OFFICIAL

CONNECTICUT REPORTS

Volume 320

PROCEEDINGS

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DECEMBER, 2015—APRIL, 2016

BY

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PUBLISHED BY
THE STATE OF CONNECTICUT
2022

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ATTORNEY GENERAL

HON. GEORGE JEPSEN

NOTES

[1] Retired March 6, 2016, under constitutional limitation as to age.
[2] Retired January 20, 2016, under constitutional limitation as to age.
[3] Retired April 19, 2016, under constitutional limitation as to age.
[4] Senior Judge effective December 16, 2015.
[5] Retired December 7, 2015, under constitutional limitation as to age.
[6] Retired March 5, 2016, under constitutional limitation as to age.

* See General Statutes § 51-50i.

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

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

TABLE OF THE CASES REPORTED

Anigbo *v.* B & W Paving Co. (Order) 929
Athena Holdings, LLC *v.* Marcus (Order). 908

Benedetto *v.* Dietze & Associates, LLC (Order) 901
Bongiorno *v.* J & G Realty, LLC (Order) 924
Bova *v.* Commissioner of Correction (Order) 920
Boykin *v.* Commissioner of Correction (Order) 928
Bozelko *v.* Commissioner of Correction (Order) 926
Bozelko *v.* Webster Bank, N.A. (Order) 910
Brenmor Properties, LLC *v.* Planning & Zoning Commission of Lisbon (Order) 928
Brown *v.* Commissioner of Correction (Order) 916
Brown *v.* Hartford (Order) 911
Brown, Kumah *v.* (Order) 908
Burton *v.* Connecticut Siting Council (Order) 925

Caruso *v.* Zoning Board of Appeals of Meriden 315
Zoning; certification from Appellate Court; whether defendant zoning board of appeals improperly granted application for variance filed by defendant company; whether Appellate Court properly affirmed trial court's conclusion that substantial evidence did not support board's finding that zoning regulations had practically confiscated property; variance, defined and discussed; unusual hardship in variance context, discussed.
Clougherty *v.* Clougherty (Orders) 932
Connecticut National Mortgage Co. *v.* Knudsen (Orders) . 926, 927
Conroy *v.* Stamford (Order) 917
Couture *v.* Commissioner of Correction (Order) 911

Dairyland Ins. Co. *v.* Mitchell 205
Declaratory judgment; insurance; summary judgment; whether plaintiff insurer was obligated to indemnify and defend defendant who was covered operator under decedent's automobile insurance policy in wrongful death action; claim that exemption precluding coverage for claims of bodily injury to named insured was not enforceable when included in body of insurance policy rather than as separate endorsement as required by statute ((Rev. to 2009) § 38a-335 (d)); plenary review of applicability of statute; endorsement, defined.
Dauti *v.* Lighting Services, Inc. (Order). 914
Davis *v.* Commissioner of Correction (Order). 905
DeNunzio *v.* DeNunzio 178
Probate appeal; conservatorship; whether Probate Court could use best interests of conserved person as consideration and guide in

examining statutory (§ 45a-650 (h)) factors in conservatorship proceedings; claim that Probate Court improperly relied on report of guardian ad litem recommending that defendant be appointed because it contained either conclusion on ultimate issue in case or inadmissible hearsay; whether plaintiff's substantial rights prejudiced by Probate Court's consideration of guardian ad litem report.

Deutsche Bank National Trust Co. *v.* Bliss (Order) 903

E & F Associates, LLC *v.* Zoning Board of Appeals 9

Zoning; appeal from decision of defendant town zoning board of appeals granting application for variances allowing vertical expansion of nonconforming building; claim that variances granted to defendant property owner without showing that strict application of zoning regulations would produce unusual hardship; standard of review on appeal of zoning board's decision; variance, defined; whether trial court improperly dismissed appeal of plaintiff abutting property owner.

Entertainment Financial, LLC *v.* Blackstone (Order) 902

Fairfield Merrittview Ltd. Partnership *v.* Norwalk 535

Taxation; appeal from decision by defendant city's Board of Assessment Appeals upholding city assessor's valuation of certain real property; motion for permission to amend appeal and add party as plaintiff; certification from Appellate Court; appeal from Appellate Court's decision remanding case to trial court with direction to dismiss plaintiff's appeal; standing requirements for maintaining municipal property tax appeal, discussed; statute (§ 12-117a) governing appeals from boards of assessment appeals, set forth and discussed; construction of motion for permission to amend appeal as motion to add or substitute party plaintiff.

