similar circumstances. Following a trial, the habeas court denied the petition. The petitioner appealed from that denial, and we dismissed the appeal. *Sanders* v. *Commissioner of Correction*, 118 Conn. App. 905, 984 A.2d 122 (2009). On August 2, 2010, the petitioner filed a second habeas petition, but that was withdrawn on November 6, 2012.

eight years incarceration on a guilty plea. In count three, the petitioner alleged actual innocence, but he withdrew that claim prior to trial.

At the trial on December 2, 2014, the petitioner presented evidence describing the state's plea offer. Specifically, the petitioner submitted the transcript from the first habeas trial, which was held on October 2, 2008, when he had testified that the state's plea offer was for eight years with the right to argue for less. The petitioner repeated this testimony at the proceeding on December 2, 2014. Berke, however, testified that there was a plea offer extended by the state, but he could not remember the exact terms of the plea offer. Berke further testified that he did not recall the alleged plea offer of eight years imprisonment. In terms of how he advised the petitioner regarding the state's plea offer, Berke testified that although he could not recall any specific discussion with the petitioner, he typically presents his clients with "the positive [and] the negatives of going to trial—the risks of trial [and] the maximum exposure. [He does not] present [his] opinion on whether they should take an offer or not. . . . [T]hat was their decision and not [his]."

Following the trial, the court, *Fuger*, *J.*, denied the operative petition in an oral decision in which it concluded that Berke and DeSantis had provided the petitioner with effective assistance of counsel.[2] With

[2] The petitioner also claims that his state and federal rights to due process of law were violated when Berke failed to properly advise him concerning the plea offer and accessory liability, and when DeSantis failed to raise the issue of ineffective assistance of counsel concerning Berke's performance. In turn, the respondent, the Commissioner of Correction, in relying on *Davis* v. *Commissioner of Correction*, 160 Conn. App. 444, 455–56, 124 A.3d 992, cert. denied, 319 Conn. 957, 125 A.3d 1012 (2015), contends that the petitioner's due process claim is unreviewable because the habeas court neither considered nor ruled on the merits of that claim and the petitioner failed to obtain a ruling on it. See id. (declining to review claim when habeas court neither considered nor ruled on it and petitioner failed to alert the habeas court that ruling was inaccurate or incomplete). In the alternative, the respondent further argues that the petitioner also cannot obtain review

respect to the first count, the court determined that it could not "find any deficient performance by [DeSantis] in his representation of [the petitioner] at the first habeas trial" and, therefore, it denied the first count of the petition. In rejecting the claim that DeSantis rendered ineffective assistance for failing to allege in the first habeas action a claim that Berke's performance was ineffective for inadequately advising the petitioner regarding the state's plea offer, the court made several findings. It expressly credited the testimony of DeSantis that the petitioner did not raise any concerns to him regarding Berke's representation in connection with the plea offer, and that the petitioner made it clear to DeSantis that he wanted to go to trial to prove his

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), of this unpreserved constitutional claim because it arises out of the criminal trial proceedings and not the acts or omissions of the habeas court. See *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 67 n.2, 967 A.2d 41 (2009) (*Golding* review available only where petitioner challenges actions of habeas court). We agree with the respondent.

We also are not persuaded by the petitioner's argument that his due process claim should be reversed pursuant to the plain error doctrine; see Practice Book § 60-5; or this court's supervisory authority over the administration of justice. See *Lacks* v. *Commissioner of Correction*, 87 Conn. App. 225, 234, 866 A.2d 660, cert. denied, 273 Conn. 922, 871 A.2d 1027 (2005). We disagree.

Pursuant to our case law, a habeas petitioner cannot establish that the court abused its discretion in denying certification on issues not raised in the petition for certification to appeal. *Kowalyshyn* v. *Commissioner of Correction*, 155 Conn. App. 384, 389, 109 A.3d 963, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015). Accordingly, as the petitioner's due process claim was raised in count two of his operative petition, the record does not provide any evidence that the habeas court determined and ruled on this claim. The petitioner stated his grounds for his request for certification to appeal as follows: "Whether [the] habeas court erred when it found that trial counsel was not ineffective when he discussed the strengths [and] weaknesses of the state's case but did not advise the petitioner whether he should accept or reject the state's plea offer . . . [and] such other claims of error found after a complete review of the record." Therefore, "[b]ecause the petitioner failed to raise [his due process claim] in his petition for certification" to appeal; *Kowalyshyn* v. *Commissioner of Correction*, supra, 391; we decline to afford it review.

innocence. The court also specifically found, in accordance with DeSantis' testimony, that in order to determine which issues to raise in the habeas petition, he reviewed Berke's file, examined the criminal trial transcripts and files, conversed with the petitioner, hired an investigator, reviewed the relevant police reports and reviewed the petition with the petitioner before he filed it. In drafting the habeas petition, DeSantis testified that he tried to be overinclusive in order to preserve issues for future litigation, and his typical practice was to include a claim in the petition if the petitioner was adamant about including it, unless it was frivolous. In addition, DeSantis agreed with counsel for the respondent, the Commissioner of Correction, that the first habeas court, *Nazzaro*, *J.*, "found that it was clear that the petitioner wanted to go to trial and to prove his innocence rather than take a plea offer . . . ."

As to the petitioner's second count, the court determined that Berke's performance in the petitioner's underlying criminal proceedings was not deficient. With respect to this conclusion, the court explained that the petitioner "rejected a plea bargain that was *apparently* eight years with the right to argue for a lower sentence. [The petitioner] went to trial and received, after being found guilty by the jury, a sentence of forty years of confinement." (Emphasis added.) The court expressly noted that "Berke did convey and discuss the plea bargains with [the petitioner]. The record is crystal clear that [the petitioner] protested his innocence and always asserted that he wished to proceed to trial. The court is convinced based upon the testimony of [Berke], the testimony at the first habeas trial, that [Berke] did in fact adequately explain the pretrial offer, discuss the case, discuss the maximum punishments, discuss the pros and cons of pleading guilty or not guilty, but left, as he should have, the final decision as to whether to accept or reject such offer to [the petitioner]." It further

found Berke's representation of the petitioner to be "sufficiently within that band of representation that will pass constitutional muster."

The court then explained that the petitioner had the burden of proving that "it was reasonably probable that a court, a judge would have accepted the [state's alleged] eight year [plea] offer in this case." The court proceeded to explain that it could not "make the finding that the petitioner [established that] it [was] reasonably probable that [the trial judge] would have accepted the eight year offer, the key word being probable." With respect to this finding, the court highlighted: the petitioner's prior conviction of manslaughter, for which the petitioner had served an eleven year prison sentence; that the petitioner had been arrested in connection with a shooting incident soon after he was released after serving his sentence for his manslaughter conviction; and that the petitioner had other convictions for crimes involving firearms. On the basis of the evidence before it, the court concluded that the petitioner had not met his burden of proving by a "preponderance of the evidence that it [was] reasonably probable that a court would have accepted" the state's eight year plea offer. As a result of this finding, the court denied the operative petition claiming ineffective assistance by Berke and DeSantis. Subsequently, the petitioner filed a petition for certification to appeal. In that petition, the petitioner stated that the grounds for appeal are: "Whether [the] habeas court erred when it found that [Berke] was not ineffective when he discussed the strengths [and] weaknesses of the state's case but did not advise the petitioner whether he should accept or reject the state's plea offer."[3] On December 4, 2014, the court denied the

[3] The petitioner also stated as a ground for appeal: "Such other claims of error found after a complete review of the record." This claim, however, is meaningless because it does not provide the trial judge with notice. "It is well established that [w]e do not entertain claims not raised before the habeas court but raised for the first time on appeal. . . . The purpose of the [petition] is to put the [respondent, the Commissioner of Correction]

petition for certification to appeal. This appeal followed.

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because it improperly denied his claims of ineffective assistance of counsel with respect to Berke and DeSantis. "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, [the petitioner] 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." (Internal quotation marks omitted.) *Melendez* v. *Commissioner of Correction*, 151 Conn. App. 351, 357–58, 95 A.3d 551, cert. denied, 314 Conn. 914, 100 A.3d 405 (2014). To prove that the denial of his petition for certification to appeal constituted 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.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 214, 145 A.3d 362 (2016).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for

on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Citation omitted; internal quotation marks omitted.) *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 369, 90 A.3d 368, cert. denied, 314 Conn. 919, 100 A.3d 852 (2014).

certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Bozelko* v. *Commissioner of Correction*, 162 Conn. App. 716, 721, 133 A.3d 185, cert. denied, 320 Conn. 926, 133 A.3d 458 (2016).

Here, the petitioner's underlying claims are that the habeas court improperly concluded that (1) Berke provided effective assistance of counsel and (2) DeSantis provided effective assistance of counsel. After determining the merits of these underlying claims, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal.

Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 775, 138 A.3d 908 (2016). Therefore, "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." (Internal quotation marks omitted.) *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 228, 965 A.2d 608 (2009).

It is well established that "[a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Citation omitted; internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 775. "To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Internal quotation marks omitted.) Id., 776. "An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Internal quotation marks omitted.) *Bozelko* v. *Commissioner of Correction*, supra, 162 Conn. App. 722–23. The court, however, "may decide against a petitioner on either prong, whichever is easier." *Lewis* v. *Commissioner of Correction*, 165 Conn. App. 441, 451, 139 A.3d 759, cert. denied, 322 Conn. 901, 138 A.3d 931 (2016).

I

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal because it improperly denied his claim of ineffective assistance of counsel with respect to Berke. As described in the preceding paragraph, to determine whether the habeas court abused its discretion in denying the petition for certification to appeal, this court will look at the underlying merits of the petitioner's claims. See *Bozelko* v. *Commissioner of Correction*, supra, 162 Conn. App. 721. Specifically, the petitioner contends that the habeas court improperly concluded that (1) Berke's performance concerning the state's plea offer was neither deficient nor prejudicial and (2) Berke's failure to advise the petitioner on accessorial liability did not constitute ineffective assistance. We will address each claim in turn.

A

Turning to the petitioner's first claim, we agree with the petitioner that Berke's performance pertaining to the state's plea offer was deficient; however, we are not persuaded that the petitioner established that he was prejudiced by the deficient performance. As " '[a]n ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied' "; id., 722–23; we conclude that the petitioner failed to meet his burden of establishing his ineffective assistance of counsel claim with respect to Berke's performance pertaining to the state's plea offer. Because the petitioner failed to establish that he was prejudiced by Berke's deficient performance, he cannot demonstrate that the issues pertaining to this claim are debatable among jurists of reason, that a court could resolve those issues differently or that the questions raised deserve encouragement to proceed further. Therefore, as we discuss subsequently in this opinion, the petitioner has failed

to demonstrate that the court abused its discretion in denying his petition for certification to appeal as to this claim.

We begin by setting forth the governing legal principles in cases involving claims of ineffective assistance of counsel in the plea bargain context. As previously noted, under the *Strickland* test, "[a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Internal quotation marks omitted.) *Mahon* v. *Commissioner of Correction*, 157 Conn. App. 246, 253, 116 A.3d 331, cert. denied, 317 Conn. 917, 117 A.3d 855 (2015).

