STATE OF CONNECTICUT *v.* RICHARD A. HOUGHTALING (SC 19510)

Rogers, C. J., and Palmer, Eveleigh, Espinosa, Robinson and D'Auria, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of possession of marijuana with the intent to sell and possession of more than four ounces of marijuana, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly denied his motion to suppress certain evidence that the police seized from property he owned but leased to another individual, P, and his subsequent statement to the police. While conducting a marijuana eradication operation, the police observed numerous marijuana plants located on the property. During their search of the property, the police noticed two men, including P, inside a partially constructed greenhouse. After being administered *Miranda* warnings, P indicated to the police that he was leasing the property and gave the police consent to search it. Thereafter, the defendant, who was driving a van with another occupant, pulled into the driveway on the property, where unmarked police vehicles were parked, and then backed out very quickly and departed. After pursuing the van, the police questioned the defendant, handcuffed him, brought him and the other occupant back to the property, and gave them *Miranda* warnings. The defendant gave a statement to the police indicating that he had purchased the home the prior year, that he leased it to P and that he started helping P cultivate marijuana four to five months beforehand. The Appellate Court affirmed the judgment of conviction, concluding that the trial court properly denied the defendant's motion to suppress because he lacked a reasonable expectation of privacy in the property, the police were justified in stopping the defendant and conducting an inquiry as they had a reasonable and articulable suspicion that he had engaged in criminal conduct, and the police had probable cause to arrest him after they observed certain materials in the van similar to the materials being used to construct the greenhouse. On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the defendant lacked standing to challenge the warrantless search of the property because he lacked a subjective expectation of privacy therein: the defendant presented no evidence establishing the frequency and nature of his visits to the property or whether he retained the right to exclude others from all or part of the property, or any evidence indicating that he stayed at the property or otherwise continually used the property after leasing it to P, and the only evidence that may have connected the defendant to the property was a few pieces of mail and one personal item on the property, which

did not establish how often the defendant visited the property or the nature of his relationship therewith; moreover, the defendant could not prevail on his claim that he maintained a connection with the property by participating in P's marijuana grow operation, the defendant having failed to present sufficient evidence to establish the extent of his involvement with that operation.

2. The defendant could not prevail on his claim that his confession to the police was the fruit of the unlawful stop of the defendant in his van and his subsequent warrantless arrest: the police were justified in detaining the defendant to further inquire about his relationship to the property because they had a reasonable and articulable suspicion that the defendant was connected with the marijuana grow operation, as the police could have reasonably inferred from their experience and knowledge of the grow operation, and from the defendant's actions in light of the circumstances, that he was at least aware of, if not directly connected to, the activities occurring on the property; moreover, the defendant's interaction with the police after their stop of the van and the fact that the van contained, in the plain view of the police officers, materials resembling those used to build the greenhouse, which the officers had previously observed was under construction, were sufficient to establish probable cause to believe that the defendant was involved with P's marijuana grow operation and, thus, provided a basis on which to arrest the defendant.

State v. *Boyd* (57 Conn. App. 176), to the extent that it requires a defendant, in order to establish a subjective expectation of privacy in property, to show facts sufficient to create the impression that his relationship with the location was personal in nature, and was more than sporadic, irregular or inconsequential, and that he maintained the location and items within it in a private manner at the time of the search, overruled.

Argued March 29—officially released July 25, 2017

Procedural History

Substitute information charging the defendant with the crimes of possession of marijuana with the intent to sell and possession of more than four ounces of marijuana, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the court, *Riley*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court on a conditional plea of nolo contendere; judgment of guilty, from which the defendant appealed to the Appellate Court, *Gruendel*, *Beach* and *Alvord*, *Js.*, which affirmed the judgment

of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Richard Emanuel, with whom, on the brief, was *David V. DeRosa*, for the appellant (defendant).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Anne Mahoney*, state's attorney, and *Matthew Crockett*, senior assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. The primary issue in this certified appeal is whether the defendant, Richard Houghtaling, presented evidence sufficient to establish his subjective expectation of privacy in a residence he had leased to a third party. After the police found numerous marijuana plants during a search at the residence, the officers located and stopped the defendant and later arrested him. After his arrest, the defendant admitted he was aware of, and had provided some unspecified assistance with, the grow operation. The state later charged the defendant with certain drug related offenses. The defendant moved to suppress evidence gathered during the search and his subsequent statements to the police as the fruits of a warrantless and illegal search of the property, which he owned but had leased to a third party, Thomas Phravixay. He also claimed that the police had illegally stopped and arrested him. The trial court denied the defendant's motion, and he subsequently entered a conditional plea of nolo contendere. The Appellate Court affirmed the defendant's conviction; see *State* v. *Houghtaling*, 155 Conn. App. 794, 830, 111 A.3d 931 (2015); and we granted certification to appeal. *State* v. *Houghtaling*, 317 Conn. 919, 919–20, 118 A.3d 62 (2015). Because we agree with the Appellate Court that the defendant lacked standing to challenge the search, and that his detention and subsequent arrest

were lawful, we affirm the judgment of the Appellate Court.

The record reveals the following facts relevant to this appeal. On August 9, 2010, the Statewide Narcotics Task Force (task force)—comprised of federal, state, and local law enforcement officers—was conducting a marijuana eradication operation in the northeast corner of the state. The operation was comprised of two spotters who were patrolling the area in a helicopter and a ground team consisting of several members. The task force had performed marijuana eradication missions earlier in the day, and, shortly after noon, the helicopter team notified the ground team of a suspected large crop of marijuana at 41 Raymond Schoolhouse Road in the town of Canterbury (property). From the air, the spotters were able to see dozens of marijuana plants within a fenced-in pool area behind the house, as well as several plants along the outside of the fence. The ground team arrived at the property approximately thirty minutes later in separate, undercover and unmarked vehicles, which bore no resemblance to police vehicles.

The property consisted of 5.6 acres and was largely surrounded by dense forest. The only means of ingress and egress was a narrow dirt driveway more than 100 feet long and lined with trees on both sides. There were signs marked "No Trespassing" posted on trees along the driveway, and, about halfway down the driveway, there was a metal gate that could block the driveway but that was not closed. The ground team parked their vehicles in front of the gate, donned protective vests, which identified them as police officers, and proceeded to the front door of the house on foot. As the members of the ground team approached the home, they saw no occupant vehicles or persons, smelled nothing, and heard nothing. The officers knocked on the front door but received no answer.

The ground team then left the front door and proceeded toward the back door. The air team had told the ground team that, if they continued around the side of the house, they would see "a whole lot of marijuana right out in the open." Before reaching the back door, the officers saw a pool area with dozens of marijuana plants inside and additional plants surrounding the area. The officers then continued to search the property, including a greenhouse located behind the pool, near the rear of the property. As the police approached the greenhouse, they noticed it was still under construction. The ends of the structure had no side walls, and there were piles of lumber on the ground nearby. Inside the greenhouse, the police were able to see numerous marijuana plants and two men, one of whom was later identified as Phravixay.

Both of the men were given *Miranda*[1] warnings and agreed to answer questions. Phravixay told the officers he was renting the home and later gave the officers written consent to search the property. The search ultimately revealed more than 1000 marijuana plants.

While two members of the ground crew were returning to their vehicles to obtain an evidence kit, they noticed a white van pull into the driveway of the property, where the unmarked police vehicles were parked, and then reverse back into the street and depart "[v]ery quickly." The helicopter team also spotted the van enter the driveway and radioed the ground team to alert all of the officers concerning the van's presence. The officers were suspicious of the van, believing that its occupants might be involved in the marijuana grow operation, and decided to pursue the van. By the time the police got into a car, headed up the driveway after the van, and arrived out on the road, the van was already

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

parked at the side of the road, approximately one tenth of one mile away, facing back toward the driveway.

The officers drove to the location where the van was parked, exited their vehicle, and approached the van. The officers had drawn their weapons for their safety because, as the trial court noted, those involved in drug dealing often possess firearms. The van was occupied by two males—the defendant was in the driver's seat and another person sat in the passenger seat. Upon determining that the occupants of the van posed no threat, the officers holstered their weapons and asked the defendant for identification. When the officers asked the defendant why he had pulled into the driveway and then left abruptly, he stated that he was going to visit a friend but left when he saw that the driveway was full of cars he did not recognize. As the trial court found, the defendant's answers to the officers' questions were evasive, and, although he claimed to be visiting a friend, he would not name the friend. While the police were questioning the defendant, they were able to observe from outside the van that it contained lumber and irrigation piping similar to that which was used to construct the greenhouse. The officers then handcuffed the defendant and the passenger, and brought them back to the property.

Upon arriving back at the property, the police advised the defendant of his *Miranda* rights. The defendant at first refused to speak with the police but then agreed to once the officers told him that Phravixay had consented to their search of the property, that they had found mail with the defendant's name on it in the house and in the mailbox, and that Phravixay had identified the defendant as the homeowner and the person who leased the property to him. The defendant told the officers he had purchased the home in the prior year but could not afford the mortgage payments, so, to help cover his expenses, he leased the property to Phravixay,

whom he had known for several years. The defendant said Phravixay had paid rent only periodically, and the defendant had been helping Phravixay cultivate marijuana for the previous four or five months to "recoup some of [his] money." Although the defendant said he was helping with the cultivation, he stated that, "up until [that day, he] didn't realize the extent of the grow operation. I own my own business and didn't really think much of what was going on at the house . . . ."

The defendant initially was charged with numerous drug related offenses,[2] and he moved to suppress "(1) all evidence seized by law enforcement officers in connection with the warrantless search and seizure conducted at [the] property on August 9, 2010; (2) all statements made by [the defendant] and others, including . . . Phravixay, as a result of the illegal search and seizure; and (3) the fruits of any and all other evidence obtained, derived or developed as a result of the illegal search and seizure and illegally obtained statements . . . ." The defendant claimed that the court must suppress this evidence because the police had violated his fourth amendment rights when they failed to obtain a warrant before searching the property and when they detained him in his van, which he claims was done without reasonable suspicion that he had engaged in criminal activity.

At the hearing on the motion to suppress, the state called three police officers to testify about their actions and observations during the search and seizure. The defendant called one witness, another police officer. After the witnesses testified, the state argued that the defendant had failed to establish his subjective expectation of privacy because all of his personal property was

[2] The defendant initially was charged with the production and preparation of a controlled substance without a license, possession of more than four ounces of marijuana, the sale of illegal drugs, and the operation of a drug factory.

in the city of Danbury, where he lived with his wife and family, and the defendant had failed by any other conduct to demonstrate a subjective expectation of privacy in the property where the search occurred. Defense counsel responded by arguing that the defendant's ownership of the property alone was sufficient to establish standing. He argued that the state was trying to get around this fact by making a "hyper-technical argument on standing . . . ."

The trial court agreed with the state and denied the defendant's motion to suppress the evidence seized from the search of the property and the defendant's statements to the police. The trial court concluded that the defendant had failed to establish that he had a subjective expectation of privacy in the property. The court also found that the police possessed a reasonable and articulable suspicion sufficient to justify stopping the defendant's van after he entered and quickly exited the driveway. Lastly, the trial court concluded that the officers had probable cause to arrest the defendant. The defendant then entered a conditional plea of nolo contendere.[3]

The defendant appealed to the Appellate Court from the judgment of conviction, claiming that the trial court's denial of his motion to suppress was improper because "(1) he had a reasonable expectation of privacy in the area searched, including the home and the area surrounding it, (2) his fourth amendment rights were violated by the warrantless search conducted by the . . . task force, [and] (3) the police lacked a reasonable and articulable suspicion to conduct a motor vehicle stop of the van operated by the defendant, and his resulting arrest was unsupported by probable cause . . . ." (Footnote omitted.) *State* v. *Houghtaling*, supra,

[3] The defendant pleaded guilty to possession of marijuana with the intent to sell, and possession of more than four ounces of marijuana.

155 Conn. App. 797. The Appellate Court rejected all of these claims. Id., 800, 808, 818, 823.

Specifically, the Appellate Court concluded that the defendant's first two claims failed because he lacked a reasonable expectation of privacy.[4] Id., 808. The Appellate Court determined that the defendant failed to establish his subjective expectation of privacy because he did not sufficiently develop his personal relationship with the property at the suppression hearing. See id., 803. The defendant argued that he was a cooccupant of the property and cited three facts to support this contention: (1) he leased the property to Phravixay for less than his monthly mortgage payment; (2) he received and stored items on the premises; and (3) he received some mail at the property. Id.

The Appellate Court determined that the fact that Phravixay's rent was less than the defendant's mortgage established nothing about the manner in which he retained rights to use the property, or if he retained them at all. Id. Moreover, although the defendant claimed that he received and stored property on the premises, he identified only a single item of his at the property—an aeration system addressed to him at his Danbury residence. Id., 804. The court did not find that the presence of a single piece of property established that the defendant was a cotenant. See id. Finally, the Appellate Court concluded that the presence of " 'some mail' "; id.; did not establish that the defendant lived at the property or otherwise was there frequently. See id.

The Appellate Court also concluded that the police possessed a reasonable and articulable suspicion that

[4] The Appellate Court relied on the three part test set forth in *State* v. *Boyd*, 57 Conn. App. 176, 185, 749 A.2d 637, cert denied, 253 Conn. 912, 754 A.2d 162 (2000). See *State* v. *Houghtaling*, supra, 155 Conn. App. 802–808. Although we agree with the Appellate Court's ultimate conclusion, we conclude that the factors the court in *Boyd* considered do not properly measure a defendant's subjective expectation of privacy. See part I B of this opinion.

the defendant had engaged in criminal conduct. Id., 818. The Appellate Court determined that, on the basis of the totality of the circumstances, including the spatial and temporal link between the *Terry*[5] stop and the investigation of the felony in progress (the marijuana grow operation), as well as the defendant's act of entering and quickly leaving the property, the police were justified in stopping the defendant. Id., 813–16, 818. The Appellate Court also determined that the police had probable cause to arrest the defendant after they observed lumber and irrigation piping in the van similar to the materials being used to construct the greenhouse, demonstrating a probable connection between the defendant and the marijuana operation at the property. Id., 821–23.