Farren *v.* Farren (Orders) 933
Fazio *v.* Fazio (Order) 922
Fine *v.* Commissioner of Correction (Order) 925
Fluker *v.* Commissioner of Correction (Order) 905
Forgione *v.* Forgione (Order) 920

Gonda *v.* Commissioner of Correction (Order) 904
Goodwin *v.* Colchester Probate Court (Order) 924
Graziani *v.* Commissioner of Correction (Order) 917
Greene *v.* Commissioner of Correction (Order) 902

Hilton *v.* Commissioner of Correction (Order) 921

In re Glerisbeth C. (Order) 921
In re Nioshka A. N. (Order) 912

Ippolito *v.* Olympic Construction, LLC (Order) 934
Isabella D. *v.* Dept. of Children & Families 215
Administrative appeal; motion to dismiss; whether trial court properly granted motion to dismiss filed by defendant Department of Children and Families; whether plaintiff minor child had standing to appeal from decision of defendant declining to reconsider order removing alleged abuser from central child abuse and neglect registry; whether plaintiff had specific, personal and legal interest in substantiation process; classical and statutory aggrievement, discussed.

James B. *v.* Commissioner of Correction (Order). 905
J.E. Robert Co. *v.* Signature Properties, LLC 91
Mortgage foreclosure; commercial property; judgment of strict foreclosure; deficiency judgment; fair market value; claim that trial court improperly relied on appraiser's testimony and report in determining fair market value because appraiser valued leased fee interest of property rather than fee simple interest; whether trial court properly relied on appraiser's testimony and appraisal report in determining fair market value; whether trial court's fair market value finding was erroneous or improper.

JP Morgan Chase Bank, N.A. *v.* Mendez 1
Mortgage foreclosure; motion to open and vacate judgment of foreclosure by sale; claim that trial court improperly applied statute (§ 52-212) governing opening of judgments entered on default or nonsuit rather than standard in statute (§ 49-15) governing judgments of strict foreclosure; appeal dismissed as moot.

JPMorgan Chase Bank, National Assn. *v.* Simoulidis (Order) . . . 913

King *v.* Commissioner of Correction (Order) 913
Kumah *v.* Brown (Order). 908

Lee *v.* Stanziale (Order) 915
Lewis *v.* Clarke 706
Negligence; motion to dismiss; subject matter jurisdiction; whether trial court properly concluded that doctrine of tribal sovereign immunity did not preclude claim against defendant tribal employee in individual capacity; doctrine of tribal sovereign immunity, discussed.

McCullough *v.* Swan Engraving, Inc. 299
Workers' compensation; whether Compensation Review Board properly concluded that plaintiff dependent's claim for survivor's benefits was barred by statute of limitations (§ 31-294c); whether separate timely notice of claim for survivor's benefits was

required where decedent had filed timely notice of claim for benefits during his lifetime; claim that review board's determination entitled to deference.

MERSCORP Holdings, Inc. *v.* Malloy 448

Declaratory judgment; claim that statutes (§§ 7-34a (a) (2) and 49-10 (h)) governing fees imposed in connection with recording of documents in municipal public land records were unconstitutional; registration of loans secured by mortgage in national electronic registration database; amendments to statutes creating two tiered fee system under which mortgage nominees such as plaintiffs must pay higher recording fees than do other mortgagees; claim that statutory scheme violated equal protection provisions of federal and state constitutions; whether fees imposed by statutory scheme were taxes or user fees; rational basis standard of review, discussed; whether legislature's objective in imposing higher fees on mortgage nominees was legitimate public purpose; whether disparate treatment between mortgage nominees and other mortgagees was rationally related to that public purpose; claim that challenged statutory provisions violated dormant commerce clause of federal constitution; whether imposition of fees affected interstate commerce; whether statutory scheme facially discriminated against interstate commerce; whether scheme unduly burdened interstate commerce; claims that challenged statutory provisions violated plaintiffs' substantive due process rights under federal and state constitutions, federal constitutional prohibition against bills of attainder, and 42 U.S.C. § 1983.