"Pretrial negotiations implicating the decision of whether to plead guilty is a critical stage in criminal proceedings . . . ." (Internal quotation marks omitted.) Id. "[P]lea bargaining is an integral component of the criminal justice system and essential to the expeditious and fair administration of our courts. . . . Commentators have estimated that between 80 and 90 percent of criminal cases in Connecticut result in guilty pleas, the majority of which are the product of plea bargains. . . . Thus, almost every criminal defendant is faced with the crucial decision of whether to plead guilty or proceed to trial. Although this decision is ultimately made by the defendant, the defendant's attorney must make an informed evaluation of the options and determine which alternative will offer the defendant the most favorable outcome. *A defendant relies heavily upon counsel's independent evaluation of the charges and defenses, applicable law, the evidence and the risks and probable outcome of a trial.*" (Emphasis in original;

internal quotation marks omitted.) *Ebron* v. *Commissioner of Correction*, 120 Conn. App. 560, 572, 992 A.2d 1200 (2010), rev'd in part on other grounds, 307 Conn. 342, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

"To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. . . . To prevail on a claim of ineffective assistance of counsel, both prongs of the *Strickland* test must be satisfied." (Citations omitted; internal quotation marks omitted.) *Mahon* v. *Commissioner of Correction*, supra, 157 Conn. App. 253–54, quoting *Missouri* v. *Frye*, 566 U.S. 134, 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); see also *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012) (to show prejudice in rejected plea case, petitioner must establish: "[1] it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and [2] the trial judge would have conditionally accepted the plea agreement if it had been presented to the court"), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

In his challenge to the habeas court's conclusion as to Berke's performance, the petitioner contends that Berke's failure to provide the petitioner his professional advice, assistance and opinion on the petitioner's best course of action concerning the state's plea offer fell below an objective standard of reasonableness and, thus, constituted deficient performance under the first prong of the *Strickland* test. We agree.

In focusing on the performance prong, we are guided by our case law, which provides that "[i]n 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 . . . . 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." (Internal quotation marks omitted.) *Helmedach* v. *Commissioner of Correction*, 168 Conn. App. 439, 453, 148 A.3d 1105 (2016).

The petitioner bore the burden of presenting sufficient evidence to establish that Berke's actions constituted deficient performance. In order to establish that Berke's performance was deficient, the petitioner was required to overcome the presumption that Berke's conduct was reasonable. See *Moye* v. *Commissioner of*

Correction, supra, 168 Conn. App. 218. In determining what is reasonable, we are guided by "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . ." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 679, 51 A.3d 948 (2012), quoting *Strickland* v. *Washington*, supra, 466 U.S. 688.

This court has recently stated that counsel performs effectively and reasonably when he or she provides a petitioner with adequate information and advice upon which the petitioner can make an informed decision as to whether to accept the state's plea offer. See *Melendez* v. *Commissioner of Correction*, supra, 151 Conn. App. 359. We are mindful that "[c]ounsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness . . . ." (Internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 795, 93 A.3d 165 (2014). Accordingly, "[t]he need for recommendation depends on countless factors, such as the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial compared to the guilty plea . . . whether [the] defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform [his] plea decision." (Internal quotation marks omitted.) Id.

In denying the petitioner's claim with respect to Berke, the habeas court expressly concluded that Berke's representation was not controlled by our decision in *Barlow*. The habeas court explained: "[B]ased upon the facts that have been produced in this trial, [Berke] does not fit within the specific boundaries of *Barlow* . . . . [Berke] did not simply act as a conduit. [Berke] did go further. Later on in 2014, and *Barlow* is a 2014 case—later on in 2014, the case of *Melendez* v. *Commissioner*, 151 Conn. App. 351, reaches a contrary

conclusion finding that the representation by counsel for Mr. Melendez did pass constitutional muster. That was a more detailed explanation in which the counsel offered explanations, pros and cons, and a recommendation."[4] In addition, the court noted that "[i]t is clear from all of the testimony that [Berke] did convey and discuss the plea bargains with [the petitioner]. The record is crystal clear that [the petitioner] protested his innocence and always asserted that he wished to proceed to trial. The court is convinced, based upon the testimony of [Berke], the testimony at the first habeas trial, that [Berke] did in fact adequately explain the pretrial offer, discuss the case, discuss the maximum punishments, discuss the pros and cons of pleading guilty or not guilty, but left, as he should have, the final decision as to whether to accept or reject such offer to [the petitioner]. . . . While it would appear that [Berke's] representation may be closer to that of *Barlow* than it is *Melendez*, nevertheless, the court will find that [Berke's] representation was sufficiently within that band of representation that will pass constitutional muster." We disagree.

In *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 789–90, 796–97, this court held that the petitioner's defense counsel had rendered deficient performance in failing to advise the petitioner adequately regarding the court's plea offer. We noted that the petitioner's counsel had testified during the habeas trial that she refrained from giving the petitioner *any advice* as to the plea offer proposed by the trial court. Id., 801. Counsel further had testified that she "merely gave [the petitioner] the facts of the offer, [and] provid[ed] no

[4] In *Melendez* v. *Commissioner of Correction*, supra, 151 Conn. App. 359, this court concluded that counsel effectively and reasonably "provided the petitioner with adequate information and advice upon which the petitioner could make an informed decision as to whether he should accept the state's initial five year plea offer." With respect to this conclusion, this court noted that counsel specifically advised the petitioner to accept the plea offer. Id.

assistance or advice as [the petitioner] weighed his options." Id. We concluded that "[a]lthough we agree with the habeas court that [counsel] had no obligation in this case specifically to tell the petitioner whether to take the court's plea offer . . . [counsel did have] an obligation to provide advice and assistance to the petitioner regarding that plea offer, which, she admittedly failed to do." Id., 796–97. We reasoned that "[a]lthough the [petitioner] ultimately must decide whether to accept a plea offer or proceed to trial, this critical decision, which in many instances will affect a [petitioner's] liberty, should be made by a represented [petitioner] with the *adequate professional assistance, advice, and input of his or her counsel.*" (Emphasis in original.) Id., 800. We further noted that "a crucial component of counsel's effective representation during plea negotiations is *giving professional advice* to a [petitioner]. . . . [C]ounsel should give the [petitioner] his or her *professional advice* on the best course of action given the facts of the particular case and the potential total sentence exposure." (Citations omitted; emphasis in original.) Id., 799–800. Therefore, we concluded that counsel's "performance was deficient because she did not give the petitioner her professional advice and assistance concerning, and her evaluation of, the court's plea offer." Id., 802.

In *Barlow*, the petitioner's trial counsel testified that she did not provide *any advice* to the petitioner concerning the plea offer proposed by the court. Id., 801. Similarly, in this case, Berke testified during the habeas trial that it was his general practice *never* to advise his client or give him advice as to whether he should accept or reject a plea offer.[5] As this court held in *Barlow*,

[5] As found by the first habeas court, "the petitioner and [Berke] agree that [Berke] did not recommend specifically the taking of any plea bargain. . . . Indeed, [Berke] did not recall the specifics of a plea, but that it was his custom, and in this instance he did not recommend the taking of a plea and that it was not his custom to recommend pleas one way or the other but to leave the decision to the client."

advising the petitioner on the strengths and weaknesses of his case, alerting him to his potential exposure and explaining to him the terms of the plea offer is insufficient; without the professional advice as to the best course of action, such representation constitutes deficient performance. Id., 800–802.

Although the petitioner maintained his innocence during pretrial discussions with Berke, Berke had an obligation to provide the petitioner his "professional advice on the best course of action given the facts of the particular case and the potential total sentence exposure." (Emphasis omitted.) Id., 800; see *Cardoza* v. *Rock*, 731 F.3d 169, 178 (2d Cir. 2013) ("defense counsel have a constitutional duty to . . . advise their clients on the crucial decision whether to accept a plea offer" [internal quotation marks omitted]); see also *Vazquez* v. *Commissioner of Correction*, 123 Conn. App. 424, 437, 1 A.3d 1242 (2010) (stating that "[a] defense lawyer in a criminal case *has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable*" [emphasis added; internal quotation marks omitted]), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011).

During the habeas proceeding before Judge Fuger, the following exchange occurred between the petitioner's counsel and Berke:

"Q. [A]nd is—is it your practice to advise the client or give him advice as to whether or not he thinks it's a good idea to take an offer or a bad idea to take an offer?

"A. I never do.

"Q. Okay. And could you explain to the court why you do that?

"A. I present them the positive, the negatives of going to trial . . . the risks of trial, the maximum exposure. I don't present my opinion on whether they should take an offer or not. That's their decision. I've always maintained that that was their decision and not mine. I don't influence clients on what decision they make. I do—I do present them, at least from a legal and factual opinion, the strengths and weaknesses of their case . . . by defense. . . .

"Q. But your job is to give them professional legal advice as to whether or not they should take the plea or whether or not they should go to trial.

"A. I don't tell clients to take the plea."

The respondent, however, argues that Berke's performance was not deficient for failing to make a specific recommendation as to whether the petitioner should accept or reject the state's plea offer because such a recommendation was not required under *Barlow*. Although we agree that *Barlow* did not establish a per se rule obligating counsel to provide recommendations regarding plea offers, we are not persuaded by the respondent's argument. *Barlow* set forth an obligation for defense counsel to provide professional advice, assistance and an "informed opinion as to what pleas [to] enter" and to make "an informed evaluation of the options and determine which alternative will offer the [petitioner] the most favorable outcome." (Internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 798. We, therefore, read *Barlow* to require counsel to provide the petitioner his professional advice, assistance and opinion on the petitioner's best course of action concerning the state's plea offer. This, Berke admits, he did not do.

We note that in his argument that Berke's performance was not deficient pursuant to the standard set forth in *Barlow*, the respondent relies on our decision in *Andrews* v. *Commissioner of Correction*, 155 Conn. App. 548, 110 A.3d 489, cert. denied, 316 Conn. 911, 112 A.3d 174 (2015). That reliance is misplaced.

In *Andrews*, the petitioner challenged the habeas court's finding that he failed to show that his trial counsel was deficient.[6] Id., 551. In support of his claim on appeal, the petitioner relied on *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 781. See

[6] In the habeas petition, the petitioner in *Andrews* claimed that "his trial counsel provided ineffective assistance by failing to recommend that he accept the plea offered by the trial court . . . ." *Andrews* v. *Commissioner of Correction*, supra, 155 Conn. App. 550. The habeas court, however, found that the petitioner failed to show that his trial counsel's advice was deficient. Id., 551.