The defendant appealed to this court from the judgment of the Appellate Court, and we granted certification on the following issues: (1) "Did the Appellate Court properly determine that the defendant did not have standing (a reasonable expectation of privacy) to challenge a search of residential premises that he owned but had leased at the time of the search?" *State* v. *Houghtaling*, supra, 317 Conn. 920. (2) "If the answer to the first question is in the negative, were all subsequent actions of the police—the *Terry* stop of the vehicle, the warrantless arrest, and the defendant's confession—the fruits of one or more preceding illegalities?" Id. (3) "If the answer to the first question is in the affirmative, did the Appellate Court properly determine that the *Terry* stop and warrantless arrest of the defendant were lawful, and that the resulting confession was lawfully obtained?" Id. We answer the first question in the affirmative, do not reach the second question, and answer the third question in the affirmative. We thus affirm the judgment of the Appellate Court.

When reviewing a trial court's denial of a motion to suppress, "[a] finding of fact will not be disturbed unless

[5] *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

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. . . . [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 [trial court's] memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). Accordingly, although we must defer to the trial court's factual findings, determining whether those findings establish standing is a question of law, over which we exercise plenary review. See, e.g., *State* v. *Gonzalez*, 278 Conn. 341, 348, 898 A.2d 149 (2006).

I

The defendant first claims that the Appellate Court incorrectly determined that he lacked standing to challenge the warrantless search of the property because he lacked a subjective expectation of privacy therein. We disagree.

A

The fourth amendment to the United States constitution protects individuals from unreasonable searches and seizures.[6] "The right of the people to be secure

[6] "The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)." *State* v. *Kelly*, 313 Conn. 1, 8 n.3, 95 A.3d 1081 (2014).

in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. The rights guaranteed by the fourth amendment are personal rights, and, therefore, only one " 'whose own protection was infringed by a search and seizure' " may enforce those rights. *Rakas* v. *Illinois*, 439 U.S. 128, 138, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). To challenge a search as unreasonable, a defendant must have standing. To establish standing, a defendant must show that he possesses a reasonable expectation of privacy in the area searched. See, e.g., *State* v. *Boyd*, 295 Conn. 707, 718, 992 A.2d 1071 (2010), cert. denied, 562 U.S. 1224, 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011).

To determine whether a person has a reasonable expectation of privacy in an invaded place or seized effect, that person must satisfy the *Katz* test. See *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). The *Katz* test has both a subjective and an objective prong: "(1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant." (Internal quotation marks omitted.) *State* v. *Jackson*, 304 Conn. 383, 395, 40 A.3d 290 (2012).

In analyzing the subjective prong of the *Katz* test, we look for actions or conduct demonstrating that the defendant sought to preserve the property or location as private. See, e.g., *Smith* v. *Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); see also

State v. *Boyd*, 57 Conn. App. 176, 185, 749 A.2d 637 ("a subjective expectation of privacy rests on finding conduct [through which a defendant] has demonstrated an intention to keep activities or things private and free from knowing exposure to others' view"), cert. denied, 253 Conn. 912, 754 A.2d 162 (2000). Although this prong is the "subjective" portion of the test, it does not rest solely on the defendant's actual beliefs. See *Smith* v. *Maryland*, supra, 741 n.5 (stating that, in some cases, normative inquiry rather than subjective expectations inquiry is proper); O. Kerr, "*Katz* Has Only One Step: The Irrelevance of Subjective Expectations," 82 U. Chi. L. Rev. 113, 114–15 (2015) (the subjective prong of *Katz* test was originally more akin to question of waiver—meant to summarize precedents on exposure to third parties—rather than question regarding defendant's actual belief). "The first part of the *Katz* test requires only . . . [a person's] conduct [to] have demonstrated an intention to keep activities and [property] . . . private, and that he did not knowingly expose [it] to the open view of the public." (Internal quotation marks omitted.) 1 W. LaFave, Search and Seizure (5th Ed. 2012) § 2.1 (c), p. 585; see also *United States* v. *Taborda*, 635 F.2d 131, 137 (2d Cir. 1980).

The trial court found that the defendant had failed to establish a subjective expectation of privacy in the property but also concluded that, even if he did, it was not one that society would recognize as reasonable. The Appellate Court determined that the defendant lacked a subjective expectation of privacy and therefore did not examine the objective prong of the *Katz* test. See *State* v. *Houghtaling*, supra, 155 Conn. App. 807–808.

To evaluate whether the defendant met his burden of establishing a subjective expectation of privacy, the Appellate Court relied on the three factor test set in *Boyd*. See id., 802–808. Specifically, the court in *Boyd* declared that a defendant "must show facts sufficient

to create the impression that (1) his relationship with the location was personal in nature, (2) his relationship with the location was more than sporadic, irregular or inconsequential, and (3) he maintained the location and the items within it in a private manner at the time of the search." *State* v. *Boyd*, supra, 57 Conn. App. 185.

We have not recently had occasion to review a decision that turns solely on the first, subjective prong of the *Katz* test, and specifically have not had occasion to consider whether the factors discussed in *Boyd* appropriately measure a particular defendant's subjective expectation of privacy. Although we agree with the Appellate Court's ultimate conclusion, upon reviewing these factors, and understanding that the Appellate Court panel appropriately considered itself bound by its own precedent in *Boyd*, we disagree with *Boyd*'s three factor test as articulated and thus overrule *Boyd* to the extent that it requires a defendant to meet its three factor test to establish his or her subjective expectation of privacy. We take this occasion to clarify the proper method of evaluating a defendant's subjective expectation of privacy.[7]

This court has not previously adopted a rigid test for determining a subjective expectation of privacy, and we decline to do so now. See, e.g., *State* v. *Davis*, 283

[7] We note that *Boyd*'s three factor test has been employed in only five Connecticut cases. In fact, only this case was decided solely on the basis of the subjective prong of the *Katz* test. See *State* v. *Houghtaling*, supra, 155 Conn. App. 802–808. The courts in all of the other cases either relied on the objective prong only, or on both the subjective and objective prongs of the *Katz* test, to reject the defendants' claims. See *State* v. *Braswell*, 145 Conn. App. 617, 642, 76 A.3d 231 (2013) (no objectively reasonable expectation of privacy), aff'd, 318 Conn. 815, 123 A.3d 835 (2015); *State* v. *Pierre*, 139 Conn. App. 116, 128 and n.7, 54 A.3d 1060 (2012) (same), aff'd, 311 Conn. 507, 88 A.3d 489 (2014); *State* v. *Lester*, Superior Court, judicial district of Litchfield, Docket No. CR-09-131899 (January 19, 2011) (no subjective or objective expectation of privacy); *State* v. *Kelly*, Superior Court, judicial district of Ansonia-Milford, Docket No. CR-06-61742 (January 8, 2009) (same).

Conn. 280, 324, 929 A.2d 278 (2007) ("the [reasonable expectation of privacy] test offers no exact template that can be mechanically imposed upon a set of facts to determine whether . . . standing is warranted" [internal quotation marks omitted]); cf. O. Kerr, "Four Models of Fourth Amendment Protection," 60 Stan. L. Rev. 503, 506 (2007) ("[t]he [United States] Supreme Court has not and cannot adopt a single test for when an expectation is 'reasonable' because no one test effectively and consistently distinguishes the more troublesome police practices that require [f]ourth [a]mendment scrutiny from the less troublesome practices that do not").

Our continuing decision not to adopt a rigid test for determining a defendant's subjective expectation of privacy stems from the fact that the *Boyd* factors are unsupported by relevant precedent. The court in *Boyd* cited *United States* v. *Gerena*, 662 F. Supp. 1218, 1235 (D. Conn. 1987), as support for its three factor test.[8] *State* v. *Boyd*, supra, 57 Conn. App. 185. In *Gerena*, the District Court began by articulating a generalized requirement for establishing a subjective expectation of privacy: "The defendant must show that he or she personally sought to preserve the particular location, and its contents, as private." *United States* v. *Gerena*, supra, 1234. The District Court then went on to describe what would become the *Boyd* factors: "A defendant satisfies [the subjective] prong of the test by alleging facts sufficient to create the impression that his or her relationship with the location was personal in nature; was more than sporadic, irregular, or inconsequential;

[8] The court also cited *State* v. *Mooney*, 218 Conn. 85, 96–97, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991), in support of its three factor test. *State* v. *Boyd*, supra, 57 Conn. App. 185. *Mooney*, however, dealt with the objective prong of the *Katz* test, not the subjective prong, and specifically disavowed mechanistic tests to determine whether a defendant had a legitimate expectation of privacy. See *State* v. *Mooney*, supra, 97.

and that the defendant maintained the location and the items within it in a private manner at the time of the search." Id., 1235. The District Court cited no precedent to support the use of these factors, let alone a reason why they would apply in every case. See generally id. Rather, that court appears to have been articulating a series of factors that were relevant in that particular case, providing no reason to apply these factors outside of *Gerena*.[9]

In addition to not truly reflecting an analysis grounded in United States Supreme Court precedent, we note several problems with the *Boyd* test. First, it is written in the conjunctive, requiring that a defendant satisfy all three prongs of the test to establish standing. A defendant might fail to satisfy one of the prongs of the test, even though he possesses a subjective expectation of privacy that is well recognized as reasonable. Also, the first two prongs of the *Boyd* test are particularly problematic.

For example, the first *Boyd* factor requires the defendant to establish that "his relationship with the location was personal in nature . . . ." *State* v. *Boyd*, supra, 57 Conn. App. 185. Although fourth amendment rights are personal in nature; see, e.g., *Rakas* v. *Illinois*, supra, 439 U.S. 138; because the word "personal" is susceptible to multiple meanings, *Boyd*'s requirement that the defendant's relationship with the location be personal in nature is problematic. For example, Black's Law Dictionary defines personal as "[o]f or affecting a person," and "[o]f or constituting personal property . . . ." Black's Law Dictionary (10th Ed. 2014) p. 1325. The first definition is overinclusive because defendants would likely not seek to exclude evidence that has no bearing

[9] Only two cases cite to this standard, namely, *United States* v. *Abreu*, 730 F. Supp. 1018, 1026 (D. Colo. 1990), aff'd, 935 F.2d 1130 (10th Cir.), cert. denied, 502 U.S. 897, 112 S. Ct. 271, 116 L. Ed. 2d 224 (1991), and *Boyd*.

on their case, and, therefore, any evidence sought to be suppressed would be "affecting a person . . . ." Id. The second definition is underinclusive because an illegal search need not have involved the defendant's personal property for the defendant to possess a privacy interest. "[P]roperty rights are neither the beginning nor the end of [the] [c]ourt's inquiry into whether a defendant's [reasonable expectation of privacy has] been violated by an illegal search." (Internal quotation marks omitted.) *State* v. *Davis*, supra, 283 Conn. 309.[10] Additionally, this definition could exclude commercial property, even though this court has held that a defendant can have a reasonable expectation of privacy in such property. See *State* v. *Zindros*, 189 Conn. 228, 229, 240–42, 456 A.2d 288 (1983) (holding that commercial tenant possessed reasonable expectation of privacy in space he had leased to use as restaurant), cert. denied, 465 U.S. 1012, 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984).

The second prong of the *Boyd* test also presents problems. That prong requires a defendant to show that "his relationship with the location was more than sporadic, irregular or inconsequential . . . ." *State* v. *Boyd*, supra, 57 Conn. App. 185. The case law of this state—as well as multiple federal cases—recognizes several situations in which a defendant possesses a reasonable expectation of privacy but in which that same defendant would fail the subjective expectation of privacy test under this second prong of *Boyd*. For example, under *Boyd*, a person who travels to a new city, rents a hotel room, drops off her bag in the room and leaves for several days on an excursion could be said to have a relationship with that room that is spo-

[10] We note that property rights may be the beginning and the end of a fourth amendment analysis when the police have physically intruded on a person's residence. See *Florida* v. *Jardines*, U.S. , 133 S. Ct. 1409, 1417, 185 L. Ed. 2d 495 (2013). In the present case, however, the defendant has presented no evidence that he resided at the property where the search occurred.

radic and irregular. Concluding that this relationship was insufficient under *Boyd*, however, would be clearly contrary to our case law establishing that a person who rents a hotel room generally has a reasonable expectation of privacy in that room, as long as he or she intends to return to it. Cf. *State* v. *Jackson*, supra, 304 Conn. 396–98 (defendant had no expectation of privacy in hotel room or in personal effects therein when he left room with no intent to return). The *Boyd* test could also fail to recognize an overnight guest's subjective expectation of privacy; see *Minnesota* v. *Carter*, 525 U.S. 83, 89, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998); because that guest's presence might be sporadic, irregular, and inconsequential.

The third prong of *Boyd* also suffers from deficiencies. It requires that the defendant have "maintained the location and the items within it in a private manner at the time of the search." *State* v. *Boyd*, supra, 57 Conn. App. 185. Although less problematic than the other two prongs, the third prong can also fail to recognize a reasonable expectation of privacy when one exists. For example, in *United States* v. *Vega*, 221 F.3d 789 (5th Cir. 2000), cert. denied sub nom. *Ramon Vega* v. *United States*, 531 U.S. 1155, 121 S. Ct. 1105, 148 L. Ed. 2d 975 (2001), the police surrounded a home looking for evidence of drug trafficking. See id., 794. When the defendants noticed the police, one defendant ran out through the back door, leaving it open. See id. The government argued that, because the door was left open, the house was exposed to public view and lost its fourth amendment protection. See id., 796. Although the court rejected the government's contention; id.; if it had applied the third factor of *Boyd*, its fourth amendment analysis could have led to the opposite result.

For these reasons, we decline to adopt the *Boyd* test. Although the factors enumerated in *Boyd* might, in a particular case, be relevant to a court's analysis, they

should not serve as an inflexible yardstick by which the privacy interests of all criminal defendants are measured. Instead, we reaffirm that courts should properly test a defendant's subjective expectations by looking for conduct demonstrating an intent " 'to preserve [something] as private,' " and free from knowing exposure to the view of others. *Bond* v. *United States*, 529 U.S. 334, 338, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000). [11]

B

At the hearing on the motion to suppress, the defendant failed to adduce sufficient evidence to establish his intent to keep the property private and free from knowing exposure to the view of others. Although the defendant did establish that he owned the property, he told the police he could not afford the payments and had leased the house to Phravixay for months. At the suppression hearing, the defendant did not present a written lease or offer any testimony regarding the provisions of the lease. Nor did he present sufficient evidence that he maintained frequent contact with the property, retained the right to exclude others or engaged in other significant contact with the property.