Miller *v.* Appellate Court 759

Writ of error; attorney misconduct and discipline; hearing to show cause in Appellate Court; Appellate Court order suspending plaintiff in error from practice of law before that court, requiring application for reinstatement, referring plaintiff in error to Chief Disciplinary Counsel, and dismissing certain appeals that plaintiff in error had filed on behalf of her clients; whether Appellate Court abused its discretion in suspending M from practice of law before that court on basis of her repeated failure to meet deadlines, to comply with rules of practice, and for filing frivolous appeal.

Nationwide Mutual Ins. Co. *v.* Pasiak (Order) 913

New Alliance Bank *v.* Schaeppi (Order) 915

NPC Offices, LLC *v.* Kowaleski 519

Quiet title; injunction; certification from Appellate Court; whether plaintiff's easement over shared driveway on adjacent property owned by defendants had terminated; whether mortgage brokerage, home health-care agency, and appliance delivery coordination service constituted professional offices within meaning of agreement creating easement; construction of deeds, discussed.

O'Brien *v.* O'Brien (Order) 916

Oliphant v. Commissioner of Correction (Order) 910
O'Toole *v.* Hernandez (Order) 934
Ouellette *v.* Commissioner of Correction (Order). 907

Palmenta *v.* Commissioner of Correction (Order) 909
Pelletier Mechanical Services, LLC *v.* G & W Management, Inc. (Order). 932
Pramuka *v.* Cromwell (Order) 908

Reynolds *v.* Commissioner of Correction (Order). 930
Rodriguez *v.* Clark (Order). 926
R.S. Silver Enterprises, Inc. *v.* Pascarella (Order). 929

Salisbury Bank & Trust Co. *v.* Christophersen (Order). 931
Saunders *v.* Commissioner of Correction (Order). 921
Schaeppi *v.* Unifund CCR Partners (Order) 909
Schull *v.* Schull (Order) 930
Seminole Realty, LLC *v.* Sekretaev (Order) 922
Southport Congregational Church–United Church of Christ *v.* Hadley. 103
Probate appeal; certification from Appellate Court; whether Appellate Court properly concluded that trial court improperly granted defendant coexecutors' application for permission to sell real property pursuant to statute (§ 45a-325); whether Appellate Court correctly concluded that doctrine of equitable conversion was precluded by unfulfilled and unexpired mortgage contingency clause; doctrine of equitable conversion, discussed.
Sowell *v.* DiCara (Order) 909
Standard Oil of Connecticut, Inc. *v.* Administrator, Unemployment Compensation Act 611
Unemployment compensation; appeal to trial court from decision of Employment Security Appeals Division, Board of Review; three-pronged (ABC) statutory (§ 31-222 (a) (1) (B) (ii)) test for determining whether individual is employee or independent contractor for purposes of Unemployment Compensation Act, discussed; whether trial court improperly determined that certain installers and technicians, who worked for plaintiff, were plaintiff's employees under parts A and B of ABC test; whether plaintiff satisfied its burden of demonstrating that workers were free from plaintiff's control and direction under part A of ABC test and, therefore, were independent contractors for purposes of test; whether homes of plaintiff's customers at which workers performed work were places of business under part B of ABC test when plaintiff did not supervise their work there and whether workers were independent contractors for purposes of that part of test.

State *v.* Acker (Order) 915
State *v.* Acosta (Order) 922
State *v.* Anthony D. 842
Sexual assault first degree; motion to withdraw guilty plea; certification from Appellate Court; whether Appellate Court properly affirmed trial court's denial of defendant's motion to withdraw guilty plea due to ineffective assistance of counsel; whether trial court had affirmative duty to inquire into factual basis of defendant's motion under applicable rule of practice (§ 39-26); burden of proof on motion to withdraw guilty plea, discussed.
State *v.* Berrios 265
Robbery first degree; jury tampering; motion for mistrial; whether presumption of prejudice established in Remmer *v.* United States *(347 U.S. 227) continues to apply to claims of jury tampering;* Remmer *presumption of prejudice, discussed; whether trial court abused its discretion by denying defendant's motion for mistrial.*
State *v.* Brundage 740
Sexual assault first degree; risk of injury to child; motion to dismiss; certification from Appellate Court; whether Appellate Court properly concluded that trial court improperly determined that state was precluded from filing substitute information containing new charges on remand because those charges exceeded scope of remand; doctrine of res judicata, discussed; whether Appellate Court properly concluded that doctrine of res judicata did not bar retrial of defendant on kidnapping charges.
State *v.* Carrillo Palencia (Order) 927
State *v.* Carter 564
Murder; criminal violation of restraining order; certification from Appellate Court; whether Appellate Court properly concluded there was sufficient evidence of restraining order in effect that prohibited defendant from assaulting victim; appeal dismissed on ground that certification improvidently granted.
State *v.* Conyers (Order) 923
State *v.* Daley (Order) 919
State *v.* Davalloo. 123
Murder; motions in limine; statutory (§ 54-84b) marital communications privilege; certification from Appellate Court; whether Appellate Court properly affirmed trial court's determination that defendant's statements to her husband were not protected by marital communications privilege; whether defendant's communications to her husband were induced by affection, confidence, loyalty and integrity of marital relationship as required by § 54-84b (a); plenary review of statutory marital communications privilege.
State *v.* Davis (Order) 901
State *v.* Dyous 176
Petition for order extending defendant's commitment to Psychiatric Security Review Board; certification from Appellate Court; whether Appellate Court properly determined that defendant's