Andrews v. *Commissioner of Correction*, supra, 155 Conn. App. 553. This court, however, concluded that because the facts in *Andrews* were distinguishable, the petitioner's reliance on *Barlow* was misplaced. Id. Specifically, we explained that "[u]nlike trial counsel in *Barlow*, who provided no advice or assistance to her client on the plea offer, trial counsel in the present case explained to the petitioner the strengths and weaknesses of the state's case, the charges he was facing, and the maximum sentence he would be exposed to if he was unsuccessful at trial. Trial counsel explained that the petitioner would likely receive a significantly higher sentence than twelve years if he was convicted at trial, that he believed that the state had a strong case against the petitioner, and that it would be a difficult case to win because most of the witnesses were police officers, and one of the police officers had sustained permanent serious injury. Although trial counsel left the ultimate decision of whether to accept or to reject the offer to the petitioner, he provided the petitioner with adequate professional advice on [his] options and the best course of action, unlike trial counsel in *Barlow*, given the facts of the case and the petitioner's potential total sentence exposure." Id., 554–55.

Unlike counsel in *Andrews*, Berke did not provide the petitioner with his opinion as to whether the state would prevail at trial, nor did he provide advice on the best course of action for the petitioner. This case is thus distinguishable from *Andrews*, where defense counsel explained to the petitioner that in his professional opinion the state had a strong case against the petitioner. See id. Here, the extent of Berke's advice concerning the plea offer was to discuss with the petitioner the specific strengths and weaknesses of the state's case. This is distinguishable from the facts in *Andrews* where defense counsel provided detailed advice on the petitioner's options and best course of action. See id. Therefore, we reject the respondent's argument that *Andrews*

v. *Commissioner of Correction*, supra, 155 Conn. App. 554–55, compels us to reach a different conclusion.

For the foregoing reasons, we conclude that this case falls within the reasoning of *Barlow*, and, therefore, contrary to the conclusion of the habeas court, Berke's failure to provide the petitioner his professional advice, assistance and opinion on the petitioner's best course of action concerning the state's plea offer constituted deficient performance under the first prong of *Strickland*.

2

Having concluded that Berke's performance concerning the state's plea offer was deficient, we turn now to the prejudice prong of *Strickland*. The petitioner contends that the court did not provide any factual or legal basis for its "belief" that the petitioner failed to meet his burden of establishing that he was prejudiced by Berke's deficient performance. We disagree.

The following legal principles are relevant to our resolution of this claim. In order to show prejudice stemming from a petitioner's rejection of a plea bargain due to ineffective assistance of counsel, "a petitioner need establish only that (1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, supra, 307 Conn. 357. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities." (Citation omitted; internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 553–54, 124 A.3d 1, cert. denied, 320

Conn. 910, 128 A.3d 954 (2015). "If the habeas court determined that . . . it is not reasonably probable that the trial court would have imposed the sentence embodied in the plea agreement, the prejudice prong has not been satisfied." *Ebron* v. *Commissioner of Correction*, supra, 355–56.

Although the petitioner testified that he would have accepted the state's plea offer but for Berke's deficient performance, he has failed to establish, in accordance with *Ebron*, that there was a reasonable probability that the trial judge would have conditionally accepted the state's plea offer. With respect to this conclusion, we find that the evidence adduced at the habeas trial provided both factual and legal support for the court's determination. In the habeas court's decision, Judge Fuger stated that "while I cannot categorically say yes or no that such a plea bargain would have been accepted, I can say that I do not believe the . . . petitioner in this case has met his burden of proving with a preponderance of the evidence that it is reasonably probable that a court would have accepted the eight year offer." To support this finding, the court expressly stated various factors, including that the petitioner had "a prior conviction for manslaughter for which he served an eleven year sentence. Very shortly after serving that sentence, he was arrested for a shooting incident in which somebody was apparently severely injured. [The petitioner] has other convictions [that] involved a firearm."

The court also recognized "the difficulty of trying to prove that [a court would have conditionally accepted the state's plea offer], particularly in a case such as this where the identities of the particular judges apparently are unknown." Both our Supreme Court and this court have considered the difficulty of trying to prove that the trial court would have accepted the plea offer when the identities of the judges are unknown and/or the

record does not provide sufficient evidence regarding the trial court's general practices. For example, in *Ebron* v. *Commissioner of Correction*, supra, 307 Conn. 361, our Supreme Court recognized that "when there is evidence that a particular judge had indicated that he would have conditionally accepted the plea agreement, such evidence is probative on the question of what a reasonable court would have done. We further conclude that such evidence is sufficient to prove prejudice in the absence of any evidence that the particular judge's practice deviated significantly from the normal practice or that the particular sentence would have been an outlier. Because there was no such evidence in the present case, we conclude that the factual finding that [the trial judge] would have conditionally accepted the plea agreement was sufficient to establish prejudice." Id. In addition, in *Lewis* v. *Commissioner of Correction*, supra, 165 Conn. App. 454, this court held that the petitioner failed to establish prejudice because there was "no evidence in the record that the trial court would have accepted [the] plea agreement . . . ." It then explained that "[t]o hold otherwise on the record before us would amount to pure speculation, in which we decline to engage." Id.

In accordance with the legal principles pertaining to the prejudice prong of *Strickland*, as set forth in *Ebron* and *Lewis*, the record before us does not reveal the identity of the trial judge who would have been presented with the plea offer or whether there was a reasonable probability that a trial judge would have conditionally accepted the state's plea offer. The facts therefore are distinguishable from those in *Ebron*, where the record revealed the identity of the trial judge to whom the plea would have been presented and evidence that the trial judge would have conditionally accepted the plea. *Ebron* v. *Commissioner of Correction*, supra, 307 Conn. 346 n.1. Specifically, in *Ebron*,

the prosecutor "testified at the habeas proceeding that [the trial judge] thought [that] the state's [plea] offer was appropriate and that she would not be adjusting it, lowering it or changing it. When asked if [the prosecutor] had any reason to believe that [the trial judge] would not have imposed the agreed on sentence if the petitioner had accepted the plea offer, [the prosecutor] stated that [the trial judge] was a quite experienced judge, and that she would have indicated that the plea offer was too high or too low if she did not intend to accept it. Accordingly, [the prosecutor] believed that [the trial judge] would have imposed [the agreed on sentence]." (Internal quotation marks omitted.) Id.

Contrary to the facts of *Ebron*, here, the only evidence in the record pertaining to whether the trial judge would have conditionally accepted the plea offer was Berke's testimony describing the plea offer as reasonable. We note that Berke was very hesitant to make such a definitive statement concerning the reasonableness of the plea offer. Further, Berke admitted that he did not know whether a trial judge would have accepted the state's plea offer, given the facts of this case.[7] Even with Berke's testimony, the habeas court determined that, due to the paucity of evidence, it could not find that the petitioner established that there was a reasonable probability that the trial judge would have conditionally accepted the plea offer.

We emphasize that "the petitioner's burden of proving that a fundamental unfairness has been done is not met by speculation . . . but by demonstrable realities."

[7] In addition, the testimony during the first habeas trial provides further insight into whether it was reasonably probable that such a plea offer would have been conditionally accepted, as Berke testified that he could not recall the exact details of the state's plea offer and that "the issue of being a persistent offender [did] not come up until well into the game, the initial discussions and the pleas discussions did not include any reference that the state was going to charge him as a persistent offender."

(Citations omitted; internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 553–54. The petitioner's failure to satisfy his burden of establishing that there was a reasonable probability that the trial judge would have conditionally accepted the state's plea offer is fatal to this claim. See *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 196, 19 A.3d 705, cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011). Under the circumstances of this case, the petitioner has not demonstrated prejudice because he failed to provide sufficient evidence to support his claim that there was a reasonable probability that the trial judge would have conditionally accepted the plea offer. See *Lewis* v. *Commissioner of Correction*, supra, 165 Conn. App. 454.

We thus conclude that the petitioner failed to demonstrate that his claim of ineffective assistance of counsel with respect to Berke's representation pertaining to the state's plea offer involved issues that are debatable amongst jurists of reason, that a court could resolve the issue in a different manner, or that the issue is adequate to deserve encouragement to proceed further. Therefore, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal as to this claim. See *Bozelko* v. *Commissioner of Correction*, supra, 162 Conn. App. 729–30.

B

The petitioner next claims that the court abused its discretion in denying his petition for certification to appeal because the court erred in finding that Berke's alleged failure to advise the petitioner on accessorial liability did not constitute ineffective assistance.[8] Specifically, the petitioner argues that Berke had a duty

[8] In the operative petition, the petitioner made no explicit claim of ineffective assistance of counsel as to accessorial liability, which he now raises on appeal.

to conduct an independent investigation of the facts, evidence and law in determining which theory he would rely on to defend the petitioner if he proceeded to trial and to inform the petitioner of the ways he could be convicted and sentenced, including as an accessory to the crimes at issue. We disagree.

As enunciated in our well established case law, "the United States Supreme Court [has] determined that [ineffective assistance of counsel claims pertaining to counsel's obligation to investigate the facts and legal principles of each case] must be supported by evidence establishing that . . . counsel's representation fell below an objective standard of reasonableness, and . . . 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." (Emphasis omitted; internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 113 Conn. App. 378, 393–94, 966 A.2d 780 (2009). "An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Internal quotation marks omitted.) *Bozelko* v. *Commissioner of Correction*, supra, 162 Conn. App. 722–23. Accordingly, in addressing this claim we focus on the performance prong of the *Strickland* test.

"While it is incumbent on a trial counsel to conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . counsel need not track down each and every lead or personally investigate every evidentiary possibility." (Internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, 87 Conn. App. 517, 525–26, 865 A.2d 1231 (2005). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

(Internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 547. "In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation, but by demonstrable realities. . . . One cannot successfully attack, with the advantage of hindsight, a trial counsel's trial choices and strategies that otherwise constitutionally comport with the standards of competence. . . . Because this court is constrained to evaluating demonstrable realities, we will not engage in mere speculation." (Citation omitted; internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, supra, 526. "[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." (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 218.

The following additional facts, as set forth by the habeas court, are relevant to this claim. In its decision, the court stated: "It was the state's theory at trial that [the petitioner] was the person who did the shooting based upon statements of eyewitnesses. Based upon the testimony of [the petitioner at the habeas trial], he [was] not the person who did the shooting. He [was], in fact, the driver of the car. Unfortunately, [the petitioner] did not properly communicate these facts to [Berke]." In light of this, the court concluded that "Berke proceeded on the belief that his client was not involved in this shooting, and the reason why [Berke] was under that misapprehension [was] not because he failed to investigate, not because he was ineffective, it was because he trusted that his client, under the protection of attorney-client privilege, was going to tell him the truth, and he did not. As a result, [Berke] went

into this process with a client who had lied to him, whose story was not inconsistent with his adamant assertion of innocence, and who made it clear that in no way, shape or form did he intend to take a plea bargain, that he wanted to go to trial and have his day in court."

We agree with the habeas court and are not persuaded that the petitioner met his burden of establishing that Berke's performance pertaining to accessorial liability was deficient. The authority cited in the respondent's brief, namely, *Crawford* v. *Commissioner of Correction*, 285 Conn. 585, 940 A.2d 789 (2008), supports the respondent's assertion that the petitioner did not establish that Berke's advice and investigation concerning accessorial liability was deficient.