When, as in the present case, a property owner has leased that property to another person, the owner generally loses any expectation of privacy in the property. A landlord is generally much less likely to possess a reasonable expectation of privacy than an owner-occu-

[11] We note that, before announcing the three pronged test, the court in *Boyd* identified the proper standard for evaluating a defendant's subjective expectation of privacy: "A subjective expectation of privacy rests on finding conduct that has demonstrated an intention to keep activities or things private and free from knowing exposure to others' view." *State* v. *Boyd*, supra, 57 Conn. App. 185. Additionally, the trial court in the present case did not rely on *Boyd*'s three factor test but, instead, used a test substantially similar to the one we reaffirm today. Applying the latter test, the trial court concluded at the suppression hearing that the defendant did not present evidence establishing his subjective expectation of privacy.

pant. This is because, upon leasing the property, he generally cedes control to the tenant, who can invite others onto the property, potentially exposing his activities or contraband to them. See, e.g., *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979) (holding that defendant's "bare legal ownership" would not suffice to establish standing absent "any indication that he used the . . . home in such a way as to raise a legitimate expectation of privacy"). "[I]f the owner of certain premises has leased them to another *without reserving any right of possession* to himself, then it cannot be said that a police intrusion into those premises encroaches upon his expectation of privacy." (Emphasis added.) 6 W. LaFave, supra, § 11.3 (a), p. 170.

If, however, the owner maintains a regular presence at the property, retains the right to exclude others from the property or otherwise exercises significant control over the property, the owner might still possess a reasonable expectation of privacy. For example, in *State* v. *Suco*, 521 So. 2d 1100 (Fla. 1988), the Florida Supreme Court held that a landlord who leased a single family dwelling had standing when he retained a key to enter for purposes of collecting rent, maintaining the premises, and making repairs, and regularly went to the house, let himself in without announcing his presence, and watched television with the tenant's family. Id., 1101–1102. Similarly, in *State* v. *Casas*, 900 A.2d 1120 (R.I. 2006), a defendant had a reasonable expectation of privacy in the basement of an apartment building owned by his wife because he collected rents, made repairs and prohibited tenants from entering the basement area, over which he retained control. Id., 1130.

In the present case, although it might have been possible for the defendant to establish standing, he presented no evidence establishing the frequency and nature of his visits to the property, or whether he retained a right to exclude others from any or all of the property. Nor

did he produce any evidence indicating that he stayed at the property or otherwise continuously used the property after leasing it to Phravixay. He established nothing but bare legal ownership. See *United States* v. *Rios*, supra, 611 F.2d 1345.

The only other evidence perhaps connecting the defendant to the property consisted of a few pieces of mail and an aeration system addressed to the defendant at his Danbury residence. None of these items, however, established how often the defendant visited the property or the nature of his relationship to the property, and thus did not sufficiently establish his subjective expectation of privacy. The defendant did not submit the mail into evidence or even identify what type of mail it was. As anyone who has ever changed residences knows, a previous occupant's mail might continue to arrive for months, if not years, after that person has moved. Without knowing the nature or the volume of the correspondence, we cannot assume that it was significant or anything other than junk mail. Additionally, no evidence was offered about whether or how often the defendant went to the property to retrieve the mail. Similarly, the mere presence of a single piece of property addressed to the defendant tells us nothing meaningful about how the defendant used the property. The defendant offered no evidence about how the aeration system ended up at the property, or whether it was ever used. Phravixay or a confederate could have driven to the defendant's home in Danbury to pick up the item and deliver it to the property in Canterbury. Without any testimony to establish how much property the defendant purchased, or how it made its way from Danbury to Canterbury, the presence of a single aeration system cannot establish the defendant's subjective expectation of privacy in the property. Furthermore, leaving a single piece of personal property establishes nothing about the frequency of the defendant's visits

to the property or the level of his involvement in the grow operation.

The defendant argues that he nevertheless had a reasonable expectation of privacy because he maintained a connection with the property by participating in the marijuana grow operation. We disagree. Even if a defendant could establish a subjective expectation of privacy through his participation in a criminal conspiracy,[12] the defendant still has not met his burden.[13] The defendant did not present sufficient evidence at the hearing to establish what his involvement with the marijuana cultivation actually was. Although he cites his statement to the police that, "about [four] to [five] months ago I began to help [Phravixay] cultivate the marijuana," the defendant offers no evidence of what his "help" entailed or how that "help" manifested a privacy interest in the property.

Also, the defendant's own statements to the police suggest that his presence at the property was more limited than he would now have us believe. When he was arrested, the defendant told the police: "[u]p until

[12] Because the defendant has not presented any facts establishing the extent of his participation in the marijuana grow operation, we leave this question for another day.

[13] The defendant cites numerous cases, including *United States* v. *Vega*, supra, 221 F.3d 789, and *United States* v. *Washington*, 573 F.3d 279 (6th Cir. 2009), to support his contention that his use of the property to cultivate marijuana established standing. The defendant misreads these cases. In *Vega*, the Fifth Circuit Court of Appeals concluded that the defendant possessed an expectation of privacy in the property where he resided *despite* his use of the property for illegal purposes, not *because* he used the property for illegal activities. See *United States* v. *Vega*, supra, 797. Likewise, in *Washington*, the court held that the defendant's criminal activity did not eliminate his reasonable expectation of privacy, which derived from his status as an overnight guest in the apartment. See *United States* v. *Washington*, supra, 283–84. In both of these cases, therefore, independent bases supported the defendant's standing; it did not derive from the criminal activity itself. The defendant in the present case has not established an independent basis for his claim of standing.

today I didn't realize the extent of the grow operation." This statement indicates that the defendant's involvement with the grow operation could not have been extensive, further diminishing any significance of the mail and aeration system, because even a brief visit and cursory view of the property would have revealed an extremely large grow operation containing more than 1000 plants, hundreds of which were inside the house.

Thus, the defendant has simply failed to establish a subjective expectation of privacy. At the suppression hearing, the defendant challenged the constitutionality of the warrantless search solely on the basis of his ownership of the property. As a result, the defendant did not present sufficient evidence detailing his connection to the property or the grow operation that took place there, if such evidence existed at all. Because the defendant has failed to adduce any evidence that he maintained a regular presence, was an overnight guest, retained the right to exclude others, or had any other significant connection to the property, he has failed to establish a reasonable expectation of privacy. Under the facts presented, the defendant "could not legitimately expect that the [property] . . . would remain secure from prying eyes, irrespective of whether those eyes were private or governmental." *United States* v. *Ramapuram*, 632 F.2d 1149, 1156 (4th Cir. 1980), cert. denied, 450 U.S. 1030, 101 S. Ct. 1739, 68 L. Ed. 2d 225 (1981). As such, we have no occasion to address the defendant's claim that the officers were not justified in entering the property without a warrant.

II

The defendant next claims that, even if he lacked standing to challenge the warrantless search of the property, his confession to the police was the unlawful fruit of the *Terry* stop and warrantless arrest. We disagree and uphold the trial court's conclusion that the

police possessed a reasonable and articulable suspicion to stop the defendant and, later, had probable cause to arrest him.

A

The law in this area is well settled. "A stop pursuant to *Terry* v. *Ohio*, [392 U.S. 1, 21–22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)], is legal if three conditions are met: (1) the officer must have a reasonable suspicion that a crime has occurred, is occurring, or is about to occur; (2) the purpose of the stop must be reasonable; and (3) the scope and character of the detention must be reasonable when considered in light of its purpose. . . . The United States Supreme Court has further defined reasonable suspicion for a traffic stop as requiring some minimal level of objective justification for making the stop. . . . Because a reasonable and articulable suspicion is an objective standard, we focus not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion." (Citations omitted; internal quotation marks omitted.) *State* v. *Cyrus*, 297 Conn. 829, 837, 1 A.3d 59 (2010). What constitutes a reasonable and articulable suspicion depends on the totality of the circumstances. See, e.g., *State* v. *Lipscomb*, 258 Conn. 68, 77, 779 A.2d 88 (2001). "Moreover, [w]e do not consider whether the defendant's conduct possibly was consistent with innocent activity . . . ." (Internal quotation marks omitted.) *State* v. *Peterson*, 320 Conn. 720, 733, 135 A.3d 686 (2016).

"On appeal, [t]he determination of whether a reasonable and articulable suspicion exists rests on a two part analysis: (1) whether the underlying factual findings of the trial court are clearly erroneous; and (2) whether the conclusion that those facts gave rise to such a suspi-

cion is legally correct." (Internal quotation marks omitted.) *State* v. *Cyrus*, supra, 297 Conn. 837–38.

Several facts known to the officers establish that they were justified in detaining the defendant to further investigate his presence on and rapid departure from the property. First, the trial court credited the officers' testimony that someone entering the property might be involved in the grow operation. "While it is well settled that an individual's mere presence at a location known for criminal activity is not sufficient, without more, to support a reasonable suspicion . . . the individual's presence in such a location can be a relevant articulable fact in the *Terry* reasonable suspicion calculus." (Citations omitted.) *State* v. *Peterson*, supra, 320 Conn. 734. In the present case, the record demonstrates that the defendant was not stopped simply because he was in the wrong place at the wrong time. The defendant was not just passing through a high crime area. Rather, he entered a remote property containing a very large and sophisticated marijuana grow operation and rapidly exited the driveway—an action that the police could have reasonably inferred the defendant took in response to seeing an unfamiliar and unexpected sight. He then drove a short distance down the road and turned around, parking the van facing back toward the property. The officers' experience and their knowledge of the ongoing grow operation could have reasonably led them to infer that the defendant was at least aware of, if not directly connected to, the activities occurring on the property. This gave the officers a reasonable and articulable suspicion sufficient for them to briefly detain the defendant and inquire about his relationship to the property.

The defendant contends that the only reason he was stopped was that he pulled his van into the driveway

and quickly exited.[14] The defendant, however, overlooks several of the trial court's findings. First, the defendant did not simply enter an empty driveway and turn around; he entered a driveway that led to a huge marijuana grow operation. That driveway was filled with cars he could not have recognized.[15] Upon arriving on the scene and pulling in behind vehicles unfamiliar to him, the defendant rapidly exited the driveway. The defendant concedes that the property is rural and isolated. This makes it less likely that the defendant coincidentally pulled into this particular driveway to turn around, particularly when considering that he drove down the road approximately one tenth of one mile before *turning around* and parking the van on the side of the road, facing toward the property. We agree with the trial court that these facts provided the officers with a reasonable and articulable suspicion that the defendant was somehow connected to the grow operation.

B

The defendant also claims that his arrest following the *Terry* stop was not supported by probable cause. We conclude that it was. "Probable cause, broadly defined, comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred." (Internal quotation marks omitted.) *State* v. *Johnson*, 286 Conn. 427, 435, 944 A.2d 297, cert. denied,

[14] The defendant challenges only one of the trial court's factual findings. Specifically, he claims that it was unreasonable for the trial court to conclude that the defendant was fleeing from the police because there is no evidence to support an inference that the defendant ever saw the police or was otherwise aware that the vehicles on the property belonged to law enforcement. We need not resolve this issue because we find that, even if the defendant was not fleeing from the police, the police possessed a reasonable and articulable suspicion and thus were justified in stopping the defendant.

[15] Sergeant Douglas Hall of the task force testified that the officers were driving undercover vehicles with "no resemblance to police vehicles."

555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144 (2008). "The quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction. Our cases have made clear that [t]here is often a fine line between mere suspicion and probable cause, and [t]hat line necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances. . . . Furthermore, when we test the quantum of evidence supporting probable cause, it is not the personal knowledge of the arresting officer but the collective knowledge of the law enforcement organization at the time of the arrest [that] must be considered." (Citations omitted; internal quotation marks omitted.) *State* v. *Dennis*, 189 Conn. 429, 431–32, 456 A.2d 333 (1983).

Applying these principles to the present case, we conclude that the facts known to the officers gave them probable cause to arrest the defendant. When the officers had initially approached the defendant, they asked him for his license and registration, and the reason for his presence at the home. The officers later testified that the defendant's answers were evasive and that he would not name the friend he was allegedly there to visit; the trial court credited this testimony. This interaction occurred immediately after the defendant had driven the van directly to, but departed "[v]ery quickly" from, the property, which was the site of a massive marijuana grow operation. Additionally, the trial court credited an officer's testimony that the van contained, in plain view of the officers, lumber and irrigation piping resembling the materials used in the greenhouse, which task force members observed was under construction. The presence of these materials and the attendant circumstances were sufficient to establish probable cause to believe that the defendant was involved with the

grow operation, giving them grounds to arrest the defendant.[16]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

DOMINIC PEREZ *v.* COMMISSIONER OF CORRECTION (SC 19855)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille, Js.*

Syllabus

Pursuant to statute ([Rev. to 2009] § 54-125a [b] [2], as amended by P.A. 10-36), a person convicted of an offense involving the use of physical force against another person shall be ineligible for parole until he has served not less than 85 percent of the definite sentence imposed.

Pursuant further to statute ([Rev. to 2009] § 54-125a [e]), the Board of Pardons and Paroles shall hold a hearing to determine the suitability for parole of any person whose eligibility for such parole is subject to the provisions of § 54-125a (b) (2) upon his completion of 85 percent of his definite or aggregate sentence.

The petitioner, who had been convicted of manslaughter in the first degree and carrying a pistol without a permit for conduct occurring in 2010, filed a petition for a writ of habeas corpus, claiming, inter alia, that amendments in 2013 (P.A. 13-3 and P.A. 13-247) to § 54-125a violated his constitutional rights to due process and equal protection, the ex post facto clause of the United States constitution, and the separation

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[16] The defendant also argues that his statement to the police, made subsequent to his arrest, should be suppressed. His arguments are all premised on his contention that the search of the property and the *Terry* stop were illegal, and that the officers lacked probable cause to arrest him. Because we conclude that (1) the defendant is without standing to challenge the search, (2) the *Terry* stop was legal, and (3) the officers had probable cause to arrest him, we are left with no other circumstances that would support a finding that his statement was involuntary.