equal protection claim failed under first prong of State *v.* Golding *(213 Conn. 233) because there was inadequate record for appellate review; whether Appellate Court properly determined that trial court correctly found that defendant failed to present any evidence in support of equal protection claim; appeal dismissed on ground that certification was improvidently granted.*

State *v.* Faust (Order). 914
State *v.* Flowers (Order) 917
State *v.* Gjini (Order) 931
State *v.* Godbolt (Order) 931
State *v.* Griswold (Order) 907
State *v.* Holley (Order) 906
State *v.* Jamison 589

Illegal possession of narcotic substance; illegal possession of explosive; manufacturing bomb; certification from Appellate Court; claim that Appellate Court incorrectly determined that trial court had committed plain error when it failed to give jury specific instruction regarding credibility of defendant's alleged accomplice, who testified for state at defendant's trial; claim that Appellate Court's judgment could be affirmed on alternative ground that trial court had violated defendant's right against self-incrimination under state constitution by compelling him to provide handwriting exemplar.

State *v.* Jason B.. 259

Sexual assault first degree; unlawful restraint first degree; motion to correct illegal sentence; claim that statute ((Rev. to 2005) § 53a-70 (b) (3)) proscribing sexual assault first degree mandates that persons convicted of such offense be sentenced to period of imprisonment and special parole; whether, in light of this court's decision in companion case, § 53a-70 (b) (3) provides that, if court elects to impose sentence including term of imprisonment and period of special parole for conviction under § 53a-70, total combined period of imprisonment and special parole must total at least ten years; whether trial court properly granted in part defendant's motion to correct illegal sentence and properly resentenced defendant.

State *v.* Jerzy G. (Order) 919
State *v.* Jones 22

Assault second degree; motion to suppress; prosecutorial impropriety; alleged violations of rule set forth in State *v.* Singh *(259 Conn. 693) prohibiting prosecutor from asking witness to characterize another witness' testimony as lie, mistaken or wrong; certification from Appellate Court; whether Appellate Court improperly concluded that prosecutor's* Singh *violations deprived defendant of fair trial; claim, as alternative ground for affirming Appellate Court's judgment, that trial court improperly instructed jury on initial aggressor exception to self-defense; claim that Appellate Court improperly upheld trial court's denial of defendant's motion to suppress knife used in assault; whether safekeeping rationale*

for maintaining temporary possession of knife justified its continued, warrantless retention by police for use as evidence against him in his criminal case.

State *v.* Joseph (Order) 923

State *v.* Leandry (Order) 912

State *v.* Leconte 500

Murder; attempt to commit murder; felony murder; robbery first degree; robbery second degree; claim that defendant was deprived of sixth amendment right to counsel when trial court admitted incriminating statements regarding defendant's involvement in two separate robberies that defendant made to cellmate while incarcerated on charges relating to third robbery; claim that, because charges stemming from three separate robberies were tried together, incriminating statements regarding two robberies could have led jury to infer that, if defendant was involved in those two robberies, it was likely that he was involved in third robbery and, therefore, that his convictions relating to third robbery should be reversed; whether admission of incriminating statements was harmless beyond reasonable doubt; claim that trial court violated defendant's sixth amendment right to confrontation or otherwise abused its discretion by restricting defense counsel's cross-examination of one of state's key witnesses.