In *Crawford*, our Supreme Court concluded that the habeas court properly denied the petitioner's ineffective assistance of counsel claim for failure to investigate "[b]ecause the petitioner did not admit until just before jury selection that he had been the driver of the vehicle . . . ." Id., 599. Our Supreme Court further concluded that "[the petitioner's] trial counsel's attempt to develop a defense relating to misidentification was reasonable in light of the petitioner's insistence that he had not been the driver of the vehicle." Id., 599–600. The facts in *Crawford* are analogous to those in the present case, where the petitioner failed to communicate to Berke that he was "driving the vehicle when [the victim] was shot . . . [t]hat [he] drove the shooter to the location . . . [he was] aware that [he was] driving the shooter to the location for the purpose of the shooter shooting [the victim]" and therefore "Berke proceeded on the belief that the petitioner was not involved in this shooting . . . ." Here, as in *Crawford*, the petitioner continued to claim that he was innocent throughout the discussions, the trial and sentencing, and it was not until after the petitioner was sentenced that Berke received

a communication from the petitioner that was inconsistent with the prior information. In addition, the evidence at the habeas trial established only that Berke could not recall whether he had discussed accessorial liability with the petitioner.

As defense counsel is presumed to have rendered adequate assistance unless deficient performance is affirmatively proven, the petitioner in the present case has failed to rebut this strong presumption with credible evidence. See *Sanders* v. *Commissioner of Correction*, 83 Conn. App. 543, 551, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004). Because the petitioner failed to establish that Berke rendered deficient performance, his ineffective assistance of counsel claim fails.

We thus conclude that the petitioner failed to demonstrate that his claim of ineffective assistance of counsel with respect to Berke's performance pertaining to accessorial liability involved issues that are debatable amongst jurists of reason, that a court could resolve the issue in a different manner, or that the issue is adequate to deserve encouragement to proceed further. We, therefore, further conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to this claim.

II

The petitioner finally claims that the habeas court abused its discretion in denying his petition for certification to appeal because it improperly denied his claim of ineffective assistance of counsel with respect to DeSantis' performance during the first habeas trial. As previously noted, to determine whether the habeas court abused its discretion in denying the petition for certification to appeal, this court will look at the underlying merits of the petitioner's claims. See *Bozelko* v. *Commissioner of Correction*, supra, 162 Conn. App. 721. As set forth in count one of the operative petition,

the only allegation of deficient performance as to DeSantis is his failure to raise the issue of Berke's ineffective assistance during the plea process. Therefore, the sole claim on appeal against DeSantis is the petitioner's allegation that he provided ineffective assistance of counsel during the petitioner's first habeas trial, by failing to raise the issue of the ineffective assistance of Berke.

When a petitioner challenges the habeas court's denial of his operative petition on the basis of ineffective assistance of both his first habeas counsel and his criminal defense counsel, the petitioner must prove both that (1) his habeas counsel was ineffective and (2) his criminal defense counsel was ineffective. *Lapointe* v. *Commissioner of Correction*, supra, 113 Conn. App. 394. Therefore, we are "mindful that the petitioner's [claim] related to his habeas counsel must fail if [his] claims of ineffective assistance of [his criminal defense] counsel are unavailing." Id., 395.

As we previously concluded in part I of this opinion, the petitioner failed to establish his claim of ineffective assistance of Berke. Therefore, the petitioner cannot establish that DeSantis' performance was deficient in failing to raise the claim of ineffective assistance as to Berke in the petitioner's first habeas corpus proceeding because the petitioner did not establish the underlying claim on which that claim is predicated, i.e., that Berke's representation constituted ineffective assistance.

We thus conclude that the petitioner failed to demonstrate that his claim of ineffective assistance of counsel with respect to DeSantis involved issues that are debatable amongst jurists of reason, that a court could resolve the issue in a different manner, or that the issue is adequate to deserve encouragement to proceed further. We, therefore, conclude that the habeas court

did not abuse its discretion in denying the petition for certification to appeal with respect to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

MARK AMBROSE *v.* COMMISSIONER OF CORRECTION (AC 38229)

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

Syllabus

The petitioner, who had been convicted on a plea of guilty to felony murder and assault in the first degree, sought a writ of habeas corpus. He claimed that his trial counsel rendered ineffective assistance by failing to place on the record a certain plea offer that was made by the state, and to argue that he should have been allowed to accept the plea offer and that the state unlawfully withdrew the plea offer. The habeas court rendered judgment denying the petition and, thereafter, 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 from the judgment denying the habeas petition, the petitioner having failed to prove that the court abused its discretion in denying the petition for certification to appeal.

Argued October 24—officially released December 20, 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.*

Richard H. Stannard III, assigned counsel, with whom, on the brief, was *John Drapp III*, assigned counsel, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's

attorney, and *David M. Carlucci*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Mark Ambrose, 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, he claims that the court (1) abused its discretion by denying his petition for certification to appeal and (2) improperly concluded that the performance of his criminal trial counsel was not deficient. We dismiss the appeal.

The following facts and procedural history are relevant to our discussion. On May 11, 1995, the state charged the petitioner with felony murder in violation of General Statutes § 53a-54 (c) and assault in the first degree in violation of General Statutes § 53a-59 (a) (1). On June 7, 1996, the petitioner appeared before the court, *J. Kaplan*, *J.*, to enter guilty pleas to these charges.[1] After some discussion, the court accepted the petitioner's guilty pleas. Following the petitioner's conviction, on August 1, 1996, the court imposed a total sentence of sixty years incarceration, from which the petitioner did not appeal.

[1] The petitioner alleges that the guilty plea he entered was on the second plea offer the state made. According to the petitioner, the state's second plea offer required him to plead guilty by substitute information to one count of felony murder in violation of § 53a-54 (c) and one count of assault in the first degree in violation of § 53a-59 (a) (1). In exchange for the petitioner's guilty plea, the state would recommend that the court impose a sentence of fifty years to serve for the offense of felony murder and a consecutive ten years to serve for the offense of assault in the first degree, for a total effective sentence of sixty years to serve. The petitioner contends that, under the first plea offer, he would have pleaded guilty to the same offenses as in the state's second plea offer, but the state would recommend that the court impose a sentence of forty years to serve for the offense of felony murder and twenty years to serve concurrently for the offense of assault in the first degree, for a total effective sentence of forty years to serve.

During the plea proceedings, the prosecutor set forth the following factual bases underlying the charges against the petitioner. "On May 10, 1995, approximately twelve noon, the [petitioner] entered the Gold & Diamond Exchange, which is a jewelry store in the town of Ellington. He entered with the intent to commit robbery therein. . . . Inside the store at that time were the proprietor, Raymond Roy, and a jewelry salesman named Elli Parzivan. After being in the store for some time and after being shown—at his request—several diamond rings, [the petitioner] removed a—small caliber . . . pistol from his person, indicated to the occupants that this was a robbery [and] ordered them to get down behind the jewelry cases."

"[The petitioner] then vaulted the jewelry cases," and "pointed his gun at Mr. Parzivan and shot Mr. Parzivan through the head. The [petitioner] was approximately three to five feet away from Mr. Parzivan when he shot him. [The petitioner] then turned toward Mr. Roy and shot Mr. Roy in the face. Mr. Roy was moving at that time, and although [the petitioner] shot him in the face, he was able to survive his injuries after surgery at Hartford Hospital.

"Mr. Parzivan, however, was taken also to Hartford Hospital and died the following day, on May 11, 1995. The autopsy indicated that the cause of death was a gunshot wound to the head.

"The [petitioner]—after shooting both individuals—then removed several trays of diamond rings from . . . a jewelry case, leaving a latent fingerprint on top of that case. He also removed many loose diamonds from a desk nearby. He put all of these items into a bag and fled the jewelry store.

"He was chased outside of the store by Mr. Roy, who had armed himself with his own pistol. Mr. Roy then proceeded to discharge approximately seven bullets

toward [the petitioner] and the vehicle that [the petitioner] was climbing into. Mr. Roy was able to shoot out the rear windshield as well as the left, rear driver's side window. He also shot [the petitioner] in the elbow.

"[The petitioner], nonetheless, was able to flee the scene, and he was stopped ultimately on Interstate 91 in the town of either Windsor or Bloomfield at exit 36 by the state police. This [was] approximately one-half hour to three-quarters of an hour after the incident itself. [The petitioner] at that time was taken into custody.

"Found inside the vehicle was the pistol which he used, along with the jewelry which had been stolen, and a video camera which he had also removed from the scene. The bullet taken from Mr. Parzivan's head was later matched up to the pistol, which was found inside [the petitioner's] vehicle.

"[The petitioner] was treated for his own injuries at Hartford Hospital and released at about 5 p.m. that same day. He thereafter was transported to [the state police] Troop C [barracks] in Tolland where he gave a several-page inculpatory statement regarding his actions and his involvement in the offenses earlier that day."

In March, 2013, the petitioner commenced the present habeas action. On March 6, 2015, the petitioner filed an amended petition for a writ of habeas corpus. In that petition, he alleged that his criminal trial counsel, Phillip N. Armentano, rendered ineffective assistance of counsel. Specifically, the petitioner argued that Armentano was ineffective for failing (1) to place on the record the state's first plea offer involving a forty year sentence; (2) to argue that the petitioner should be allowed to accept the state's first plea offer; and (3) to argue that the state unlawfully withdrew the first plea offer without allowing the petitioner to accept the offer

within the agreed upon time frame in violation of *Santobello* v. *New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).[2] Following a trial held on July 2, 2015, the habeas court, *Fuger*, *J.*, denied the petition for a writ of habeas corpus and subsequently denied the petition for certification to appeal. This appeal followed.

We first set forth the standard of review we apply to a claim that the habeas court abused its discretion by denying a petition for certification to appeal from the judgment denying a petition for a writ of habeas corpus. See *Parker* v. *Commissioner of Correction*, 169 Conn. App. 421, 422, 151 A.3d 430 (2016). "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, [the petitioner] 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." (Internal quotation marks omitted.) *Melendez* v. *Commissioner of Correction*, 151 Conn. App. 351, 357, 95 A.3d 551, cert. denied, 314 Conn. 914, 100 A.3d 405 (2014). To prove that the denial of his petition for certification to appeal constituted 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

[2] In *Santobello* v. *New York*, supra, 404 U.S. 262, the United States Supreme Court stated: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 214, 145 A.3d 362 (2016).