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille. Although Justices Palmer and Espinosa were not present when the case was argued before the court, they have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

of powers doctrine. In 2011, while the petitioner's criminal case was pending, the legislature enacted a statute (§ 18-98e) pursuant to which the respondent, the Commissioner of Correction, was vested with discretion to award risk reduction credit toward the reduction of an inmate's sentence, up to five days per month, for positive conduct. The legislature also amended § 54-125a (b) (2) and (e) in 2011 to provide that risk reduction credit earned under § 18-98e was to be applied to an inmate's definite sentence to advance the inmate's end of sentence date, and rendered that inmate eligible for a parole hearing after he had served 85 percent of that reduced sentence. After the petitioner had been sentenced, the legislature again amended § 54-125a in 2013, eliminating the language that permitted the parole eligibility date to be advanced by the application of earned risk reduction credit, and eliminating the requirement that the Board of Pardons and Paroles "shall" hold a parole hearing after an inmate has completed 85 percent of his sentence. Under the 2013 amendments, which became effective July 1, 2013, any risk reduction credit earned by an inmate, and not subsequently revoked by the respondent, would still be applied to reduce an inmate's sentence but would not be applied to advance his parole eligibility date, and, once that eligibility date arises, the parole board may decline to hold a hearing. In his habeas petition, the petitioner challenged the application of the 2013 amendments to the calculation of his parole eligibility date and to his right to a hearing on his suitability for parole, alleging that he had already been awarded risk reduction credit by the respondent, and that, prior to the 2013 amendments, the respondent had applied that credit to advance his parole eligibility date. The habeas court granted the respondent's motion to dismiss all counts of the habeas petition, concluding that all of the petitioner's claims failed given the speculative nature of earned risk reduction credit and the respondent's discretion to award and revoke such credit, and concluding that, because the petition failed to state a claim on which habeas relief could be granted, the court lacked subject matter jurisdiction over the petition. The habeas court thereafter rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed. *Held* that the habeas court properly dismissed the petition for a writ of habeas corpus, this court having determined that, although the habeas court improperly dismissed many of the petitioner's claims solely on the basis of the speculative nature of earned risk reduction credit, the habeas court lacked jurisdiction over all of the petitioner's claims:

1. The petitioner could not prevail on his claims that the 2013 amendments to § 54-125a that eliminated the application of prior earned risk reduction credit to advance his parole eligibility date and the mandate that a parole hearing be held violated his right to due process under the federal and state constitutions and his right to personal liberty pursuant to the state constitution: the petitioner failed to establish a vested liberty interest in either the granting of parole, the timing of when parole is granted or

the procedure by which the parole board exercises its discretion to award or deny parole, as the granting of parole is within the discretion of the parole board, and the petitioner also failed to establish a vested right in the application of the risk reduction credit previously granted to advance his parole eligibility date, as that credit was subject to revocation at the discretion of the respondent for good cause; moreover, the monthly parole eligibility calculation that the respondent provided to the petitioner was simply an informational tool to allow the respondent and the petitioner to estimate his parole eligibility date, provided the respondent did not rescind any of the earned credit.

2. The petitioner's claim that the 2013 amendments to the parole hearing and eligibility provisions of § 54-125a violated the ex post facto clause of the federal constitution was not cognizable, as the parole hearing provision did not increase the petitioner's overall sentence, alter his initial parole eligibility date, change the standard used by the parole board to determine parole suitability, or increase the punishment imposed for the petitioner's offense, and the parole eligibility amendment restored the parole eligibility calculation to 85 percent of the petitioner's definite sentence, thereby returning the petitioner to the position he was in at the time of his offense.

3. This court found unavailing the petitioner's claim that the parole board's established policy of not awarding parole to any inmate whose parole eligibility date was within six months of the date he would have completed serving his definite sentence violated the doctrine of separation of powers in that such a policy converted a legislatively determined parole eligible offense into an offense that, by virtue of executive action, was rendered parole ineligible: the petitioner failed to allege that the determination of parole eligibility was a power solely vested in the legislature and may not be delegated to the executive branch, and the circumstances giving rise to such a constitutional defect were extraordinarily speculative because, even if the petitioner earned the maximum possible risk reduction credit, the respondent was vested with discretion to revoke such credit, and, thus, the claim therefore was premature; moreover, the petitioner did not address or challenge a 2015 amendment to § 18-98e (a) that rendered him ineligible to earn any further risk reduction credit.

4. The petitioner could not be granted habeas relief on his claim that the 2013 amendment to the parole eligibility provision of § 54-125a as applied to him violated the equal protection clause of the federal constitution because there was disparate treatment of classes of inmates by the parole board when that board calculated the parole eligibility dates for certain inmates who had been granted parole as of July 1, 2013, by including earned risk reduction credit, but did not include such credit in the calculation of the parole eligibility date for the petitioner and other inmates who had not yet been granted parole; even if the two classes of inmates were similarly situated, the timing of parole eligibility

was not a fundamental right and inmates, or subsets of inmates differentiated only by the timing of when they were considered for parole, are not a suspect class, and, accordingly, the application of earned risk reduction credit to parole eligibility based on whether an inmate had already been granted parole prior to July 1, 2013, did not violate equal protection when there was a rational basis for such differentiation, that basis being the parole board's determination that its decision not to revoke a grant of parole that had already been awarded supported clarity in the administration of parole and an understanding that revocation of parole due to no action on the part of the offender could have a negative impact on the offender's rehabilitation and reintroduction into society.

5. The petitioner could not obtain habeas relief on his claim that § 18-98e facially violates the equal protection clause of the federal constitution on the ground that it does not permit offenders to earn risk reduction credit while held in presentence confinement and, as a result, offenders like the petitioner, who cannot afford bail, do not earn risk reduction credit for the entire period of their confinement, whereas offenders who can afford bail are able to benefit from the award of risk reduction credit during their entire sentence; even if these two classes of offenders are similarly situated, an inmate has no fundamental right in the opportunity to earn risk reduction credit because such credit is a statutory creation and is not constitutionally required, the petitioner has not alleged that, as a result of § 18-98e, he, or other indigent individuals, have been imprisoned beyond the maximum period authorized by statute, the class' status as indigent individuals did not constitute a suspect class, and there are numerous rational bases for treating presentence confinement differently under a credit statute, including the different purposes of presentence confinement and incarceration after sentencing.

6. The petitioner could not be granted habeas relief on his statutory claim that a proper interpretation of the 2013 amendments to the parole eligibility and hearing provisions of § 54-125a would limit application of those provisions prospectively to inmates who were committed to the respondent's custody to begin serving their sentences on or after July 1, 2013, that claim having been premature; it was uncertain whether the parole board would decline to conduct a parole hearing when the petitioner became eligible for parole, and if the parole board decided to hold a hearing or if the petitioner did not have any earned risk reduction credit remaining that would have advanced his parole eligibility date under the 2011 parole eligibility provision, then retroactive application to the petitioner of the 2013 amendments would not cause the petitioner to suffer an actual injury.

Argued April 6—officially released July 25, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of

Tolland, where the court, *Fuger*, *J.*, granted the respondent's motion to dismiss and rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed. *Affirmed.*

Temmy Ann Miller, assigned counsel, for the appellant (petitioner).

Steven R. Strom, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (respondent).

Opinion

McDONALD, J. This case presents challenges to the constitutionality of substantive and procedural amendments to General Statutes (Rev. to 2013) § 54-125a, which governs parole eligibility for persons who received a definite sentence or aggregate sentence of more than two years, as applied to an offender who was sentenced before the amendments took effect. More specifically, we consider statutory amendments (1) eliminating earned risk reduction credit from the calculation of a violent offender's parole eligibility date, when such credit was not available at the time the offense was committed; Public Acts 2013, No. 13-3, § 59 (P.A. 13-3); and (2) altering parole eligibility hearing procedures to allow the Board of Pardons and Paroles to forgo holding a hearing. Public Acts 2013, No. 13-247, § 376 (P.A. 13-247). The petitioner, Dominic Perez, appeals[1] from the judgment of the habeas court dismissing his petition claiming that application of these 2013 amendments to him violated his state and federal due process and liberty rights, the ex post facto clause of the United States constitution, the separation of powers

[1] The habeas court granted the petitioner's petition for certification to appeal pursuant to General Statutes § 52-470 (g). The petitioner subsequently appealed from the judgment of the habeas court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

doctrine, and the equal protection clause of the United States constitution, and is contrary to the language of § 54-125a. The petitioner contends that the habeas court improperly dismissed his claims on the ground that it would be speculative whether the statutory changes would cause any injury to the petitioner because the award of risk reduction credit by the respondent, the Commissioner of Correction, is discretionary. We agree with the petitioner to the extent that the habeas court improperly dismissed many of the claims raised in the petition solely on the basis of the "speculative nature" of earned risk reduction credit. Nevertheless, applying the proper test to each claim raised by the petitioner, we hold that the habeas court lacked jurisdiction over the petitioner's claims. We therefore affirm the judgment of the habeas court dismissing the petition.

I

The following procedural and statutory history is relevant to this appeal. The petitioner committed the offenses giving rise to his incarceration, which involved his use of deadly force, in November, 2010. At that time, the relevant parole eligibility provision of § 54-125a provided in relevant part: "A person convicted of . . . an offense, other than [certain parole ineligible offenses] where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed." General Statutes (Rev. to 2009) § 54-125a (b) (2), as amended by Public Acts 2010, No. 10-36, § 30. At that time, the relevant parole hearing provision of § 54-125a provided that the board "*shall* hold a hearing to determine the suitability for parole release of any person whose eligibility for parole release is subject to the provisions of subdivision (2) of subsection (b) of this section upon

completion by such person of eighty-five percent of such person's definite or aggregate sentence. . . ." (Emphasis added.) General Statutes (Rev. to 2009) § 54-125a (e).

In July, 2011, while the petitioner's criminal case was pending before the trial court, General Statutes § 18-98e[2] became effective, pursuant to which the respondent had discretion to award risk reduction credit

[2] General Statutes § 18-98e provides in relevant part: "(a) Notwithstanding any provision of the general statutes, any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date . . . may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006.

"(b) An inmate may earn risk reduction credit for adherence to the inmate's offender accountability plan, for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the commissioner, provided (1) good conduct and obedience to institutional rules alone shall not entitle an inmate to such credit, and (2) the commissioner or the commissioner's designee may, in his or her discretion, cause the loss of all or any portion of such earned risk reduction credit for an act of misconduct or insubordination or refusal to conform to recommended programs or activities or institutional rules occurring at any time during the service of the sentence or for other good cause. If an inmate has not earned sufficient risk reduction credit at the time the commissioner or the commissioner's designee orders the loss of all or a portion of earned credit, such loss shall be deducted from any credit earned by such inmate in the future. . . .

"(d) Any credit earned under this section may only be earned during the period of time that the inmate is sentenced to a term of imprisonment and committed to the custody of the commissioner and may not be transferred or applied to a subsequent term of imprisonment. . . ."

We note that § 18-98e was amended in 2015; see Public Acts 2015, No. 15-216, § 9; to include additional offenses for which conviction renders an inmate ineligible to earn risk reduction credit, including General Statutes § 53a-55a, one of the two offenses of which the petitioner is convicted. The majority of the petitioner's claims are based on previously awarded risk reduction credit and, therefore, the 2015 amendment is not relevant to those claims. Insofar as the petitioner's separation of powers claim relies on the future award of risk reduction credit, however, this amendment is addressed in part II C of this opinion.

toward a reduction of an inmate's sentence, up to five days per month, for positive conduct. General Statutes § 18-98e (a) and (b). The respondent also was vested with discretion to revoke such credit, even credit yet to be earned, for good cause. See General Statutes § 18-98e (b). At the same time, the legislature amended the parole eligibility provision to provide: "A person convicted of . . . an offense . . . where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed *less any risk reduction credit earned under the provisions of section 18-98e*." (Emphasis added.) General Statutes (Rev. to 2011) § 54-125a (b) (2), as amended by Public Acts 2011, No. 11-51, § 25 (P.A. 11-51). The subsection of § 54-125a addressing parole hearings was similarly amended to account for earned risk reduction credit. General Statutes (Rev. to 2011) § 54-125 (e), as amended by P.A. 11-51, § 25. Accordingly, under the 2011 amendments, earned risk reduction credit was to be applied to an inmate's definite sentence to advance the inmate's end of sentence date, and the parole eligibility date calculated as a percentage of the sentence would advance in similar measure.

In May, 2013, the petitioner was sentenced to a total effective sentence of fifteen years incarceration after he pleaded guilty to manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a, and carrying a pistol without a permit in violation of General Statutes (Rev. to 2009) § 29-35 (a), for the 2010 offense. Under the 2011 amendments to § 54-125a and § 18-98e, any risk reduction credit earned by an inmate, and not subsequently revoked, would have both reduced his sentence and rendered him eligible for a

hearing to determine whether he should be granted parole after he had served 85 percent of that reduced sentence.

Effective July 1, 2013, the legislature again amended § 54-125a. Specifically, with regard to offenses like one of those of which the petitioner was convicted, the legislature eliminated the language that permitted the parole eligibility date to be advanced by the application of any earned risk reduction credit. See P.A. 13-3. The legislature also eliminated the requirement that the board "shall" hold a parole hearing after such inmates had completed 85 percent of their definite or aggregate sentences. See P.A. 13-247. Instead, under the revised statute, the board "may" hold such a hearing, but "[i]f a hearing is not held, the board shall document the specific reasons for not holding a hearing and provide such reasons to such person. . . ." General Statutes (Supp. 2014) § 54-125a (e). Thus, under the 2013 amendments, any risk reduction credit earned by an inmate, and not subsequently revoked, would still be applied to reduce his sentence, but would not be applied to advance his parole eligibility date. In other words, he would only be eligible for a hearing to determine whether he should be granted parole after he had served 85 percent of his *original* sentence (in the petitioner's case, after twelve years and nine months). Moreover, the board may decline to hold a hearing once that eligibility date arises.

The petitioner thereafter filed his petition for a writ of habeas corpus challenging the application of the 2013 amendments to the calculation of his parole eligibility date and to his right to a hearing on his suitability for parole. In the operative thirteen count petition, the petitioner alleged that he already had been awarded risk reduction credit by the respondent and that prior to July 1, 2013, the respondent had applied that credit to advance the petitioner's parole eligibility date. The

petitioner challenged the application of these amendments to him by the respondent[3] as a violation of his constitutional rights under the federal and/or state constitution—specifically, claims related to due process, liberty interests, the ex post facto clause, the separation of powers doctrine and the equal protection clause—and as contrary to the statutory text. Subsequently, the respondent filed a motion to dismiss all counts of the petition.

After a hearing, the habeas court granted the respondent's motion to dismiss the petition. The habeas court's decision did not analyze each claim separately. Rather, it concluded that all of the petitioner's claims failed on the same basis, namely, that "[g]iven the speculative nature of [earned risk reduction credit], and the [respondent's] discretion to both award and take [it] away as an administrative tool to manage the inmate population, [the habeas] court . . . lacks subject matter jurisdiction over the . . . petition and . . . [the petition] fails to state a claim upon which habeas corpus relief can be granted." This appeal followed.