State *v.* Louis (Order) 929

State *v.* Maietta 678

Violation of probation; motion to suppress; whether trial court improperly admitted evidence obtained in violation of fourth and fourteenth amendments to United States constitution and separation of powers doctrine; whether exclusionary rule was applicable to probation revocation proceedings; sufficiency of evidence for determination that defendant violated his probation; whether trial court's evidentiary rulings were abuse of its discretion and deprived defendant of right to present defense; claim that condition of defendant's probation barring him from possessing firearms violated right to bear arms pursuant to second amendment to United States constitution.

State *v.* Martone (Order) 904

State *v.* Obas 426

Sexual assault second degree; certification from Appellate Court; posttrial motion to modify term of probation requiring registration as sex offender pursuant to statute (§ 54-251 (b)); whether trial court had authority to grant exemption under § 54-251 (b) after period of registration had commenced; whether defendant was precluded from seeking exemption under terms of plea agreement in absence of explicit waiver; construction of plea agreements, discussed.

State *v.* Orlando (Order) 930

State *v.* Parnoff (Order) 901
State *v.* Peeler 567
Murder; attempted murder; risk of injury to child; whether trial court properly denied defendant's motion for public funding for private attorney when, following remand for violation of constitutional right to counsel of choice, defendant was indigent and private attorney would not accept case by assignment; right to counsel of choice, discussed.
State *v.* Peterson. 720
Possession of controlled substance with intent to sell; conditional plea of nolo contendere; motion to suppress; whether police had reasonable and articulable suspicion to detain defendant; certification from Appellate Court; appeal from Appellate Court judgment directing vacation of nolo contendere plea and granting of motion to suppress; claim that trial court improperly denied motion to suppress because police lacked reasonable and articulable suspicion that defendant was engaged in or about to engage in criminal activity when he was detained in driveway of known drug location; law governing investigatory detentions, discussed; objective standard of reasonable and articulable suspicion, discussed; whether trial court's conclusion that there was reasonable and articulable suspicion for defendant's detention was legally and logically correct; alternative claim that, even if police had authority to detain defendant, they exceeded permissible scope of Terry *v.* Ohio *(392 U.S. 1) and ordered him to exit vehicle.*
State *v.* Phillips (Order) 903
State *v.* Redmond (Order) 918
State *v.* Rodriguez 694
Violation of probation; certification from Appellate Court; whether Appellate Court properly determined that claim that evidence was insufficient to support trial court's finding that defendant violated probation was moot when defendant pleaded guilty to underlying criminal charge; claim that pending habeas corpus petition challenging plea to underlying criminal charge preserved live controversy as to whether defendant committed crime while on probation; whether, if defendant prevails in habeas corpus action resulting in vacating of underlying criminal conviction, this court or habeas court would have jurisdiction or authority to reinstate his appellate rights in violation of probation finding.
State *v.* Rodriguez (Order) 934
State *v.* Roman. 400
Murder; assault first degree; criminal possession of pistol; risk of injury to child; whether trial court, following inquiry held after remand from this court, improperly rejected defendant's allegation of juror misconduct; whether extended delay in scheduling postremand inquiry into alleged juror misconduct violated defendant's right to due process and fair trial; consideration of factors identified by United States Supreme Court in Barker *v.* Wingo *(407 U.S. 514) to determine whether delay in scheduling*

postremand inquiry violated defendant's right to due process and fair trial.

State *v.* Sienkiewicz (Order) 924
State *v.* Skipwith (Order) 911
State *v.* Stanley (Order) 918
State *v.* Terry (Order) 916
State *v.* Vandeusen (Order) 903
State *v.* Victor O. 239

Sexual assault first degree; risk of injury to child; motion to correct illegal sentence; special parole; whether trial court correctly concluded that statute ((Rev. to 2001) § 53a-70 (b) (3), as amended by P.A. 02-138, § 5) proscribing sexual assault first degree does not mandate that persons convicted of such offense be sentenced to period of imprisonment and special parole but requires only that, if court does impose such sentence, total combined period of imprisonment and special parole must total at least ten years; whether this court determined in State *v.* Victor O. *(301 Conn. 163) that sentencing court is required to sentence person convicted under § 53a-70 to period of special parole; whether § 53a-70 (b) (3) constituted mandatory minimum sentence provision; harmonization of § 53a-70 (b) (3) with sentencing scheme; whether court's interpretation of § 53a-70 (b) (3) comported with legislative history surrounding special parole statute (§ 54-125e) and statute (§ 53a-29 (f)) governing minimum and maximum periods of probation for convictions under § 53a-70.*