After careful review of the record and the briefs, the arguments of the parties, and the habeas court's oral decision, we conclude that the petitioner has failed to prove that the court abused its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

JEFFREY FORD *v.* SAINT FRANCIS HOSPITAL AND MEDICAL CENTER ET AL.
(AC 37866)

Alvord, Prescott and Mihalakos, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries he sustained as a result of the alleged negligence of the defendants. The matter was tried to a jury, which returned a verdict in favor of the defendants. The trial court denied the plaintiff's motions to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. In his motion for a new trial, the plaintiff, relying on a statement allegedly made by a juror to his attorney after the trial had concluded, claimed that the jury improperly employed a clear and convincing burden of proof, rather than the appropriate preponderance of the evidence standard. *Held* that the trial court properly denied the plaintiff's motion for a new trial, as the plaintiff's claim of juror error was based on speculation and lacked merit: there was no indication in the record as to when the alleged conversation between the juror and the plaintiff's attorney took place, nor was there an affidavit or other documentary evidence concerning the exact words used by the juror, there was contradictory evidence at trial with respect to the accident that caused the plaintiff's injuries, the trial court found the plaintiff's portrayal of the evidence misleading, the court's instructions charged the jury to apply a preponderance of the evidence burden of proof, and the jury interrogatories expressly referred to the preponderance of the evidence standard.

Argued October 18—officially released December 20, 2016

Procedural History

Action to recover damages for personal injuries sustained as result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Graham*, *J.*, granted the motion to intervene as a plaintiff filed by Terracon Consultants, Inc.; thereafter, the intervening plaintiff filed a complaint for workers' compensation reimbursement; subsequently, the matter was tried to the jury before *Elgo*, *J.*; verdict for the defendants; thereafter, the court, *Elgo*, *J.*, denied the named plaintiff's motions to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the named plaintiff appealed to this court. *Affirmed.*

Juri E. Taalman, with whom, on the brief, were *Timothy Brignole* and *Joseph R. Serrantino*, for the appellant (named plaintiff).

Andrew S. Turret, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Jeffrey Ford,[1] appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendants, Saint Francis Hospital and Medical Center (hospital), Turner Construction Company, RJB Contracting, Inc., and R.J.B. Concrete Pumping, LLC.[2] The plaintiff claims that the court improperly (1) denied his motion to set aside the jury verdict, (2) failed to give the jury an instruction on res ipsa loquitur, (3) failed to adequately instruct the jury regarding the nondelegable duty owed to business invitees, (4) allowed evidence of an event that occurred

[1] Ford's employer, Terracon Consultants, Inc., intervened as a plaintiff in this case. Our references to the plaintiff in this opinion are to Ford only.

[2] Hereinafter, we refer to RJB Contracting, Inc., and R.J.B. Concrete Pumping, LLC, collectively as RJB.

subsequent to the incident at issue, and (5) denied his motion for a new trial although he demonstrated that the jury applied the wrong burden of proof. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The plaintiff, employed by Terracon Consultants, Inc., was injured at a construction site located on Woodland Street in Hartford, which is the hospital's principal place of business. The plaintiff brought a negligence action against the defendants, claiming that they were the owner, general contractor, and subcontractors for the construction project, for their alleged failure to maintain safe work conditions at the site. At trial, the plaintiff testified that he sustained injuries to his shoulder and elbow when an employee of RJB dropped a bucket of concrete onto his arm from an elevated platform. The jury heard contradictory testimony, however, from the plaintiff's coworker, who testified that the plaintiff sustained his injuries while lowering the bucket of concrete to that coworker. Additionally, the plaintiff's employer testified that the plaintiff's version of the accident had been summarized in the employer's incident report. The plaintiff told his employer that he had lifted, rather than received, the bucket of concrete.

On December 23, 2014, the jury returned a verdict for the defendants. In the jury interrogatories, the first question was whether the plaintiff had proved by a preponderance of the evidence that the defendants were negligent. The jury responded "No," and it, therefore, was not necessary to answer the remaining questions addressed to comparative negligence and damages. The plaintiff filed a motion to set aside the verdict and a motion for a new trial on January 2, 2015. In his motion to set aside the verdict, the plaintiff claimed that the jury's verdict was not supported by the evidence. In his motion for a new trial, the plaintiff claimed "harmful juror error." The plaintiff alleged that

his counsel spoke with the foreperson of the jury after the trial, who indicated that the jurors "were not convinced that the defendants did anything wrong." On the basis of that statement, the plaintiff argued that the jury had applied a "clear and convincing" burden of proof rather than the appropriate "preponderance of the evidence" standard.

The court held a hearing on the plaintiff's posttrial motions on February 9, 2015. On April 2, 2015, the court issued its memorandum of decision denying the plaintiff's motions. The court concluded that there were differing versions of how the accident occurred and that the jury could have found that the plaintiff's testimony was "neither reasonable nor credible." Further, the court stated that "[t]he plaintiff's portrayal of the evidence . . . is misleading." With respect to the claim of juror error, the court, quoting from case law, stated that "[t]here is a presumption of regularity in civil proceedings including jury deliberations. . . . A court cannot resort to assumptions and conjecture when analyzing the basis of a jury's verdict." (Internal quotation marks omitted.) This appeal followed.

We address only the claim that the trial court improperly failed to grant the plaintiff's motion for a new trial on the basis of his assertion that the jury applied the wrong burden of proof.[3] This claim merits discussion because it is a baseless attack on the jurors, who devoted several days of service to this particular trial.

First, we note it is well established that "the testimony of jurors cannot be received to set aside a verdict on the ground of mistake or misconduct on the part of the jurors." (Internal quotation marks omitted.) *Aillon* v.

[3] We have considered the plaintiff's other claims of error, and, upon a careful review of the record and briefs and affording the appropriate scope of review to all of the claims of error raised by the plaintiff in his remaining four challenges, we find no merit to these claims.

State, 168 Conn. 541, 549, 363 A.2d 49 (1975).[4] "[T]he various policies behind the rule [are] to give stability to the verdicts of jurors, to minimize the temptation for jury-tampering, and to prevent inquisition into the arguments and reasoning of the jurors that go into their ultimate verdict." Id., 550.

We next address the plaintiff's specific allegation of "juror error." The plaintiff's counsel, after representing that he spoke with the jury foreperson after the trial, attributes a statement to her that the jury was "not convinced that the defendants did anything wrong." There is no indication as to whether this conversation occurred immediately after the verdict, while the jurors were still present in the courthouse, or days later. Further, there is no affidavit or other documentary evidence with respect to the exact words used by the foreperson in responding to the questions of the plaintiff's counsel. The plaintiff also did not request an evidentiary hearing.

Instead, the plaintiff claims that this one alleged statement demonstrates that the jury employed a "clear and convincing" burden of proof rather than the appropriate "preponderance of the evidence" burden of proof. As support for this claim, the plaintiff argues that the only conclusion that could have been reached based on the evidence at trial was that an employee of RJB dropped a bucket of concrete onto the plaintiff's arm. As previously noted, however, there was contradictory evidence presented at trial as to how the accident occurred and, as noted by the trial court, "[t]he plaintiff's portrayal of the evidence . . . is misleading." We further note that the court's instructions charged the jury to

[4] Historically, the Supreme Court's rule was to preclude *any* juror testimony in impeachment of a verdict. Our Supreme Court moved away from a complete prohibition against such testimony and allows the taking of testimony concerning irregularities and misconduct extraneous to the mental operations of the jury. See *Sawicki* v. *New Britain General Hospital*, 302 Conn. 514, 523–24, 29 A.3d 453 (2011).

apply a preponderance of the evidence burden of proof,[5] and the jury interrogatories expressly refer to the preponderance of the evidence burden of proof.

We fully appreciate counsel's duty to zealously advocate for his client. Here, however, the present claim of juror error is speculative at best, and there is no appreciable factual or legal support for this claim. It is important to recognize the importance of jurors to our judicial system. The Judicial Branch has published "Your Guide to Jury Service" for prospective jurors.[6] In that guide, Chief Justice Chase T. Rogers makes the following comments: "Whether or not you are selected to serve on a case, you are fulfilling a vital role in the judicial process by being a part of the pool of jurors. A large jury pool is the best guarantee of the Judicial Branch's ability to provide fair and impartial jurors in our courtrooms . . . . We recognize that jury service interrupts other important obligations in your life and we greatly appreciate the sacrifice that jury service often entails. Please know that our jury system is possible because people like you are willing to serve. We are grateful for your participation and we will do everything we can to make your service pleasant, interesting and meaningful." Attacks directed at juries, such as the one in the present case, could have the effect of chilling juror participation.

For these reasons, we disapprove of the plaintiff's challenge to the integrity of the jury in this case when the basis for such a claim is nothing more than sheer speculation. This claim, like the other four claims, is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

[5] "Absent evidence to the contrary, a jury is presumed to have followed the court's instruction." *Baranowski* v. *Safeco Ins. Co. of America*, 119 Conn. App. 85, 91, 986 A.2d 334 (2010).

[6] The guide can be accessed on the Judicial Branch website at https://www.jud.ct.gov/Publications/ja005.pdf (last visited December 6, 2016).

STATE OF CONNECTICUT *v.* RUFFINO FERNANDEZ (AC 38088)

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

Syllabus

Convicted of the crimes of risk of injury to a child, sexual assault in the second degree, and sexual assault in the fourth degree, arising out of several incidents in which the defendant touched the intimate parts of the twelve year old victim in the basement of his store, the defendant appealed to this court. *Held*:

1. The trial court did not abuse its discretion by denying the defendant's request to make a missing witness argument during his closing remarks regarding the state's failure to call the victim's sister to testify, the defendant having failed to make an adequate offer of proof that the sister was available to testify or that her testimony would have been detrimental to the state's case: the defendant's offer of proof was based on mere speculation that the state's failure to call the victim's sister as a witness to bolster the credibility of another witness, D, who testified pursuant to a plea agreement, meant that the sister's testimony would not have been helpful to the state, which was an insufficient basis for the court to allow a missing witness argument, especially since D testified that the sister only saw the victim ascend the basement stairs of the store with the defendant, an event that was collateral to the charged conduct, and D testified to other events that did not involve the presence of the sister; furthermore, the defendant's conclusory statement before the trial court that the sister was available to testify was unsupported by the facts regarding her living arrangements that he argued on appeal.
2. This court found unavailing the defendant's claim that a certain alleged impropriety during the prosecutor's closing argument deprived him of a fair trial: the prosecutor's comment that there was a "likelihood" that the defendant's conduct in digitally penetrating the victim could have resulted in her contracting a sexually transmitted disease, and thus was conduct likely to impair her health pursuant to the risk of injury statute (§ 53-21 [a] [2]), did not deprive the defendant of his right to a fair trial, as the prosecutor also argued that the defendant's conduct was likely to impair the victim's morals pursuant to that statute; furthermore, the remark regarding impairment of the victim's health was isolated and not severe, as the prosecutor immediately clarified the remark, and the state's case was sufficiently strong so as to not be overshadowed by that comment.
3. The defendant's unpreserved claim that the trial court's statements to the victim during her testimony before the jury deprived him of a fair trial before an impartial tribunal failed under the third prong of *State* v. *Golding* (231 Conn. 233), as the alleged constitutional violation did

not exist; the court's statements to the victim during her testimony, where she had difficulty responding verbally to certain questions regarding where the defendant touched her, which included, "take your time, I know this is difficult," and "you don't have to be nervous," were an attempt by the court to elicit testimony from a young witness and did not imply that the victim was credible or that the defendant had done anything wrong.