II

The petitioner asserts that the habeas court improperly dismissed all of his claims based on lack of justiciability, a conclusion that he contends the habeas court would not have reached had it properly analyzed each claim separately under the appropriate respective jurisdictional test. The petitioner argues that the habeas court improperly interpreted his claims as dependent

[3] The petitioner did not name the Board of Pardons and Paroles as a party to his habeas petition. Because we conclude that the habeas court lacked jurisdiction over all of the petitioner's claims, we do not reach the issue of whether the board was a necessary or indispensable party. Further, "[e]ven if it is assumed that the board is a necessary or indispensable party, the failure to join the board is not a jurisdictional defect depriving the habeas court or this court of subject matter jurisdiction." *Robinson* v. *Commissioner of Correction*, 258 Conn. 830, 837 n.9, 786 A.2d 1107 (2002).

on the future award of risk reduction credit to the petitioner, and, therefore, too speculative a basis for habeas relief. He contends that the claims challenging the hearing provision are not dependent on whether earned risk reduction credit is applied to determine his parole eligibility date. He further asserts that the claims challenging the parole eligibility provision are not dependent on any future award of risk reduction credit because he already had been awarded credit, which the respondent used to calculate his new parole eligibility date prior to July 1, 2013.

The respondent asserts that the habeas court properly dismissed all of the petitioner's claims, even though it did not address each claim separately in its analysis, because the claims were so clearly without a legal or factual basis that no analysis was required. The respondent further asserts that even if the reason stated by the habeas court for dismissing the entire petition was improper, the court nevertheless lacked jurisdiction over each claim, and this court may affirm the habeas court's granting of the respondent's motion to dismiss on alternative grounds.[4] We conclude that, under a proper analysis of the individual claims, the habeas court properly dismissed the petition in its entirety.

Practice Book § 23-29 provides: "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: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails

[4] The respondent also asserts that the petitioner, in his appeal, has abandoned counts seven through thirteen of his petition, in which he raises equal protection, separation of powers, and several due process claims, by inadequately briefing them. Reading the petitioner's brief fairly, we have determined that he has adequately asserted that the habeas court dismissed those claims for an improper reason and explained why the reason was improper. We conclude that the petitioner's brief is minimally sufficient for us to address whether the habeas court lacked jurisdiction as to those counts.

to state a claim upon which habeas corpus relief can be granted; (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition; (4) the claims asserted in the petition are moot or premature; (5) any other legally sufficient ground for dismissal of the petition exists."

"[I]n order to invoke successfully the jurisdiction of the habeas court, a petitioner must allege an interest sufficient to give rise to habeas relief." (Internal quotation marks omitted.) *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 251, 914 A.2d 1034 (2007). "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532, 911 A.2d 712 (2006). Likewise, "[w]hether a habeas court properly dismissed a petition pursuant to Practice Book § 23-29 (2), on the ground that it 'fails to state a claim upon which habeas corpus relief can be granted,' presents a question of law over which our review is plenary." *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017).

As reflected in the analysis that follows, we conclude that the habeas court improperly based its dismissal of all of the petitioner's claims, challenging the effect of the 2013 amendments, solely on the basis of the "speculative nature" of the future award of risk reduction credit. Insofar as the habeas court intended "speculative nature" to encompass both the discretionary nature of the risk reduction credit scheme and the prematurity of any claim based on the future award of such credit, we agree that those aspects of earned risk reduction credit are relevant to some of the petitioner's claims challenging the parole eligibility provision. The petitioner has raised a variety of claims challenging the

parole eligibility and hearing provisions, however, not all of which implicate the discretionary or prospective nature of earned risk reduction credit. See *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 260–61 (comparing jurisdictional requirements for ex post facto claim with due process claim). Nonetheless, if the habeas court reached the correct decision, but on mistaken grounds, this court will sustain the habeas court's action if proper grounds exist to support it. *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 540, 43 A.3d 69 (2012) (*Palmer*, *J.*, concurring). Therefore, we conduct a plenary review to determine if the habeas court lacked jurisdiction over each claim raised in the petition, and we analyze the petitioner's claims together only insofar as they turn on the same legal framework.

A

The petitioner points to the fact that, prior to the effective date of the 2013 amendments, he had already earned risk reduction credit. In reliance solely on that "earned" credit, the petitioner claims that the 2013 amendment eliminating the application of that credit to advance his parole eligibility date[5] violates his right to due process under the federal and state constitutions and his right to personal liberty pursuant to article first, § 9, of the Connecticut constitution.[6] See P.A. 13-3. The

[5] The petitioner is not claiming that he has been deprived of his earned risk reduction credit, but merely that the credit he has earned is no longer being applied to advance his parole eligibility date. Therefore, we need not decide whether a deprivation of his actual earned risk reduction credit would violate due process. See *Abed* v. *Armstrong*, 209 F.3d 63, 66–67 (2d Cir. 2000) (inmates have liberty interest in good time credit they have already earned, but no liberty interest in opportunity to earn credit under discretionary scheme).

[6] In his petition, the petitioner alleges that he has a right to personal liberty under article first, § 10, of the Connecticut constitution. We construe this allegation as a typographical error and note that the right to personal liberty is found in article first, § 9, of the Connecticut constitution. The petition does not allege, and the petitioner's briefs to this court do not contend, that the petitioner's right to personal liberty under the state constitution entitles him to any greater protection than he is due under the due

petitioner similarly claims that the 2013 amendment eliminating the parole hearing mandate violates his right to due process under the federal and state constitutions and his right to personal liberty pursuant to article first, § 9, of the Connecticut constitution. See P.A. 13-247. We disagree with these claims.

An essential predicate to all of these claims is a cognizable liberty interest. When a petitioner seeks habeas relief on the basis of a purported liberty interest in parole eligibility, he is invoking "a liberty interest protected by the [d]ue [p]rocess [c]lause of the [f]ourteenth amendment which may not be terminated absent appropriate due process safeguards." (Footnote omitted.) *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 252. "In order . . . to qualify as a constitutionally protected liberty, [however] the interest must be one that is *assured* either by statute, judicial decree, or regulation." (Emphasis in original; internal quotation marks omitted.) Id. "Evaluating whether a right has vested is important for claims under the . . . [d]ue [p]rocess [c]lause, which solely protect[s] pre-existing entitlements." (Internal quotation marks omitted.) Id., 261.

"The [United States] Supreme Court has recognized that, '[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. . . . A state may . . . establish a parole system, but it has no duty to do so.' . . . *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). Accordingly, whether and to what extent a state creates a liberty interest in parole

process clause of the federal constitution. For purposes of this appeal, therefore, we treat those provisions as embodying the same level of protection. E.g., *Florestal* v. *Government Employees Ins. Co.*, 236 Conn. 299, 314 n.8, 673 A.2d 474 (1996); see also *State* v. *Lamme*, 216 Conn. 172, 177, 579 A.2d 484 (1990) (article first, § 9, is state constitutional provision guaranteeing due process of law).

by state statute is entirely at the discretion of the state." *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 253.

This court previously has held that "parole eligibility under § 54-125a does not constitute a cognizable liberty interest sufficient to invoke habeas jurisdiction." Id., 261–62. In reaching this conclusion, we noted that "the decision to grant parole is entirely within the discretion of the board. Indeed, this court squarely has held that, '[t]here is no statutory requirement that the panel [of the board] actually consider the eligibility of any inmate for parole, the statute does not vest an inmate with the right to demand parole, and there is no statutory provision which even permits an inmate to apply for parole. . . . For even if the inmate has complied with the minimum requirements of [the parole statute], the statute does not require the board to determine his eligibility for parole.' . . . *Taylor* v. *Robinson*, [171 Conn. 691, 697–98, 372 A.2d 102 (1976)]."[7] *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 257. We further noted that "the parole eligibility statute is not within the terms of the sentence imposed." (Internal quotation marks omitted.) Id., 260.

In the present case, neither the substantive (parole eligibility calculation) nor the procedural (hearing) changes under the 2013 amendments altered the fundamental fact that the determination whether to grant an inmate parole is entirely at the discretion of the board. It follows that if an inmate has no vested liberty interest in the *granting* of parole, then the *timing* of when the board could, in its discretion, grant parole does not rise to the level of a vested liberty interest either. The lack

[7] "In *Board of Pardons* v. *Allen*, [482 U.S. 369, 378–79 n.10, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987)], the Supreme Court noted that circuit courts had held that, 'statutes or regulations that provide that a parole board "may" release an inmate on parole do not give rise to a protected liberty interest.' " *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 256 n.13.

of a vested interest giving rise to a due process claim is further compounded by the fact that under the provisions effective in 2011; P.A. 11-51; the award of risk reduction credit itself is at the discretion of the respondent.

With respect to the risk reduction credit previously granted to the petitioner, he overlooks the fact that such credit is not vested in him because it could be rescinded by the respondent at any time in the respondent's discretion for good cause during the petitioner's period of incarceration. The petitioner, in his brief, disputes that the award or revocation of risk reduction credit is wholly discretionary, but does not provide any analysis to support this assertion, instead claiming that the scope of the respondent's discretion is not necessary to resolve this motion to dismiss and would be addressed in a trial on the merits. The petitioner's position, however, is manifestly contradicted by the plain language of § 18-98e (a), which provides that an inmate may be eligible to earn risk reduction credit "at the discretion of the [respondent] for conduct as provided in subsection (b) of this section," and § 18-98e (b) (2), which provides that "the [respondent] . . . may, in his or her discretion, cause the loss of all or a portion of such earned risk reduction credit for any act of misconduct or insubordination or refusal to conform to recommended programs or activities or institutional rules occurring at any time during the service of the sentence or for other good cause." Although the legislature has provided guidance to the respondent as to how to exercise his discretion, the respondent still has broad discretion to award or revoke risk reduction credit. As such, the statute does not support an expectation that an inmate will automatically earn risk reduction credit or will necessarily retain such credit once it has been awarded.

The petitioner further relies on the monthly calculation of his parole eligibility date that he purportedly receives from the respondent, which included his earned risk reduction credit prior to July 1, 2013, as evidence that he has a vested interest in continuing to have that earned risk reduction credit reflected in his parole eligibility date. See General Statutes § 18-98e (a) (inmate is "eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month"). The petitioner misapprehends the significance of the respondent's monthly parole eligibility date calculation. Under the scheme even prior to 2013, because the respondent could have rescinded any or all of that earned credit in his discretion, the monthly parole eligibility date is nothing more than an estimate of the inmate's parole eligibility date. As such, the monthly parole eligibility date calculation is simply an informational tool to allow the respondent and an inmate to know at any given time how close to parole eligibility the inmate would be if nothing changed. Accordingly, the petitioner lacked a vested right in the application of the risk reduction credit previously granted to advance his parole eligibility date.

Similarly, the pre-2013 language providing that the board "shall" hold a parole hearing did not alter the fact that the determination of whether to grant an inmate parole is entirely at the discretion of the board. General Statutes (Rev. to 2009) § 54-125a (e). Where, as here, an inmate has no vested liberty interest in parole itself, then it follows that the procedure by which the board exercises its discretion to award or deny the petitioner parole does not implicate a vested liberty interest. See *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 257 ("[T]here is no statutory requirement that the [board] actually consider the eligibility of any inmate for parole, the statute does not vest an

inmate with the right to demand parole, and there is no statutory provision [that] even permits an inmate to apply for parole. . . . For even if the inmate has complied with the minimum requirements of [the parole statute], the statute does not require the board to determine his eligibility for parole." [Internal quotation marks omitted.]). Therefore, the habeas court lacked jurisdiction over the petitioner's due process and state liberty interest claims.

B

The petitioner also claims that the retroactive application of the 2013 amendments to him, when he committed his offense and was sentenced prior to the amendments' effective date, violates the ex post facto clause of the United States constitution. Specifically, he points to the fact that the elimination of earned risk reduction credit from the calculation of his parole eligibility date will require him to serve a longer portion of his sentence before he may be considered for parole, and, even then, the elimination of a mandatory hearing upon his parole eligibility date will result in a significant risk that he will be subject to a longer period of incarceration than under the mandatory hearing provision. We disagree.

"A law may be considered to violate the ex post facto clause if it punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with [a] crime of any defense available according to law at the time when the act was committed . . . ." (Internal quotation marks omitted.) *State* v. *Banks*, 321 Conn. 821, 844–45, 146 A.3d 1 (2016). The petitioner's claims in the present case implicate the second aspect of the ex post facto clause.

In contrast to a claim grounded in the due process clause, "[t]he presence or absence of an affirmative, enforceable right is not relevant . . . to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished has occurred. Critical to relief under the [e]x [p]ost [f]acto [c]lause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [c]lause if it is both retrospective and more onerous than the law in effect on the date of the offense." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 817, 786 A.2d 1091 (2002); see also *State* v. *Banks*, supra, 321 Conn. 845 ("[i]n order to run awry of the ex post facto clause, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it" [internal quotation marks omitted]).

"[T]he primary focus of an ex post facto claim is the probability of increased punishment. To establish a cognizable claim under the ex post facto clause, therefore, a habeas petitioner need only make a colorable showing that the new law creates a genuine risk that he or she will be incarcerated longer under that new law than under the old law." (Footnote omitted.) *Johnson* v. *Commissioner of Correction*, supra, 258 Conn. 818.