State *v.* Washington (Order) 912
State *v.* Wright 781

Aggravated sexual assault first degree; conspiracy to commit aggravated sexual assault first degree; conspiracy to commit kidnapping first degree; assault third degree; conspiracy to commit assault third degree; admissibility of evidence of victim's prior sexual conduct pursuant to rape shield statute (§ 54-86f (4)); certification from Appellate Court; State *v.* DeJesus *(270 Conn. 826), overruled to extent that it construed term "material" in § 54-86f (4) in constitutional rather than evidentiary sense; whether trial court limited defense from questioning victim in jury's presence about certain of victim's prior sexual conduct; whether excluded evidence of victim's prior sexual conduct was relevant and material; whether exclusion of evidence violated defendant's constitutional rights of confrontation and to present defense; whether trial court's improper exclusion of evidence was harmless beyond reasonable doubt; whether Appellate Court correctly concluded that defendant's conviction on three counts of conspiracy arising from single agreement with multiple criminal objectives constituted violation of double jeopardy clause of federal constitution; whether Appellate Court properly concluded that appropriate remedy for such violation was to remand case to trial court with direction to vacate defendant's conviction on two of three counts of conspiracy, to render judgment of conviction on*

one conspiracy count, and to resentence defendant on that one count.

Studer *v.* Studer 483
Dissolution of marriage; whether Florida law governed plaintiff's motion for modification of foreign child support order pursuant to statute (§ 46b-213q (d)); whether trial court improperly ordered defendant to indefinitely pay postmajority child support; interpretation of provisions of Uniform Interstate Family Support Act (§ 46b-212 et seq.).

Suntrust Mortgage, Inc. *v.* Hutchins (Order). 918

Taft *v.* Commissioner of Correction (Order). 910
Trumbull *v.* Palmer (Order) 923

U.S. Bank National Assn. *v.* Works (Order) 904

Vasquez *v.* Commissioner of Correction (Order) 925
Villages, LLC *v.* Enfield Planning & Zoning Commission. 89
Zoning; certification from Appellate Court; whether Appellate Court properly upheld trial court's determination that defendant planning and zoning commission's denials of plaintiff's applications for special use permit and open space subdivision permit were not honest, legal, and fair because one commissioner was biased against plaintiff; appeals dismissed on ground that certification was improvidently granted.

Wheelabrator Bridgeport, L.P. *v.* Bridgeport. 332
Property tax assessment appeals; waste to energy facility; whether trial court improperly granted defendant city's motion to dismiss for lack of standing; whether statute (§ 22a-270 (b)) conferred standing on plaintiff to appeal from city's property tax assessment; whether trial court improperly rejected discounted cash flow approach to valuing property as matter of law in determining value of property and improperly valued property; claim that trial court's valuation of property based on appraisal of city's expert included assessed value of plaintiff's personal property; claim that valuation effectively permitted city to impose double tax on value of plaintiff's personal property; whether trial court's finding that valuation of plaintiff's personal property was not excessive was clearly erroneous; claim that trial court improperly excluded evidence of city's wrongful conduct that allegedly resulted in overvaluation of subject property; whether city's wrongful conduct was proper consideration in property tax appeal for purposes of determining whether plaintiff was entitled to interest on overpayments to city; claim on cross appeal that trial court improperly denied city's motion to dismiss plaintiff's appeal on ground that plaintiff had refused to provide city's board of assessment appeals

with copy of draft appraisal at administrative hearing; claim on cross appeal that trial court improperly admitted appraisal testimony of plaintiff's expert witnesses on ground that they were not state licensed real estate appraisers; whether trial court abused its discretion in deducting developer's profit of 15 percent from court's reproduction cost approach calculations in determining value of property.

Wheeler *v.* Beachcroft, LLC 146

Quiet title; res judicata; summary judgment; whether plaintiff landowners' claims alleging creation of public right of way and prescriptive easements over defendant waterfront landowners' property were barred by previous actions alleging creation of prescriptive and implied easements over same property by different parties; whether privity was required for application of res judicata when plaintiffs received notice and opportunity to intervene in previous actions.