Argued October 25—officially released December 27, 2016

Procedural History

Substitute information charging the defendant with aggravated sexual assault of a child, risk of injury to a child, unlawful restraint in the second degree, conspiracy to commit risk of injury to a child, 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 *Kwak*, *J.*; thereafter, the state withdrew the charge of conspiracy to commit risk of injury to a child, and the court granted the defendant's motion for a judgment of acquittal as to the charge of aggravated sexual assault of a child; verdict and judgment of guilty of risk of injury to a child, sexual assault in the second degree and sexual assault in the fourth degree, from which the defendant appealed to this court. *Affirmed.*

Richard S. Cramer, for the appellant (defendant).

Kathryn W. Bare, 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

KELLER, J. The defendant, Ruffino Fernandez, appeals following his conviction of one count each of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), and sexual

assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (B). The defendant claims that (1) the trial court abused its discretion by not permitting him to make a missing witness argument during closing remarks; (2) the state committed prosecutorial impropriety by basing part of its closing argument on facts not in evidence; and (3) he was deprived of his rights to an impartial tribunal and a fair trial when the trial court made comments in front of the jury that bolstered the credibility of the victim. We disagree with the defendant and affirm the judgment of conviction.

The jury could reasonably have found the following facts. During the relevant time period, the defendant owned and operated Keithbel Market, a grocery store on Zion Street in Hartford. Nearby lived J,[1] then twelve to thirteen years old, along with her family. A family friend, Wilnelia "Wendy" David, also lived with J's family for a period of time, and, thereafter, in another apartment in the same building.

Prior to the events in question, David developed an arrangement with the defendant whereby she had sex with him in the basement of the market in exchange for cash or diapers for her son. Between September and December, 2012, David brought J along with her during visits to the market. On approximately four of these occasions, the defendant brought J down to the basement of the market and sexually assaulted her. David observed at least one of these assaults. During some or all of these incidents, the defendant touched and kissed J's breasts under her clothes; touched her buttocks over her clothes; and digitally penetrated her vagina. After at least some of these incidents, the defendant gave J money.

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and 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.

David was charged as an accessory to risk of injury to a child in violation of § 53-21 (a) (2). In exchange for a sentence of five years in prison and five years of special parole (the maximum time to which she was exposed was twenty years), David testified against the defendant.

After a four day trial, the jury found the defendant guilty of the three counts set forth previously. The court, *Kwak*, *J.*, sentenced the defendant to a total effective sentence of forty years to serve, followed by five years of special parole, and registration for life as a sex offender. Additional facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion by not permitting him to make a missing witness argument during his closing remarks. We are not persuaded.

The following additional facts are relevant to our discussion. At trial, David testified that on one occasion she "lost track" of J during one of their visits to the defendant's store. At the time, David was joined by J's sister. David and J's sister called out for J in an attempt to locate her. David and J's sister eventually observed J, followed by the defendant, coming up the basement staircase of the market.

The defendant requested leave from the court to make a missing witness argument during closing remarks. See *State* v. *Mungroo*, 104 Conn. App. 668, 677, 935 A.2d 229 (2007), cert. denied, 285 Conn. 908, 942 A.2d 415 (2008). Specifically, the defendant wished to argue that the state's failure to call J's sister to testify in corroboration of David's testimony that both observed J and the defendant ascending the basement staircase suggested that J's sister's testimony would be detrimental to the state's case. The defendant argued

that because David had, in the defendant's words, "credibility issues," it would have been natural for the state to call J's sister to bolster David's testimony. Thus, according to the defendant, he should have been permitted to ask the jury to draw an adverse inference from the absence of such testimony. The court denied the defendant's request, reasoning that the defendant's offer of proof was mere speculation.

The following legal principles govern our resolution of this claim. "We review the court's decision allowing the [defendant] to include a missing witness argument in [his] closing argument for abuse of discretion. . . . It is within the discretion of the trial court to limit the scope of final argument. . . . The broad discretion vested in trial courts by [*State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999) (setting forth requirements for making missing witness argument), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000)] mirrors the general standards regarding the trial court's ability to limit closing argument. [T]he scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations. . . . We first determine whether the trial court abused its discretion in light of the information before the court when it ruled on the motion. If there was such an abuse of discretion, the reviewing court must determine whether the defendant has established that, in light of the totality of evidence at trial and the trial court's subsequent instructions to the jury, the impropriety constituted harmful error." (Internal quotation marks omitted.) *State* v. *Campbell*, 149 Conn. App. 405, 419, 88 A.3d 1258, cert. denied, 312 Conn. 907, 93 A.3d 157 (2014).

"Under the sixth and fourteenth amendments to the United States constitution, a criminal defendant has a constitutionally protected right to make a closing

argument. That right is violated 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. . . .

"In [*State* v. *Malave*, supra, 250 Conn. 739], our Supreme Court abandoned, in criminal cases, the [rule of *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 165 A.2d 598 (1960)], also known as the missing witness rule, which sanctioned, under certain circumstances, a jury instruction that an adverse inference may be drawn from the failure of a party to produce a witness. Although our Supreme Court abandoned the *Secondino* rule, it did not intend to prohibit counsel from making appropriate comment, in closing arguments, about the absence of a particular witness, insofar as that witness' absence may reflect on the weakness of the opposing party's case. . . . Comments in closing argument that do not directly exhort the jury to draw an adverse inference by virtue of the witness' absence do not necessarily fall under the ambit of *Secondino* . . . and accordingly are not forbidden by *Malave*. Our Supreme Court further provided that [o]f course, the trial court retains wide latitude to permit or preclude such a comment, and may, in its discretion, allow a party to adduce additional evidence relative to the missing witness issue. . . .

"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 matters that might prejudice its deliberations. . . . While 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. . . .

"A missing witness argument is appropriate in limited circumstances. Counsel may only invite the jury to draw reasonable inferences on the basis of facts in evidence, and the court's exercise of discretion as to whether to permit such argument is dependent on the facts made known to it. For this reason, it is necessary for counsel, through facts and argument, to justify a request to make a missing witness argument. Our decisional law reflects, for example, that defense counsel should explain how the state's decision not to call [a person as a witness] exposed a weakness in the state's case and should make an offer of proof regarding the substance of [such person's] potential testimony. . . . Stated otherwise, *counsel must demonstrate that such witness was available to testify, set forth the substance of the testimony that such witness would have given had he been called to the witness stand and explain how his testimony would have been detrimental to the state's case.* Evidence that would have been merely cumulative or of no consequence to a reasonable assessment of the state's case, for example, would not warrant such an argument." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Mungroo*, supra, 104 Conn. App. 675–77.

The defendant argues on appeal that the court abused its discretion by precluding his missing witness argument because he established at trial that J's sister was available to testify, and that he sufficiently articulated the substance of such testimony and how it would have been detrimental to the state's case. See id., 677. We disagree for the reasons set forth below.

As to J's sister's availability as a witness, the defendant argued before the trial court that "the law as it stands suggests that she was apparently available to

both sides, and I could have called her if I wished to raise this point." In denying the defendant's request to make the missing witness argument, the court did not specifically address the issue of J's sister's availability. On appeal, the defendant points to the fact that "[J's sister] was still a teenager at the time of trial and lived in the same apartment building as her mother, who testified, and as [J]." The defendant continues: "As a family member, there should be little doubt that the state either knew or could have readily found this witness through the cooperation of [J], her brother, also a witness, or [J's] mother or father who also testified. Defendant, in order to secure his right to make the argument, need not show that he himself knows exactly where this witness was at the time of trial. The state allegedly did not know. But there was no question it could have readily found that out."

We emphasize that, in order to succeed on a request to make a missing witness argument, "it is necessary for counsel, *through facts and argument*, to justify [such] request . . . ." (Emphasis added.) *State* v. *Mungroo*, supra, 104 Conn. App. 677. We conclude that the defendant's offer of proof at trial did not sufficiently establish that J's sister was available to testify. The defendant presented nothing to the trial court concerning the availability of J's sister other than a conclusory statement that she was available and that the defendant "could have called her if I wished to raise this point." The defendant points now to evidence of J's sister's living arrangements at the time of the assaults to suggest that the state could have obtained her testimony without difficulty, but that is simply not the argument that the defendant made before the trial court.[2] In light of

[2] For this reason we also reject the defendant's analogy to *State* v. *Daniels*, 180 Conn. 101, 429 A.2d 813 (1980). In *Daniels*, the defendant objected to the state's missing witness argument on the ground that the availability of the witness was not established. Id., 107. On trial for sexual assault, the defendant in *Daniels* testified in his own defense that he was asleep in bed with another woman at the time the assault was alleged to have occurred.

such dearth of information, we reject the defendant's argument that his offer of proof adequately demonstrated that J's sister was available to testify.

We are likewise not persuaded that the defendant adequately set forth the substance of J's sister's testimony and how it would have been detrimental to the state's case. As previously explained, the defendant's argument to the court appears to have proceeded as follows: David, it is claimed, had serious credibility problems as a witness; therefore, the state needed to bolster her credibility by presenting J's sister as a corroborating witness; consequently, the fact that the state did not present J's sister's testimony suggests that such testimony would have harmed the state's case. The defendant, as he must, argues much the same upon appeal. See *Janusauskas* v. *Fichman*, 264 Conn. 796, 807, 826 A.2d 1066 (2003) ("a party may not try its case on one theory and appeal on another" [internal quotation marks omitted]).

The court did not abuse its discretion by precluding the defendant's missing witness argument on the ground that his offer of proof was based on mere speculation. Aside from hypothesizing that J's sister's testimony would not be "helpful" to the state, the defendant provided no actual information as to the expected content of the testimony or its prejudicial impact on the

Id. During cross-examination of the defendant, the state asked if he knew where this purported alibi witness was. Id., 110. The defendant responded, "She's home, I guess." (Internal quotation marks omitted.) Id. Our Supreme Court concluded that such testimony was sufficient to support a finding by the jury that the missing witness was available to testify. Id. The defendant in the present appeal argues that *Daniels* establishes that "the party seeking permission to make the missing witness argument need not show certainty of the availability of the witness when a family is involved." In the present case, the defendant not only failed to show, in his words, "certainty" that J's sister was available to testify, but failed to provide any factual basis at all in support of such conclusion. *Daniels*, therefore, is unavailing to the defendant.

state's case. "Where, as here, a defendant's claimed entitlement to make a missing witness argument rests on mere speculation, the court's exercise of discretion in denying permission to make such argument does not reflect an abuse of its discretion." *State* v. *Mungroo*, supra, 104 Conn. App. 678–79; see also *State* v. *Graham*, 67 Conn. App. 45, 49, 787 A.2d 11 (2001) (trial court did not abuse discretion in precluding missing witness argument because defendant "offered only a blanket statement that [the witness'] failure to testify demonstrated a weakness in the state's case"), cert. denied, 259 Conn. 911, 789 A.2d 996 (2002).