We begin with the petitioner's challenge to the retroactive application of the 2013 parole hearing provision, P.A. 13-247. As we indicated in part I of this opinion, the statute in effect when the petitioner committed his offense stated that the board *shall* conduct a hearing when a person has completed 85 percent of his total

effective sentence. General Statutes (Rev. to 2009) § 54-125a (e). The 2013 amendment provides that the board *may* conduct a hearing at that time, but requires that, in the event that the board declines to hold a hearing, it must document the specific reasons for not doing so and provide such reasons to the offender. See P.A. 13-247. Therefore, under both the pre-2013 and post-2013 scheme, the board could not release an offender on parole without having conducted a hearing.[8]

Our conclusion that the 2013 parole hearing provision did not violate the ex post facto clause is guided by the United States Supreme Court's decision in *California Dept. of Corrections* v. *Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995). In that case, the court held that a change in the frequency of parole hearings for certain offenders did not constitute an ex post facto violation. Id., 510, 514. Under the statute in place at the time of that offender's crime, an offender was entitled to an initial parole hearing upon his parole eligibility date, and, if denied parole, he was thereafter entitled to annual hearings. Id., 503. The legislature amended the statute to provide that, after the initial hearing, the parole board could elect to wait three years for a subsequent hearing if it determined at the initial hearing, or at any hearing thereafter, that the offender was unlikely to become suitable for parole within three years. Id. In reaching its conclusion that retroactive application of this change was permissible, the court

[8] The respondent asserts that the 2013 parole hearing provision merely resolved conflicting language in General Statutes (Rev. to 2009) §§ 54-124a (h) and 54-125a (e) regarding when a hearing must be held and codified the accepted practice of the board. Because we conclude that the parole hearing provision does not create a genuine risk that the petitioner will be incarcerated for a longer period of time than that under the provision in place at the time of his offense, we decline to reach the issue of whether the purported practice of the board prior to 2013 is an appropriate consideration in determining whether the petitioner has raised a valid ex post facto claim in the context of a motion to dismiss.

explained that "the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' nor . . . on whether an amendment affects a prisoner's 'opportunity to take advantage of provisions for early release' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." (Citation omitted; emphasis omitted.) Id., 506–507 n.3; see also *Garner* v. *Jones*, 529 U.S. 244, 251–52, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000) (noting that ex post facto clause must not be used as tool to micromanage legislative adjustments to parole procedures and is only violated when retroactive application of procedural changes creates significant risk of increased punishment). The court further explained that "[i]f a delay in parole hearings raises ex post facto concerns, it is because that delay effectively increases a prisoner's term of confinement, and not because the hearing itself has independent constitutional significance." *California Dept. of Corrections* v. *Morales*, supra, 509 n.4. The court noted that the amended provision at issue did not alter the offender's parole eligibility date or otherwise increase his sentence. Id., 507. The court also noted that the board was required to hold the initial hearing and make findings before delaying the next hearing for three years. Id., 511.

In the present case, as in *Morales*, the challenged parole hearing provision does not increase the petitioner's overall sentence, alter his initial parole eligibility date, or change the standard used by the board to determine parole suitability. Although the board is no longer required to provide an initial hearing, it must document its reasons if it declines to do so. Because the parole hearing provision does not alter the calculation of when an inmate is eligible for parole, and because the board must still consider the inmate's parole suitability at that time, the elimination of a mandatory hearing in the

2013 parole hearing provision does not increase the punishment imposed for the petitioner's offense. Therefore, the habeas court lacked jurisdiction to consider the petitioner's ex post facto claim concerning the parole hearing provision.

We next turn to the petitioner's challenge to the 2013 amendment to the parole eligibility provision, P.A. 13-3. As noted in part I of this opinion, when the petitioner committed his offense in 2010, a violent offender for whom parole was available would become eligible for parole after he had served 85 percent of his definite sentence. See General Statutes (Rev. to 2009) § 54-125a (e). Although a short-lived 2011 amendment altered this calculation to include earned risk reduction credit; P.A. 11-51, § 25; the challenged 2013 amendment restored the parole eligibility calculation to 85 percent of the violent offender's definite sentence. Far from creating a genuine risk that the petitioner would be incarcerated for a longer period of time, the 2013 parole eligibility provision simply returned the petitioner to the position that he was in at the time of his offense.[9]

The petitioner contends, however, that, in conducting the ex post facto inquiry, this court is not limited to

[9] We understand the petitioner's argument before this court at oral argument to include the assertion that, if he were to earn near the maximum amount of risk reduction credit authorized by § 18-98e (a)—five days per month, every month—the 2013 parole eligibility provision would not place him in the same position that he would have been in pursuant to the parole eligibility provision in effect at the time of his offense because, under those circumstances, he would be denied any possibility of parole. Although we explore and explain this speculative factual scenario in connection with the petitioner's separation of powers claim in part II C of this opinion, we note that the petitioner did not raise this argument in the ex post facto section of his petition or his brief to this court. Therefore, we decline to reach the issue of whether the court would have jurisdiction over his ex post facto claim based on such circumstances. See *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005) ("claims [raised] on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court"), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

comparing the challenged statute with the statute in effect at the time the offense was committed. Rather, the petitioner contends that *Lynce* v. *Mathis*, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997), supports the proposition that a court also may consider the statute in effect at the time of his plea and sentencing. We disagree that *Lynce* supports this proposition.

In *Lynce*, the Supreme Court held that the habeas court had jurisdiction to consider a petitioner's claim that a Florida statute eliminating good time credit, which resulted in the revocation of the petitioner's parole based on such credit and his rearrest, violated the ex post facto clause. Id., 438–39, 449. At the time of the commission of the offense at issue in *Lynce*, mandatory good time credit was issued to eligible inmates when the inmate population exceeded a specific percentage of prison capacity. Id., 437–39. Prior to the petitioner's sentencing, an amendment took effect that decreased the percentage of prisoner capacity that triggered the mandatory issuance of credit. Id., 438. The petitioner was released on parole on the basis of the various credits issued to him. Id. Thereafter, the legislature amended the statute to eliminate altogether credit based on prison population for certain classes of inmates. Id., 438–39. The petitioner's credits were revoked and he was rearrested. Id., 439. Notably, in concluding that the habeas court had jurisdiction over the petitioner's ex post facto claim, the court relied on the fact that the provision enacted after the petitioner committed his criminal offense, and that resulted in his initial release on parole, was "essentially the same" as the provision in effect at the time of his offense, differing only in the percentage of prison capacity that triggered the award, and, therefore, the fact that the petitioner was awarded credit based on the statute in effect at the time of his sentencing, rather than the statute in effect at the time of his offense, "[did] not affect the

petitioner's core ex post facto claim." Id., 448–49. The court emphasized, however, "that although the differences in the statutes did not affect [the] petitioner's central entitlement to [credit], they may have affected the precise amount of [credit] he received." Id., 449. Because it was unclear from the record whether, and to what extent, the petitioner would have been issued credit under the statute in effect at the time of the commission of his crime—the focal point of the ex post facto inquiry—the court remanded the case for further proceedings to determine the merits of the ex post facto claim. Id. The court pointed out that, if the conditions had not occurred that would have triggered the issuance of credit under that statute, then "there is force to the argument that [revocation of credit earned under the statute in effect at the time of sentencing] did not violate the [e]x [p]ost [f]acto [c]lause." Id. The mandatory nature of the good time credit scheme made it possible for the habeas court to determine on remand whether the petitioner would have received credit had the scheme not been changed from the time of his offense. Thus, the court looked past the statute in effect at the time the petitioner was sentenced and pursuant to which he had been awarded credit, and instead compared the statute in effect at the time of the criminal offense to the challenged statute repealing the credit.

Accordingly, *Lynce* supports the traditional approach, comparing the statute in effect at the time of the petitioner's offense to the challenged statute, not the one advocated by the petitioner in the present case. Under that approach, the petitioner does not state a cognizable ex post facto claim.

C

The petitioner also claims that the board's application of the 2013 parole eligibility provision violates the doctrine of separation of powers by converting a legisla-

tively determined parole eligible offense into an offense that, by virtue of executive action, is rendered parole ineligible. Specifically, the petition alleges that the board has an established policy of not awarding parole to any inmate whose parole eligibility date is within six months of the date on which the inmate will have completed serving his definite sentence. He further alleges that if he continues to earn "all possible" risk reduction credit—five days per month, every month—his sentence will be reduced to within six months of his parole eligibility date under the 2013 parole eligibility provision—85 percent of his original sentence. As such, he contends that the board will not consider him for parole, even though the legislature has deemed his offense parole eligible, in violation of the separation of powers doctrine.

Putting aside the significant problem that the petitioner has failed to allege that the determination of parole eligibility is a power solely vested in the legislature and may not be delegated to the executive branch, an essential element of a viable separation of powers claim; see generally *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 552–53, 663 A.2d 317 (1995); he ignores the fact that the circumstance that he claims purportedly would give rise to such a constitutional defect is extraordinarily speculative. He not only would have to earn the maximum possible credit, but would also have to have had none of the credit revoked, both acts wholly left to the respondent's discretion. Even if such a circumstance could arise, any claim based on such facts would be premature. Further, the petitioner has ignored the fact that a 2015 amendment to § 18-98e (a), which he has not challenged in his petition, rendered him ineligible to earn any risk reduction credit as of October 1, 2015. See Public Acts 2015, No. 15-216, § 9. Accordingly, for a host of reasons, the habeas court properly concluded that it lacked subject matter juris-

diction over this claim. See *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 270–71, 77 A.3d 113 (2013).

D

The petitioner raises two equal protection challenges—an as applied challenge to the parole eligibility provision of § 54-125a and a facial challenge to § 18-98e.[10] First, he contends that the 2013 parole eligibility provision as applied to him violates the equal protection clause of the United States constitution because violent offenders who were granted parole between the effective dates of the 2011 and 2013 amendments (from July 1, 2011 through June 30, 2013), but who had not yet been physically released on parole until July 1, 2013 or later, benefited from the inclusion of earned risk reduction credit in the calculation of their parole eligibility dates, whereas, violent offenders who were not yet granted parole as of July 1, 2013, including the petitioner, will not benefit from the inclusion of such credit in the calculation of their parole eligibility dates. Put differently, he contends that there is disparate treatment because the board does not eliminate the inclusion of earned risk reduction credit from the parole eligibility calculation for the first class and in turn revoke their grant of parole calculated on the basis of that credit. Second, he contends that § 18-98e facially violates equal protection because it does not permit offenders to earn risk reduction credit while held in presentence confinement, as was the petitioner. As a result, offenders like the petitioner who cannot afford bail do not earn risk reduction credit for the entire period of their confine-

[10] The petitioner also claims a violation of equal protection under article first, § 20, of the Connecticut constitution, but he has failed to provide an independent analysis under the state constitution. For purposes of this appeal, therefore, we treat both provisions as embodying the same level of protection. E.g., *Florestal* v. *Government Employees Ins. Co.*, 236 Conn. 299, 314 n.8, 673 A.2d 474 (1996).

ment, whereas offenders who can afford bail are able to benefit from the award of risk reduction credit during their entire sentence. We are not persuaded that the petitioner has stated a claim on which habeas relief may be granted.

"[T]o implicate the equal protection [clause] . . . it is necessary that the state statute . . . in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Consequently], the analytical predicate [of consideration of an equal protection claim] is a determination of who are the persons similarly situated." (Internal quotation marks omitted.) *Hammond* v. *Commissioner of Correction*, 259 Conn. 855, 877 n.22, 792 A.2d 774 (2002). Having determined the persons who are similarly situated, the court must then establish "the standard by which the challenged statute's constitutional validity will be determined. If, in distinguishing between classes, the statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard [under which] the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest. . . . If the statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 831, 860 A.2d 715 (2004).

This court concluded in *Harris* that application of presentence confinement credit to all sentences imposed on a single day in a single location, but not to all sentences imposed on separate dates or locations, does not violate equal protection. Id., 836. The court determined that presentence confinement credit, as a matter of legislative grace, is not a fundamental right,

persons who receive concurrent sentences on different dates are not a suspect class, and there was a rational basis to treat such individuals differently from persons sentenced to concurrent sentences on a single date. Id., 833–34; see also *Hammond* v. *Commissioner of Correction*, supra, 259 Conn. 877–89 (presentence confinement credit is not fundamental right and persons detained in another state while contesting extradition are not suspect class). The court relied on settled law holding that prisoners do not constitute a suspect class. *Harris* v. *Commissioner of Correction*, supra, 836; see also *Johnson* v. *Daley*, 339 F.3d 582, 585–86 (7th Cir. 2003), cert. denied, 541 U.S. 935, 124 S. Ct. 1654, 158 L. Ed. 2d 354 (2004); *Benjamin* v. *Jacobson*, 172 F.3d 144, 152 (2d Cir.), cert. denied, 528 U.S. 824, 120 S. Ct. 72, 145 L. Ed. 2d 61 (1999); *Tucker* v. *Branker*, 142 F.3d 1294, 1300 (D.C. Cir. 1998). Notably, the court rejected a claim that the respondent's method of applying presentence confinement credit violated equal protection on the basis of the petitioner's indigency. *Harris* v. *Commissioner of Correction*, supra, 836–41. The court held that indigent persons who cannot afford bail were not a suspect class under the scheme because application of the statute did not enable the state to imprison a defendant beyond the maximum period authorized by statute because of his indigency. Id., 838–40 (poverty itself is not suspect class; classification based on poverty can become suspect class only if statutory scheme enables state to imprison defendant beyond maximum period authorized by statute because of indigency).

Turning to the petitioner's challenge to the parole eligibility provision in the present case, even if we assume that the two classes are similarly situated, the petitioner's claim would fail. See *State* v. *Wright*, 246 Conn. 132, 143, 716 A.2d 870 (1998) (court has frequently assumed, for equal protection purposes, that categories of defendants are similarly situated with respect to chal-

lenged statute). Like the presentence confinement credit at issue in *Harris*, the award and application of risk reduction credit is not constitutionally required and is a matter of legislative grace. Further, the timing of parole eligibility itself is not a fundamental right. See *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 253 ("[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence" [internal quotation marks omitted]); see also *McGinnis* v. *Royster*, 410 U.S. 263, 270, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973) ("determination of an optimal time for parole eligibility elicit[s] multiple legislative classifications and groupings, which . . . require only some rational basis to sustain them"). Therefore, it follows that application of earned risk reduction credit to advance an inmate's parole eligibility date does not impinge on a fundamental right. As inmates are not a suspect class; *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 833; it follows that subsets of inmates differentiated only by the timing of when they were considered for parole are also not a suspect class. The petitioner has not alleged any other basis for considering as a suspect class those inmates who were awarded risk reduction credit prior to July 1, 2013, but had not yet been granted parole. In the absence of a fundamental right or suspect class, the application of earned risk reduction credit to parole eligibility based on whether an inmate had already been granted parole prior to July 1, 2013, does not violate equal protection if there is a rational basis for such differentiation. The determination by the board that it would not revoke a grant of parole that had already been awarded supports clarity in the administration of parole and also an understanding that revocation of parole due to no action on the part of the offender could have a negative impact on the offender's rehabilitation and reintroduction into society. Therefore, the

petitioner has failed to state a claim for which habeas relief may be granted with regard to the parole eligibility provision.