Wright *v.* Commissioner of Correction (Order) 919

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JP MORGAN CHASE BANK, N.A. *v.* ANTHEA MENDEZ ET AL.
(SC 19481)

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

Syllabus

The plaintiff brought a mortgage foreclosure action against the defendant and, despite sending several communications to her regarding the action, the defendant did not respond, and a default was entered against her for failure to appear. The trial court thereafter ordered a judgment of foreclosure by sale and, at a public sale of the defendant's property, the plaintiff placed the winning bid. Following the sale, the defendant appeared and filed a motion to open and vacate the judgment of foreclosure by sale pursuant to statute (§ 49-15), claiming that she had delayed in responding to the foreclosure proceeding because she mistakenly believed that she could reinstate her mortgage at any time and that she intended to use the proceeds of a settlement in an unrelated case to pay the arrearage. The defendant asked the court to exercise its equitable powers to open the judgment. The trial court denied the defendant's motion, noting that § 49-15 applied to strict foreclosures rather than to foreclosures by sale, and, when it applied the statute (§ 52-212) governing the opening of judgments entered upon default, determined that there was no justification to open the judgment because the defendant's delay in responding to the foreclosure proceeding was due to her own negligence and inattention to the matter rather than due to a mistake, accident, or other reasonable cause. The trial court further determined that it could not find any equitable grounds on which to provide relief in the defendant's case. From the trial court's denial of the motion to open the judgment, the defendant appealed. Following oral argument, this

court ordered the parties to file supplemental briefs addressing whether the defendant's appeal was moot. *Held* that the defendant's claim was moot and her appeal was dismissed for lack of subject matter jurisdiction, the trial court properly having determined that § 52-212 applied to her motion to open the judgment of foreclosure by sale and that the defendant's negligence or inattention in failing to respond and appear in the foreclosure action failed to provide good cause to open the judgment under § 52-212 and also weighed against the use of its equitable powers to open the judgment; furthermore, because the defendant did not challenge on appeal the trial court's decision not to invoke its equitable powers to open the judgment under either § 49-15 or § 52-212 under the specific facts of this case, the defendant was bound by the trial court's order determining that her case did not merit the use of its equitable powers, and the defendant could not have been afforded any practical relief if the case was remanded to the trial court.

Argued September 15—officially released December 22, 2015

Procedural History

Action to foreclose a mortgage on the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendants were defaulted for failure to appear; thereafter, the court, *Wahla*, *J.*, entered judgment of foreclosure by sale; subsequently, the court, *Vacchelli*, *J.*, denied the named defendant's motion to open and vacate the judgment of foreclosure by sale, and the named defendant appealed. *Appeal dismissed.*

Byron Paul Yost, with whom was *John G. Brosnan*, for the appellant (named defendant).

Brian D. Rich, with whom was *Peter R. Meggers*, for the appellee (plaintiff).

Opinion

ESPINOSA, J. The named defendant, Anthea Mendez,[1] appeals from the order of the trial court, claiming that the court erroneously applied General Statutes

[1] JP Morgan Chase Bank, N.A., was also named as a defendant in the present action as having a claim to an interest in the property. References herein to the defendant are to Mendez only.

§ 52-212[2] in denying her motion to open and vacate the judgment of foreclosure by sale and that the court should have applied the standard articulated in General Statutes § 49-15.[3] The defendant claims that the trial court improperly applied § 52-212, which governs the opening of judgments rendered upon default or nonsuit, rather than § 49-15, which governs the opening of judgments of strict foreclosure. The defendant contends that § 52-212 does not apply to judgments of foreclosure by sale, because such judgments are not final. Accordingly, the defendant contends that this court should construe § 49-15 to apply not only to judgments of strict foreclosure but also to judgments of foreclosure by sale. We do not reach these issues, however, because we determine that the defendant's claim is moot.

The facts of this dispute are set forth in the orders of the trial court and the underlying record. On or about October 4, 2004, the defendant executed a promissory note in favor of Century 21 Mortgage in the principal amount of $296,000. The note was secured by a mortgage deed on property located at 45 Derek Lane in

[2] General Statutes § 52-212 provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . ."

[3] General Statutes § 49-15 provides in relevant part: "(a) (1) Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection. . . ."

Windsor (property), which the defendant also executed on October 4, 2004, and delivered to Century 21 Mortgage. The mortgage was subsequently assigned to the plaintiff, JP Morgan Chase Bank, N.A., which was also the holder of the note. In 2012, the plaintiff declared the note to be in default and sought to foreclose on the property. Despite a number of communications from the plaintiff regarding the foreclosure action, the defendant did not respond and, on September 19, 2013, the trial court granted the plaintiff's motion for entry of default against the defendant for failure to appear. The trial court thereafter ordered a judgment of foreclosure by sale on September 30, 2013. Pursuant to the trial court's order, a public sale of the defendant's property was held on January 11, 2014. The plaintiff was the sole bidder present at the sale and placed the winning bid.