Put simply, the defendant's argument that the state's failure to put forth the testimony of J's sister suggests that such testimony would have been harmful to the state's case does not appear to us to be a "reasonable inference" based on the record. See *State* v. *Mungroo*, supra, 104 Conn. App. 677 ("[c]ounsel may only invite the jury to draw reasonable inferences on the basis of facts in evidence"). We conclude so for two reasons. First, contrary to the defendant's contention, we do not view David's testimony as particularly in need of corroboration. The defendant asserts that David "testified with considerable baggage" and that "[h]er testimony was replete with inconsistencies and admitted discrepancies." The defendant, however, did not identify any alleged inconsistency or discrepancy at trial, nor does he do so on appeal. The defendant does point to the fact that David testified against the defendant in exchange for a more lenient sentence as damaging to her credibility. He elides the fact, however, that were David to lie during her testimony, pursuant to her plea agreement with the state, she would have faced up to twenty years in prison. The existence of the plea agreement alone does not appear to us to warrant concluding that the testimony of J's sister would have been harmful to the state's case.

Second, we do not see the particular import of casting doubt on the event that David described—namely, that she and J's sister observed J and the defendant ascending the market's basement staircase. In other words, such event was simply not so central to the state's case that a failure to call J's sister to corroborate it suggests that her testimony would have been harmful to the state. For one, David's testimony about the staircase scene did not describe any sexual acts by the defendant. Additionally, David recounted an entirely separate incident during which she observed the defendant licking J's breasts. There is no indication that J's sister was present during that event. Finally, J testified that the defendant assaulted her approximately four times in the basement of the market, further suggesting that discrediting David's testimony about the staircase scene (which, again, did not describe any sexual contact) would not have cut to the heart of the state's case. In light of the foregoing, we fail to see how the defendant's argument that J's sister's testimony would have been harmful to the state's case is a "reasonable inference" based on the record. Accordingly, we conclude that the trial court did not abuse its discretion in precluding such argument.[3]

[3] We briefly dispose of two ancillary arguments made by the defendant:

The defendant first argues that "[t]he state's claim that [J's] sister would be cumulative to the testimony of [David] is simply no basis for the court to have denied the motion." The premise of this argument is belied by the record. The trial court did not deny the defendant's request because it concluded that J's sister's testimony would be cumulative. Rather, the court denied the request because the defendant's offer of proof was speculative. The defendant's reliance on *State* v. *Saunders*, 114 Conn. App. 493, 969 A.2d 868, cert. denied, 292 Conn. 917, 973 A.2d 1277 (2009), is misplaced. In *Saunders*, this court declined to review the merits of the defendant's missing witness argument claim, concluding that it was unpreserved. Id., 504. We decline to revisit *Saunders* here.

Second, the defendant argues that J's sister's testimony was critical to the state's case, and therefore merited a missing witness argument, because there was evidence adduced at trial that, during a police interview with the defendant prior to trial, the defendant explicitly denied that any minors had been in the market's basement. The defendant argues in part: "It would

II

The defendant next claims that the state committed prosecutorial impropriety by basing part of its closing argument on facts not in evidence. We find no error with respect to this claim.

The following additional facts are relevant to our discussion. As previously noted, the defendant was charged with and convicted of, inter alia, one count of risk of injury to a child in violation of § 53-21 (a) (2). Section 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 . . . (C) a class B felony . . . ." (Emphasis added.)

At trial, the state called as an expert witness Audrey Courtney, a pediatric nurse practitioner at Saint Francis Hospital. Courtney testified that she had performed child abuse evaluations since 1990 and had examined child abuse victims who reported digital penetration. Courtney further testified that she had observed sexually transmitted diseases among children who had reported solely digital penetration.

During closing remarks, the state, in arguing for conviction under § 53-21 (a) (2), stated: "[T]he last element of [§ 53-21 (a) (2)] is that it's likely to impair the health

appear . . . that the only witness who could . . . partially refute the defendant's exculpatory statement was [J's] sister." This argument fails for two reasons. First, the defendant did not make this particular argument before the trial court. Second, the defendant's interview statement is a peripheral matter. The defendant was not charged and convicted for merely bringing J down to the basement, but for sexually assaulting her there. It therefore does not appear to us to have been critical to corroborate David's testimony that she and J's sister observed J and the defendant ascending the market's basement staircase.

or morals of a child. . . . Morals, that's for you to decide in the more general sense of a fifty-something year old man doing this to a thirteen year old child.

"But with respect to health, I would say you had actually some more specific information, which [was] Audrey Courtney coming in and talking about the idea that even through digital penetration there is a likelihood—she has seen cases where there's been a disclosure of simply digital penetration which resulted in gonorrhea, HIV, herpes, the like, sexually transmitted diseases among children. Again, the state doesn't have to show she has any of those diseases, just that the actions of the defendant are such that the impairment of health would be likely based on his actions."

The defendant argues that the state committed prosecutorial impropriety because Courtney's testimony did not support the state's contention that digital penetration by itself would likely result in the transmission of sexually transmitted diseases. According to the defendant, "Courtney's testimony did not state there was a likelihood nor even implied it nor was there any basis for the jury to infer it. All the jury knew was that of the thousands of cases, some of the children had sexually transmitted diseases." We conclude that the state's comment did not deprive the defendant of a fair trial.

As a preliminary matter, we note that the defendant did not object to the preceding statements at trial. "It is well established law, however, 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 . . . the [occurrence] that he

now raises as [an instance] of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his [claim]. . . . 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." (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).

The following legal principles concerning prosecutorial impropriety govern our resolution of this claim. "Our jurisprudence concerning prosecutorial impropriety during closing argument is well established. [I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. Put differently, [impropriety] is [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 . . . . [O]ur determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include the extent to which the [impropriety] was invited by defense conduct or argument, the severity of the [impropriety], the frequency of the [impropriety], the centrality of the [impropriety]

to the critical issues in the case, the strength of the curative measures adopted, and the strength of the state's case. . . .

"A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. . . . Moreover, when a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Carrasquillo*, 290 Conn. 209, 222, 962 A.2d 772 (2009).

Assuming, without deciding, that the state's mention of the "likelihood" of contracting sexually transmitted diseases through digital penetration constituted prosecutorial impropriety, we conclude that the comment did not deprive the defendant of his right to a fair trial. The *Williams* factors guide our decision. See id. While the comment was not invited by defense counsel or argument, we find that the rest of the factors weigh in the state's favor. The severity of the comment was minimal—the state immediately corrected itself by stating that Courtney had merely *observed* cases in which child victims reporting solely digital penetration also suffered from sexually transmitted diseases. The frequency of the remark—it occurred once—was also minimal.

The remark was not critical to the state's case because the jury could have found the defendant guilty under § 53-21 (a) (2) on the alternative ground that his actions were likely to impair J's *morals*. See *State* v. *Romero*, 269 Conn. 481, 493, 849 A.2d 760 (2004) ("[o]nce the jury determined that . . . intercourse and mutual sexual touching took place . . . it is difficult to imagine a finding that this conduct could *not* be deemed likely—in the context of probably—to impair

[the nine year old victim's] morals" [emphasis in original]). In its closing remarks, the state explicitly argued for a guilty verdict based on the impairment of morals prong of § 53-21 (a) (2). The court instructed the jury as to this prong as well. "The jury [is] presumed to follow the court's directions in the absence of a clear indication to the contrary." (Internal quotation marks omitted.) *State* v. *Negron*, 221 Conn. 315, 331, 603 A.2d 1138 (1992).

As to curative measures taken by the court, while the court did not provide a curative instruction specifically in response to the state's comment because the defendant did not object to the remark at trial, the court instructed the jury that the statements and arguments of the attorneys were not evidence, and that "[i]f the facts as you remember them differ from the way the lawyers have stated them[,] your memory of them controls."

Finally, as to the strength of the state's case, we conclude that it was "sufficiently strong so as to not be overshadowed by the [state's comment]." *State* v. *Angel T.*, 292 Conn. 262, 293, 973 A.2d 1207 (2009). While the state's case as to the impairment of health prong of § 53-21 (a) (2) appears to us not to be particularly strong,[4] as previously explained, the jury could have found the defendant guilty under the statute on the alternative ground that his abuse of J was likely to impair her morals. Although the defendant argues that the jury could not have convicted him under the impairment of morals prong because the state's argument and the trial court's instructions as to that prong were, for

[4] Nothing from Courtney's testimony suggests to us that contraction of a sexually transmitted disease is a *likely* consequence of child sexual assault by means of digital penetration. At most, the testimony conveyed that a subset of children—whether it is 1 percent or 99 percent is unclear—reporting abuse solely in the form of digital penetration whom Courtney observed also suffered from a sexually transmitted disease.

various reasons, inadequate,[5] we find that not to be the case. Again, in closing argument, the state argued for conviction under both the health and morals prongs of § 53-21 (a) (2), and the judge instructed the jury as to both bases of liability as well. As to the evidence presented by the state, the jury heard the testimony of two eyewitnesses—J and David—who attested to the sexual abuse. J's father and brother testified as constancy of accusation witnesses. Three police officers who investigated the case also testified for the state. One officer testified that J accurately identified the defendant and David in photographic arrays. The officer also testified as to the defendant's statements and behavior during an interview the officer conducted during the investigation. According to the officer, although the defendant denied the allegations against him in the interview, he indicated that he had brought adult women down to the store's basement for sex. When the officer showed the defendant a picture of David, the officer observed the defendant's hand tremble. Another officer testified that, during his investigation of the allegations, he took photographs of the market, including of the market's basement. Those photographs were entered as trial exhibits. Certain photographs bore similarities to a picture J drew of the basement during an interview at Saint Francis Hospital about the allegations. In light of such evidence, the defendant himself

[5] The defendant argues that the state's comment on the likelihood of contracting sexually transmitted diseases by means of digital penetration so dominated the state's closing argument that the jury could have convicted the defendant under § 53-21 (a) (2) only on the basis of the impairment of J's health. The defendant also claims that the court's instructions to the jury were insufficient to apprise them of the impairment of morals prong of § 53-21 (a) (2). The defendant further contends that the court's instructions to the jury that they were "the sole judges of the facts" were insufficient because they did not convey that "statements by the prosecutor as to his *recollection* of the facts was not to be relied on." (Emphasis added.) For the reasons previously set forth in this opinion, we conclude that these arguments lack merit.

acknowledged in his appellate brief that "the jury had sufficient evidence from which it could have found that the defendant's actions were likely to impair the child's morals . . . ." The state's case for the impairment of morals under § 53-21 (a) (2)—sexual contact with a twelve to thirteen year old and paying her money afterwards—was strong enough to withstand the alleged impropriety. For the foregoing reasons, the *Williams* factors are unavailing to the defendant. Accordingly, the defendant cannot prevail on his claim of prosecutorial impropriety.

III

Finally, the defendant claims that he was deprived of his rights to an impartial tribunal and a fair trial when the trial court made comments in front of the jury that bolstered the credibility of the victim. We do not agree.