With respect to the petitioner's claim of disparate treatment under § 18-98e, even if we assume that indigent individuals who cannot afford bail and are held in presentence confinement prior to sentencing and nonindigent individuals who are not held in presentence confinement prior to sentencing are similarly situated, the petitioner's claim is without merit. As previously noted, an inmate has no fundamental right in the opportunity to earn risk reduction credit because such credit is a creature of statute and not constitutionally required. The petitioner has not alleged that the earned risk reduction credit statute has caused him, or other indigent individuals, to be imprisoned beyond the maximum period authorized by statute. Therefore, the class' status as indigent individuals does not constitute a suspect class. In the absence of a fundamental right or a suspect class, the exclusion of indigent individuals held in presentence confinement from the earned risk reduction credit scheme does not violate equal protection if there is a rational basis for such treatment. In *McGinnis* v. *Royster*, supra, 410 U.S. 264–65, 277, the United States Supreme Court rejected an equal protection challenge to a substantially similar New York good time credit statute that did not permit the award of credit during presentence confinement. The court identified numerous rational bases for treating presentence confinement differently under the credit statute, including the vastly different purposes of presentence confinement and incarceration after sentencing. Id., 270–73. In the context of the rational bases identified in *McGinnis*, therefore, the petitioner also has failed to state a claim for which habeas relief may be granted with regard to the earned risk reduction credit statute.

E

The petition summarily alleges that the respondent's construction of the 2013 amendments is contrary to the language of § 54-125a and the intent of the legislature without pointing to any particular statutory language being contravened or identifying the intent of the legislature in enacting either the 2011 or 2013 amendments. On the basis of the petitioner's brief to this court, we understand his claim to be that a proper interpretation of the 2013 parole eligibility and parole hearing provisions would limit application of those provisions prospectively to inmates who were committed to the respondent's custody to begin serving their sentences on or after July 1, 2013, the effective date of those provisions.[11] In determining whether the habeas court had jurisdiction over the petitioner's claim, however, we are limited to the allegations in the petition. See *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 570, 877 A.2d 761 (2005). Limiting our inquiry to the conclusory allegations in the petition, the petitioner has failed to allege a statutory application claim upon which habeas relief could be granted.

Further, even if we assume that the petitioner had sufficiently alleged the statutory claims he described in his brief to this court, and that those claims were claims upon which habeas relief could be granted, the petitioner's claims would be premature. "[A] trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire.

[11] The petitioner does not provide this court with any analysis as to why the 2013 amendments must be applied prospectively only. This court has undertaken analysis to determine whether a criminal statute is prospective or retroactive when the statute is silent as to whether it applies retroactively. See *State* v. *Nathaniel S.*, 323 Conn. 290, 294–95, 146 A.3d 988 (2016) (in absence of clear legislative guidance, substantive statutes apply prospectively and procedural statutes apply retroactively).

. . . [R]ipeness is a sine qua non of justiciability . . . .'' (Internal quotation marks omitted.) *Janulawicz* v. *Commissioner*, supra, 310 Conn. 271. It is impossible to know at this time whether the board will decline to conduct a hearing upon the petitioner's parole eligibility date. As discussed more fully in our analysis of the petitioner's due process claims in part II A of this opinion, even though the petitioner had previously been awarded risk reduction credit, it is uncertain whether the petitioner will have any earned risk reduction credit remaining in the future that would have advanced his parole eligibility date under the 2011 parole eligibility provision. See General Statutes § 18-98e (b) (authorizing respondent to revoke credit, and if earned credit is insufficient, to deduct from future earned credit). If the board decides to hold a hearing or the petitioner does not have any earned risk reduction credit remaining, then retroactive application of the 2013 amendments would not create an actual injury to the petitioner. Therefore, the petitioner's statutory application claims would be premature in any event.

The judgment is affirmed.

In this opinion the other justices concurred.

JAMES E. *v.* COMMISSIONER OF CORRECTION*
(SC 19854)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille, Js.**

Syllabus

The petitioner, who had been convicted of assault of an elderly person in the first degree, reckless endangerment in the first degree and risk of

* 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. General Statutes § 54-86e.

** This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille. Although Justices Palmer

injury to a child, sought a writ of habeas corpus, alleging a violation of the ex post facto clause of the federal constitution. The petitioner committed the offenses for which he was incarcerated in 2010, and, in 2011, while his criminal case was pending, the legislature enacted a statute (§ 18-98e) that permitted the respondent Commissioner of Correction to award risk reduction credit at the respondent's discretion to various classes of inmates, including the petitioner, to reduce their sentences. The legislature simultaneously amended the statute (§ 54-125a [b] [2]) governing parole eligibility to permit such credit to be taken into account when determining an inmate's parole eligibility date. After the petitioner had been sentenced, the legislature in 2013 again amended § 54-125a (b) (2) by repealing the language that permitted an inmate's parole eligibility date to be calculated on the basis of his definite sentence as reduced by earned risk reduction credit. The petitioner alleged that the 2013 amendment to § 54-125a (b) (2) increased the period of time that inmates such as him would be incarcerated before they could be released on parole. The respondent thereafter moved to dismiss the habeas petition. In denying the motion to dismiss, the habeas court determined that the 2013 amendment did not increase the punishment imposed on the petitioner because it was identical to the provision in place at the time the petitioner committed the offenses giving rise to his incarceration, that the petitioner thus had failed to allege a violation of the ex post facto clause and that the court lacked subject matter jurisdiction. The court rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed, claiming that the habeas court improperly limited its analysis to the parole eligibility provision of § 54-125a (b) (2) that was in place at the time the petitioner committed his offenses to determine whether the 2013 amendment created a genuine risk that the petitioner would be incarcerated longer under that provision. The petitioner, relying on *Lynce* v. *Mathis* (519 U.S. 433), asserted that the habeas court could have compared the 2013 amendment to the provision that was in place at the time of his sentencing to determine whether the ex post facto clause was violated. *Held* that the habeas court lacked subject matter jurisdiction over the petitioner's ex post facto claim and properly dismissed the petition; this court concluded, for the reasons set forth in the companion case of *Perez* v. *Commissioner of Correction* (326 Conn. 357), in which the petitioner raised an ex post facto claim identical to the claim raised here, and in which the petitioner was identically situated to the petitioner here, that the date of the petitioner's offense, rather than the date of sentencing, was the proper point of comparison, and this court distinguished the circumstances in *Lynce* from those presented here, noting specifically that, in contrast to the petitioner in *Lynce*, the petitioner

and Espinosa were not present when the case was argued before the court, they have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

here was ineligible for any form of earned risk reduction credit at the time of his offense.

Argued April 6—officially released July 25, 2017

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 the respondent's motion to dismiss and rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed. *Affirmed.*

James E. Mortimer, with whom, on the brief, was *Michael D. Day*, for the appellant (petitioner).

Steven R. Strom, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (respondent).

Opinion

McDONALD, J. The sole issue in this appeal[1] is whether the habeas court properly dismissed the petition for writ of habeas corpus filed by the petitioner, James E., alleging that a 2013 amendment to General Statutes (Rev. to 2013) § 54-125a repealing a provision advancing certain inmates' parole eligibility dates by earned risk reduction credit violated the ex post facto clause of the United States constitution. See Public Acts 2013, No. 13-3, § 59 (P.A. 13-3). The habeas court dismissed the petition for lack of jurisdiction, determining that because the provision at issue had been enacted after the date of the petitioner's offenses and the parole eligibility provision in effect when the petitioner committed the offenses for which he is incarcerated was

[1] The habeas court granted the petitioner's petition for certification to appeal pursuant to General Statutes § 52-470 (g). The petitioner subsequently appealed from the judgment of the habeas court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

identical to the challenged 2013 provision, the petitioner suffered no increase in punishment that would constitute a violation of the ex post facto clause. On appeal, the petitioner claims that the proper comparison for purposes of the ex post facto analysis should have been between the provision in effect at the time of his sentencing and the challenged provision thereafter enacted, which would have reflected that he has suffered an increase in punishment. For the reasons set forth in *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 374–75, 378–80, A.3d (2017), we disagree. Accordingly, we affirm the judgment of the habeas court.

The facts surrounding the criminal offenses giving rise to the present habeas action are set forth in *State* v. *James E.*, 154 Conn. App. 795, 798–800, 112 A.3d 791 (2015), cert. granted, 321 Conn. 921, 138 A.3d 282 (2016), which resulted in the petitioner's conviction of two counts of assault of an elderly person in the first degree in violation of General Statutes § 53a-59a, reckless endangerment in the first degree in violation of General Statutes § 53a-63 (a), and risk of injury to a child in violation of General Statutes (Rev. to 2009) § 53-21 (a) (1).

The following additional procedural and statutory history is relevant to the present appeal. The petitioner committed the offenses for which he is incarcerated in 2010. At that time, the relevant parole eligibility provision of General Statutes (Rev. to 2009) § 54-125a (b) (2) provided in relevant part: "A person convicted of . . . (B) an offense . . . where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed."

Thereafter, in July, 2011, while the petitioner's criminal case was pending before the trial court, General Statutes § 18-98e[2] went into effect, pursuant to which inmates were eligible to earn risk reduction credit toward a reduction of their sentences. The respondent, the Commissioner of Correction, was vested with discretion to award such credit and to revoke any or all credit. The legislature simultaneously amended General Statutes (Rev. to 2011) § 54-125a to take such credit into account to proportionately advance an inmate's parole eligibility date. Public Acts 2011, No. 11-51, § 25 (P.A. 11-51). The provision applicable to the petitioner provided in relevant part: "A person convicted of . . . (B) an offense . . . where the underlying facts and cir-

[2] General Statutes § 18-98e provides in relevant part: "(a) Notwithstanding any provision of the general statutes, any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date . . . may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006.

"(b) An inmate may earn risk reduction credit for adherence to the inmate's offender accountability plan, for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the commissioner, provided (1) good conduct and obedience to institutional rules alone shall not entitle an inmate to such credit, and (2) the commissioner or the commissioner's designee may, in his or her discretion, cause the loss of all or any portion of such earned risk reduction credit for any act of misconduct or insubordination or refusal to conform to recommended programs or activities or institutional rules occurring at any time during the service of the sentence or for other good cause. If an inmate has not earned sufficient risk reduction credit at the time the commissioner or the commissioner's designee orders the loss of all or a portion of earned credit, such loss shall be deducted from any credit earned by such inmate in the future. . . .

"(d) Any credit earned under this section may only be earned during the period of time that the inmate is sentenced to a term of imprisonment and committed to the custody of the commissioner and may not be transferred or applied to a subsequent term of imprisonment. . . ."

We note that § 18-98e was amended in 2015; see Public Acts 2015, No. 15-216, § 9; that amendment, however, is not relevant to this appeal and we refer to the current revision of the statute.

cumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed *less any risk reduction credit earned under the provisions of section 18-98e*." (Emphasis added.) General Statutes (Rev. to 2011) § 54-125a (b) (2), as amended by P.A. 11-51, § 25.

In March, 2012, the petitioner was sentenced to a total effective sentence of twenty years incarceration, execution suspended after ten years, and three years of probation. *State* v. *James E.*, supra, 154 Conn. App. 800. In 2013, after the petitioner began serving his sentence, the legislature repealed the language in the relevant parole eligibility provision of § 54-125a (b) (2) that required the parole eligibility date to be calculated on the basis of the definite sentence as reduced by earned risk reduction credit. See P.A. 13-3, § 59. As a result, although such credit continued to be available under § 18-98e to reduce an inmate's sentence, the original sentence controlled for purposes of determining parole eligibility, unaffected by such credit.

Subsequently, the petitioner commenced the present habeas action, claiming that the 2013 amendment to the parole eligibility provision violated the ex post facto clause of the United States constitution because eliminating application of earned risk reduction credit to the parole eligibility date increased the period of time that inmates like him would be incarcerated before they could be released on parole. The respondent moved to dismiss the habeas petition for lack of subject matter jurisdiction.

After a hearing, the habeas court granted the respondent's motion to dismiss on the ground that the petitioner had failed to allege a violation of the ex post

facto clause, and, therefore, the court lacked subject matter jurisdiction. Relying on this court's analysis in *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 786 A.2d 1091 (2002), the court determined that the 2013 parole eligibility provision did not increase the punishment imposed on the petitioner because it was identical to the provision that was in place at the time that the petitioner committed the offenses giving rise to his incarceration. This appeal followed.

The petitioner claims that the habeas court improperly limited its analysis to the parole eligibility provision that was in place at the time that the petitioner committed the offenses to determine whether the challenged provision created a genuine risk that the petitioner would be incarcerated longer under the latter. The petitioner, relying on *Lynce* v. *Mathis*, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997), asserts that the habeas court also may compare the provision in place at the time of his sentencing to the challenged provision to determine whether the ex post facto clause has been violated.

The ex post facto claim raised by the petitioner in the present case is identical to one of the claims raised in *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 357, which we also have decided today. The petitioner in the present case and the petitioner in *Perez* are identically situated. Both committed their offenses prior to the enactment of the 2011 amendment permitting earned risk reduction credit to be applied to the calculation of parole eligibility and were sentenced prior to July 1, 2013, when the legislature repealed that provision. In *Perez* v. *Commissioner of Correction*, supra, 374–75, 378–80, we concluded that the habeas court lacked subject matter jurisdiction over the ex post facto claim because the challenged 2013 provision was identical to the provision in place when that petitioner committed his offense, and relied on *Johnson* v.

Commissioner of Correction, supra, 258 Conn. 817, as deeming the date of the offense the proper point of comparison. See id. (The ex post facto clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the [e]x [p]ost [f]acto [c]lause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." [Internal quotation marks omitted.]). We distinguished the circumstances presented in *Perez* from those in *Lynce v. Mathis*, supra, 519 U.S. 448–49, in which the United States Supreme Court concluded that the habeas court had jurisdiction to consider an ex post facto claim that the challenged statute increased the petitioner's punishment from that imposed pursuant to the statute in effect on the date of his sentencing. Although the petitioner in *Lynce* raised a claim based on the statute in effect at sentencing, the court held that jurisdiction existed based on a comparison of the challenged statute and the statute in effect at the time of the offense, which the court determined was essentially the same as the statute in effect at the time of sentencing. The same fact that made *Lynce* distinguishable from *Perez* is also found in the present case, namely, that, in contrast to the ongoing good time credit scheme in *Lynce*, the petitioner in the present case was ineligible for any form of earned risk reduction credit at the time of his offense. Therefore, for the reasons set forth in *Perez*, we conclude that the habeas court lacked subject matter jurisdiction over the petitioner's ex post facto claim in the present case.

The judgment is affirmed.

In this opinion the other justices concurred.

RAUNI MACHADO *v.* WILBERT TAYLOR ET AL. (SC 19838)

Rogers, C. J., and Palmer, McDonald, Espinosa, Robinson and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 52-556), any person injured through the negligence of any state official or employee in the course of operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury.

The plaintiff brought an action pursuant to § 52-556 against the defendant state Department of Transportation, seeking to recover damages for personal injuries he sustained as a result of an accident in which his motor vehicle was struck by a motor vehicle owned by the state and operated by one of its employees. Although the plaintiff alleged in his complaint that the state owned the vehicle, which the defendant admitted, he did not allege that the vehicle was insured by the state against personal injuries or property damage. Following the close of evidence after a bench trial, during which the plaintiff proffered no evidence that the vehicle was insured by the state, the defendant filed a motion for judgment of dismissal, pursuant to the rules of practice (§§ 10-30 [a] [1] and 15-8), in which it asserted that the plaintiff's failure to establish at trial that the vehicle was insured by the state placed the claim outside the purview of the waiver of sovereign immunity in § 52-556 and deprived the court of subject matter jurisdiction. The plaintiff opposed that motion, contending that it was never in dispute that the vehicle was insured by the state. He attached to his motion an exhibit in which the defendant admitted in an interrogatory that the state maintained self-insurance on the vehicle. The plaintiff concurrently filed a motion to open the evidence to allow him to place the interrogatory into evidence. The defendant opposed the motion to open, arguing that the trial court first had to address the dispositive jurisdictional issue or, alternatively, that the motion should be denied because the interrogatory could have been proffered earlier. Prior to rendering judgment for the plaintiff, the trial court denied the defendant's motion for judgment of dismissal but did not rule on the plaintiff's motion to open. The court's stated rationale for its denial of the defendant's motion was the defendant's delay in filing the motion or the application of the doctrine of laches. On the defendant's appeal challenging the court's decision on the motion for judgment of dismissal, *held* that the trial court improperly denied the defendant's motion on the basis of delay or laches and rendered judgment for the plaintiff without first resolving whether the defendant's motion raised a colorable jurisdictional issue and, if so, whether the court had jurisdiction over the cause of action, and, because the record

in the case suggested that the various issues potentially implicated by the claims and circumstances were better left to be resolved in the first instance by the trial court, the judgment was reversed and the case was remanded to that court to resolve the jurisdictional challenge: to the extent that the defendant sought to challenge the trial court's subject matter jurisdiction through its motion, pursuant to Practice Book § 15-8, for failure to make out a prima facie case, such a motion was procedurally improper, and the trial court should have considered the jurisdictional issue raised by the defendant in its motion under Practice Book § 10-30, the appropriate procedure for challenging subject matter jurisdiction; moreover, the trial court was required to resolve the question of whether it had jurisdiction irrespective of the propriety of the procedural vehicle by which it was raised, and delay or laches was not a proper basis on which to deny a challenge to the trial court's subject matter jurisdiction in relation to whether a claim falls within the statutory waiver of sovereign immunity.

Argued March 28—officially released July 25, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of the named defendant's negligent operation of a motor vehicle owned by the state, brought to the Superior Court in the judicial district of New Haven at Meriden, where the action was dismissed as against the named defendant; thereafter, the matter was tried to the court, *Cronan*, *J.*; subsequently, the court denied the defendant Department of Transportation's motion for judgment of dismissal and rendered judgment for the plaintiff, from which the defendant Department of Transportation appealed. *Reversed; further proceedings.*

Ronald D. Williams, *Jr.*, for the appellant (defendant Department of Transportation).

Nathan C. Nasser, with whom was *Robert A. Shrage*, for the appellee (plaintiff).

Opinion

McDONALD, J. The sole issue in this appeal is whether a party's delay in raising a challenge to the trial court's subject matter jurisdiction is a proper ground on

which to decline to dismiss the action. The defendant state Department of Transportation appeals from the trial court's judgment in favor of the plaintiff, Rauni Machado, in his negligence action, following the trial court's denial of the defendant's motion for judgment of dismissal premised on the plaintiff's failure to allege and prove an element of the statutory waiver of sovereign immunity cited as authority to bring the action. We agree with the defendant that the timing of its motion was an improper ground on which to deny the motion for judgment of dismissal insofar as it challenged subject matter jurisdiction. Accordingly, we reverse the judgment of the trial court and remand the case for reconsideration of that motion.

The record reveals the following undisputed facts and procedural history. A motor vehicle operated by the plaintiff was struck by a motor vehicle owned by the state and operated by a state employee. In November, 2012, the plaintiff brought the present action against the defendant, seeking to recover damages for personal injuries sustained as a result of the accident and alleging in his complaint that General Statutes § 52-556 authorized the action.[1] Section 52-556 provides: "Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury." The complaint alleged that the state owned the vehicle, which the defendant admitted, but it did not allege that the vehicle was insured by the state against personal injuries or property damage. In November, 2015, the matter proceeded to a bench trial,

[1] The plaintiff also named the state employee, Wilbert Taylor, as a defendant. Taylor successfully moved to dismiss the action against him on the basis of immunity under General Statutes § 4-165. All references to the defendant herein are to the Department of Transportation.

during which the plaintiff proffered no evidence to establish that the vehicle was insured by the state.

After the close of evidence but before either party had submitted posttrial briefs, the defendant filed a motion captioned "Motion for Judgment of Dismissal," pursuant to both Practice Book §§ 10-30 (a) (1)[2] and 15-8,[3] asserting that the plaintiff's failure to offer evidence at trial to establish that the vehicle was insured by the state placed the claim outside the purview of the waiver of sovereign immunity in § 52-556, and thus deprived the court of subject matter jurisdiction. The plaintiff filed an opposition to the motion, in which he contended that it was never in dispute that the vehicle was insured by the state or that his claim fell within the waiver under § 52-556. The plaintiff attached to that opposition as an exhibit an interrogatory dated more than two years before trial, in which the defendant acknowledged that the state maintained self-insurance on the vehicle. The plaintiff concurrently filed a request to open the evidence to allow him to place the interrogatory into evidence. The defendant opposed the motion to open, arguing that the trial court first had to address the dispositive jurisdictional issue, and, alternatively, that the motion should be denied on the merits because the interrogatory could have been proffered earlier. Although the defendant argued that it would be prejudicial to consider the interrogatory, it did not contend that it would have introduced evidence to rebut its response in the interrogatory. See *Piantedosi* v. *Floridia*, 186 Conn. 275, 278, 440 A.2d 977 (1982) ("An

[2] Practice Book § 10-30 (a) (1) provides in relevant part: "A motion to dismiss shall be used to assert . . . lack of jurisdiction over the subject matter . . . ."

[3] Practice Book § 15-8 provides in relevant part: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. . . ."

answer filed by a party to an interrogatory has the same effect as a judicial admission made in a pleading or in open court. It relieves the opposing party of the necessity of proving the facts admitted . . . but it is not conclusive upon him and will not prevail over evidence offered at the trial." [Internal quotation marks omitted.]); see also General Statutes § 52-200 (same).

The trial court ruled on the defendant's motion for a judgment of dismissal in its memorandum of decision rendering judgment for the plaintiff, but it did not rule on the plaintiff's motion to open evidence. In considering the defendant's motion attacking the plaintiff's failure of proof under two rules of practice, the trial court did not expressly consider whether the motion raised a jurisdictional issue or a challenge to the legal sufficiency of the claim. See *Egri* v. *Foisie*, 83 Conn. App. 243, 246–51, 848 A.2d 1266 (failure to allege negligent operation of vehicle as required by § 52-556 should have been raised through motion to strike, not motion to dismiss, because plaintiff potentially could state claim under statute), cert. denied, 271 Conn. 931, 859 A.2d 930 (2004); see also *In re Jose B.*, 303 Conn. 569, 572–80, 34 A.3d 975 (2012) (clarifying that absence of jurisdiction means that plaintiff could not establish jurisdictional facts, not that plaintiff had not done so). Nor did the court consider whether the factual issue asserted in the defendant's motion, alone or in combination with the interrogatory, raised an issue of fact that required further proceedings to resolve the jurisdictional issue. See *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 56, 459 A.2d 503 (1983) (trial court may hold hearing if issues of fact are necessary to determine jurisdiction); see also *Conboy* v. *State*, 292 Conn. 642, 651–54, 974 A.2d 669 (2009) (describing procedures for addressing jurisdictional challenge depending on point at which issue raised). Instead, the trial court stated that it was denying the motion, cited the procedural history of the

case, and provided the following comments: "The court finds it somewhat odd that the defendant [waited] until the close of evidence to file a motion that potentially could be dispositive of a case that is over three years old. In addition, a strong argument can be made that the [d]octrine of [l]aches may well apply here."

The defendant appealed from the judgment in the plaintiff's favor, solely challenging the court's decision on its motion, and we transferred the appeal to this court. See General Statutes § 51-199 (c); Practice Book § 65-1. The defendant claims that the trial court improperly denied its motion on the basis of delay and laches because neither ground is a proper basis on which to deny a motion raising a lack of subject matter jurisdiction, and, even if such grounds were proper, the delay was justified. The plaintiff contends that the court properly denied the motion, albeit for reasons not stated by the court. We agree with the defendant that we must assume that the trial court denied the motion on the sole basis that the trial court articulated. We further agree that the stated rationale was not a proper basis on which to deny the defendant's motion purportedly raising a challenge to the court's jurisdiction.

We observe at the outset that, although the defendant's motion for judgment of dismissal was made pursuant to Practice Book §§ 10-30 (a) (1) and 15-8, our analysis focuses on the former. To the extent the defendant sought to challenge the court's subject matter jurisdiction through a motion for judgment of dismissal for failure to make out a prima facie case under the latter provision, the motion was procedurally improper for two reasons. First, a motion to dismiss pursuant to Practice Book § 10-30 (a) (1) is the appropriate procedure for challenging subject matter jurisdiction. See *St. George* v. *Gordon*, 264 Conn. 538, 545, 825 A.2d 90 (2003). Second, to the extent the motion sought a judgment of dismissal pursuant to Practice Book § 15-8, the

defendant waived a claim that the plaintiff failed to make out a prima facie case under § 52-556 by presenting evidence in its defense and waiting until the close of evidence to file the motion. See, e.g., *Cormier* v. *Fugere*, 185 Conn. 1, 2, 440 A.2d 820 (1981) ("[a] motion for judgment of dismissal must be made by the defendant and decided by the court after the plaintiff has rested his case, but before the defendant produces evidence").

Although the motion was captioned in accordance with Practice Book § 15-8 as a motion for judgment of dismissal, the trial court nonetheless was required to consider the jurisdictional issue raised under Practice Book § 10-30. See *Franco* v. *East Shore Development, Inc.*, 271 Conn. 623, 629 n.7, 858 A.2d 703 (2004) ("[w]here a party captions its motion improperly, we look to the substance of the claim rather than the form" [internal quotation marks omitted]). "[O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *Golden Hill Paugussett Tribe of Indians* v. *Southbury*, 231 Conn. 563, 570, 651 A.2d 1246 (1995); see also *Baldwin Piano & Organ Co.* v. *Blake*, 186 Conn. 295, 297, 441 A.2d 183 (1982) ("[w]henever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction" [internal quotation marks omitted]). The trial court, therefore, was required to resolve the question of whether it had jurisdiction over the subject matter irrespective of the propriety of the procedural vehicle by which it was raised.

Accordingly, the question before us is whether delay or the doctrine of laches is a proper basis on which to

deny the defendant's challenge to the trial court's subject matter jurisdiction in relation to whether the plaintiff's claim falls within the statutory waiver of sovereign immunity. We conclude that they are not.

It is well established that "[t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Miller* v. *Egan*, 265 Conn. 301, 313, 828 A.2d 549 (2003).

Delay suggests a failure to comply with a time limitation, whether specific or governed by a reasonableness standard. See General Statutes § 52-128 (after amendment, "the defendant shall have a reasonable time to answer the same"); Practice Book § 10-59 (plaintiff may amend pleading as of right during first thirty days after return day). "Laches consists of an inexcusable delay which prejudices the defendant. . . . We have said on other occasions that [t]he defense of laches does not apply unless there is an unreasonable, inexcusable, and prejudicial delay in bringing suit. . . . Delay alone is not sufficient to bar a right; the delay . . . must be unduly prejudicial."[4] (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 398–99, 119 A.3d 462 (2015). We have

[4] We have not previously considered whether laches may be asserted by a plaintiff in an offensive manner, a matter on which other courts disagree, or whether it can be asserted to bar a motion as opposed to a cause of action, and our decision should not be construed to recognize the propriety of such an action. We need not resolve these issues, however, for purposes of this appeal.

never stated that delay or laches precludes a jurisdictional challenge.

Indeed, such a conclusion would contravene well settled law. "[A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The objection of want of jurisdiction may be made *at any time* . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction *cannot be waived by any party and can be raised at any stage in the proceedings*." (Emphasis added; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 548, 133 A.3d 140 (2016); accord Practice Book § 10-33; *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 815–16, 12 A.3d 852 (2011). Hence, this court has recognized that it is proper to consider a challenge to subject matter jurisdiction raised posttrial before the trial court; see *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 552; *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86 n.22, 952 A.2d 1 (2008); raised for the first time on appeal; see *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 506, 43 A.3d 69 (2012); and even raised in a collateral attack under certain circumstances. See *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013). Only in the context of a collateral attack on the judgment by way of a separate action have we considered whether the parties had a full opportunity originally to contest the jurisdiction of the adjudicatory tribunal. See id.

Accordingly, it was improper for the trial court to deny the defendant's motion and render judgment in favor of the plaintiff without first resolving whether the defendant's motion raised a colorable jurisdictional issue, and, if so, whether it had jurisdiction over the cause of action. Although this court will resolve a juris-

dictional challenge raised for the first time on appeal, the record in this case suggests that the various issues potentially implicated by the claims and circumstances are better left to be resolved in the first instance by the trial court. To the extent that further proceedings are necessary to resolve those issues, nothing stated in this opinion precludes such proceedings in accordance with law.

The judgment is reversed and the case is remanded for further proceedings.

In this opinion the other justices concurred.