The following additional facts are relevant to our discussion. The state called J as a witness during the trial. When the state asked J where on her body the defendant had touched her, J was unwilling or unable to respond verbally, and was instead allowed to write certain anatomical terms on a piece of paper. When J failed to respond verbally to one such question, the trial court told J, "Take your time; I know this is difficult" and "You don't have to be nervous." Later in J's testimony, the court again told her, "I know it's difficult for you" and "I know this was very difficult."[6] All of these statements were made in front of the jury. The defendant did not object to them during the trial. He argues

[6] The defendant asserts in his appellate brief that the trial court also told J that it "understood why she was 'nervous and *distressed*' . . . ." (Emphasis added.) Although, as noted previously in this opinion, the trial court did tell J, "You don't have to be nervous," our review of the trial transcripts does not disclose, and the defendant has not identified through citation to the transcripts, an instance in which the court used the word "distressed" in this context.

on appeal that these statements deprived him of a fair trial and impartial tribunal because they bolstered J's credibility. According to the defendant, the court's comments conveyed to the jury that it believed J's allegations because the only reason it would be "difficult" for her to testify was if the allegations were true. "[I]n showing compassion to a witness and empathizing with the great difficulty which she had in testifying about her ordeal," the defendant argues, "[the court] blatantly enhanced her credibility in the minds of the jury." As the defendant did not object to the court's statements at trial, he pursues relief under *State* v. *Golding*, supra, 213 Conn. 233. We do not find the defendant's argument persuasive.

"To prevail on his unpreserved constitutional claim, the defendant must satisfy all four conditions set forth in *Golding*. He must show that (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. . . . Failure to satisfy any of the four conditions will cause the defendant's claim to 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Eason*, 116 Conn. App. 601, 603–604, 976 A.2d 797, cert. denied, 294 Conn. 902, 982 A.2d 646 (2009); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). In the present case, we conclude that the record is adequate to review the claim and that the claim is of constitutional magnitude

alleging violation of a fundamental right. We therefore proceed to *Golding*'s third prong.

The following legal principles pertaining to the judge's role in conducting a criminal trial guide our analysis. "While no precise theorem can be laid down, we have held that it is proper for a trial court to . . . [intervene] where the witness is embarrassed, has a language problem or may not understand a question." (Internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 652, 881 A.2d 1005 (2005); see also *State* v. *Graham*, 21 Conn. App. 688, 692–93, 575 A.2d 1057 ("[a] trial court has a discretionary right to intervene in the examination of witnesses where such intervention is necessary to clarify confusing testimony, restrain an obstreperous witness, or elucidate a witness' understanding of a question"), cert. denied, 216 Conn. 805, 577 A.2d 1063 (1990). "If the judge chooses to intervene in a criminal trial, such intervention must reach a *significant extent* and be adverse to the defendant to a *substantial degree* before risking impaired functioning of the finder of fact or the appearance of an impartial judge." (Emphasis added; internal quotation marks omitted.) *State* v. *Eason*, supra, 116 Conn. App. 605.

While there are perhaps more neutral ways of obtaining cooperation from a reluctant witness whose testimony is key to the case than stating "I know this is difficult" and "You don't have to be nervous" in the presence of the jury, we cannot say that such statements were so significant, and the harm to the defendant so substantial, as to deprive the defendant of a fair trial and an impartial tribunal. In our view, the court's statements did not imply that the court found J a credible witness or that the defendant had done anything wrong, but were, rather, an attempt by the court to elicit testimony from a young witness who was noticeably nervous while testifying. Moreover, in its instructions to the jury, the court cured any potential misapprehensions

by stating that "[y]ou should not be influenced by my actions during the trial . . . in questions to witnesses . . . . You are not to take my actions as any indication of my opinion as to how you should determine the issues of fact." As previously explained, "[t]he jury [is] presumed to follow the court's directions in the absence of a clear indication to the contrary." (Internal quotation marks omitted.) *State* v. *Negron*, supra, 221 Conn. 331. Consequently, we conclude that these comments did not deprive the defendant of his rights to a fair trial and an impartial tribunal.

The judgment is affirmed.

In this opinion the other judges concurred.

Note

Appellate Court Memorandum Decisions begin at page 901. Page numbers 876 to 900 are intentionally omitted.

Reporter of Judicial Decisions

MEMORANDUM DECISIONS

MILTON CAMPBELL *v.* COMMISSIONER OF CORRECTION
(AC 37892)

Alvord, Sheldon and Mullins, Js.

Argued October 5—officially released October 25, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Shah, J.*

Per Curiam. The appeal is dismissed.

DANNY LEE HINES *v.* COMMISSIONER OF CORRECTION
(AC 37908)

Lavine, Beach and West, Js.

Argued October 5—officially released October 25, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger, J.*

Per Curiam. The appeal is dismissed.

CITIMORTGAGE, INC. *v.* MARGARETTE CHARLES ET AL.
(AC 36206)

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

Argued October 6—officially released October 25, 2016

Defendant's appeal from the Superior Court in the judicial district of Fairfield, *Tyma, J.*

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

LYNN GOLD *v.* KELLY PETROPULOS ET AL.
(AC 37611)

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

Submitted on briefs October 13—officially released November 1, 2016

Plaintiff's appeal from the Superior Court in the judicial district of Fairfield, *Bellis*, *J.*

Per Curiam. The judgment is affirmed.

RETAINED REALTY, INC. *v.* EILEEN M. LENAHAN ET AL.
(AC 37587)

Sheldon, Mullins and Bear, Js.

Argued October 17—officially released November 8, 2016

Named defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Mintz*, *J.*; *Povodator*, *J.*

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

CHRISTOPHER CARRION *v.* COMMISSIONER OF CORRECTION
(AC 38794)

Sheldon, Mullins and Bear, Js.

Argued October 17—officially released November 8, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger*, *J.*

Per Curiam. The appeal is dismissed.

JOSEPH ANCONA *v.* COMMISSIONER
OF CORRECTION
(AC 37357)

Lavine, Beach and Bishop, Js.

Argued October 17—officially released November 8, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger*, *J.*

Per Curiam. The appeal is dismissed.

FC STRATFORD TOD, LLC *v.* TOWN
OF STRATFORD ET AL.
(AC 38266)

Keller, Prescott and Mullins, Js.

Submitted on briefs October 20—officially released November 8, 2016

Defendants' appeal from the Superior Court in the judicial district of New Britain, *Hon. Arnold W. Aronson*, judge trial referee.

Per Curiam. The judgment is affirmed.

CLIFF BROWN *v.* COMMISSIONER
OF CORRECTION
(AC 37583)

Beach, Sheldon and Flynn, Js.

Argued October 20—officially released November 15, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver*, *J.*

Per Curiam. The judgment is affirmed.

JERMAINE JONES *v.* COMMISSIONER OF CORRECTION
(AC 38199)

Alvord, Sheldon and Prescott, Js.

Submitted on briefs October 24—officially released November 15, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger*, *J.*

Per Curiam. The appeal is dismissed.

STATE OF CONNECTICUT *v.* GLEN GUILD
(AC 37651)

Lavine, Prescott and Bishop, Js.

Argued October 25—officially released November 22, 2016

Defendant's appeal from the Superior Court in the judicial district of Fairfield, geographical area number two, *Doyle*, *J.*

Per Curiam. The judgment is affirmed.

RANDY VIRGO *v.* COMMISSIONER OF CORRECTION
(AC 38276)

Lavine, Prescott and Bishop, Js.

Submitted on briefs October 25—officially released November 22, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver*, *J.*

Per Curiam. The judgment is affirmed.

HOUSING AUTHORITY OF THE TOWN OF GREENWICH *v.* KENNETH DESHOMMES
(AC 37485)

Beach, Mullins and Lavery, Js.

Argued October 26—officially released November 22, 2016

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, Housing Session, *Rodriguez, J.*

Per Curiam. The judgment is affirmed.

DEBBY J. GIORDANO *v.* THE STOP AND SHOP SUPERMARKET COMPANY, LLC
(AC 38216)

Alvord, Prescott and Norcott, Js.

Argued October 26—officially released November 22, 2016

Plaintiff's appeal from the Superior Court in the judicial district of Ansonia-Milford, *Hon. Arthur A. Hiller*, judge trial referee.

Per Curiam. The judgment is affirmed.

BENJAMIN CRUZ *v.* COMMISSIONER OF CORRECTION
(AC 37669)

Alvord, Sheldon and Harper, Js.

Argued October 27—officially released November 22, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver, J.*

Per Curiam. The appeal is dismissed.

WINDHAM REALTY, LLC, ET AL. *v.* POND VIEW APARTMENTS LIMITED ET AL.
(AC 38598)

Alvord, Sheldon and Prescott, Js.

Submitted on briefs October 24—officially released November 22, 2016

Plaintiffs' appeal from the Superior Court in the judicial district of Fairfield, *Hon. Richard P. Gilardi*, judge trial referee.

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* DARNELL WALKER
(AC 37003)

Lavine, Alvord and Schaller, Js.

Argued November 14—officially released December 13, 2016

Defendant's appeal from the Superior Court in the judicial district of Tolland, *Graham, J.*

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* ALEXANDER BARBER
(AC 38329)

Beach, Mullins and Lavery, Js.

Argued November 14—officially released December 13, 2016

Defendant's appeal from the Superior Court in the judicial district of Hartford, *Suarez, J.*

Per Curiam. The judgment is affirmed. See *State* v. *Bryant*, 202 Conn. 676, 523 A.2d 451 (1987).

DONALD GIBSON *v.* COMMISSIONER
OF CORRECTION
(AC 37505)

Keller, Prescott and Harper, Js.

Submitted on briefs November 16—officially released December 13, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger*, *J.*

Per Curiam. The appeal is dismissed.

SHAWN ROBINSON *v.* COMMISSIONER
OF CORRECTION
(AC 38170)

Keller, Prescott and Harper, Js.

Argued November 16—officially released December 13, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver*, *J.*

Per Curiam. The judgment is affirmed.

MARIA DELGADO *v.* JOSE DELGADO
(AC 38014)

Alvord, Sheldon and Norcott, Js.

Submitted on briefs November 16—officially released December 13, 2016

Plaintiff's appeal from the Superior Court in the judicial district of New Haven at Meriden, *J. Fischer*, *J.*

Per Curiam. The judgment is affirmed.

VICTOR L. JORDAN, SR. *v.* COMMISSIONER OF CORRECTION
(AC 38409)

Alvord, Sheldon and Norcott, Js.

Argued November 16—officially released December 13, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver, J.*

Per Curiam. The judgment is affirmed.

GREGORY VALENTE *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 38560)

Alvord, Prescott and Mihalakos, Js.

Argued November 15—officially released December 13, 2016

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Schuman, J.*

Per Curiam. The judgment is affirmed.

GILBERTO GONZALEZ *v.* COMMISSIONER OF CORRECTION
(AC 38780)

Keller, Prescott and West, Js.

Argued November 29—officially released December 20, 2016

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Sferrazza, J.*

Per Curiam. The appeal is dismissed.