Following the plaintiff's winning bid on the property, the defendant, through her attorney, made her first appearance in the case on January 14, 2014, and filed a motion to open and vacate the judgment of foreclosure by sale pursuant to § 49-15. The defendant claimed that she had mistakenly believed that she had the ability to reinstate her mortgage at any point in time. Accordingly, she argued that she had delayed in responding to the foreclosure proceeding because she had intended to use the settlement proceeds that she had been expecting in an unrelated civil action to pay the arrearage owed to reinstate the mortgage. She argued that the court should invoke its powers in equity to open the judgment. As bases justifying the exercise of the court's equitable powers, the defendant cited to personal hardships, as well as to her prior history of making timely mortgage payments, including prepayments on the principal of the loan. The defendant contended that these facts demonstrated her good faith to make future payments on the debt. The trial court denied the defendant's motion.

In its order denying the defendant's motion, the trial court stressed that § 52-212, rather than § 49-15, properly applies to a motion to open a judgment of foreclosure by sale entered upon default. The court noted that § 49-15 applies to strict foreclosures rather than foreclosures by sale. Accordingly, the trial court determined that although the defendant's motion was timely, there was no justification to open the judgment given that the defendant's delay in responding to the foreclosure proceeding was "due to her own inattention to the matter" rather than due to a mistake, accident, or some other reasonable cause. The trial court also observed that, as foreclosure actions are proceedings in equity, there may be cases in which the finality of judgments must yield to principles of equity. The court determined, however, that the defendant's case was not one of them, as equitable principles cannot provide relief against the "operation of judgments rendered through the negligence or inattention of the party claiming to be aggrieved."

The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. On appeal, the defendant advances two arguments in support of her claim that the trial court incorrectly applied § 52-212 in denying her motion to open. First, the defendant contends that, because a foreclosure action is a proceeding in equity, § 52-212—which applies to civil proceedings generally—cannot apply to a foreclosure action and that § 49-15 must govern. Second, the defendant argues that, because the sale of the defendant's property had yet to be approved, the judgment was not final and § 52-212 applies only to final judgments. In response, the plaintiff argues that, because the judgment was one of foreclosure by sale, the trial court properly applied § 52-212 because § 49-15 applies only to judgments of strict foreclosure. Fur-

thermore, the plaintiff responds that a judgment of foreclosure by sale is a final judgment for the purposes of § 52-212.

Following oral argument before this court, we ordered sua sponte the parties to submit supplemental briefs to address the issue of whether this appeal should be dismissed as moot because, even if the defendant were to prevail on the issue she raised on appeal, she could not be afforded any practical relief due to the fact that the trial court also found no equitable grounds upon which to grant relief. See *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 308 Conn. 719, 738–39, 66 A.3d 848 (2013). We conclude that the defendant's claim is indeed moot and that the appeal should be dismissed.

We begin with the standard of review. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable." (Internal quotation marks omitted.) *Valvo* v. *Freedom of Information Commission*, 294 Conn. 534, 540, 985 A.2d 1052 (2010). "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, supra, 308 Conn. 736. "A case is considered moot if [the trial] court cannot grant the appellant any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) Id.; *Moraski* v. *Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 255, 967 A.2d 1199 (2009). Because

a question of mootness implicates the subject matter jurisdiction of this court, "it raises a question of law over which we exercise plenary review." (Internal quotation marks omitted.) *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, supra, 736.

In *Wyatt Energy, Inc.*, the plaintiff, Wyatt Energy, Inc. (Wyatt), claimed that the Appellate Court had used an incorrect legal standard when conducting its analysis under Connecticut antitrust law. Id., 730–31. In response, the named defendant, Motiva Enterprises, LLC (Motiva), raised the argument that, even if the court agreed with Wyatt's argument, Wyatt had failed to appeal the findings of the trial court that recognized that there were other factors present that would have prevented Motiva from raising its prices in a monopolistic fashion that violated state antitrust law. Id., 731. Thus, the unchallenged ruling presented a basis on which to affirm the Appellate Court independent from Wyatt's claim. Accordingly, we concluded that, due to the unchallenged ruling, Wyatt could not be afforded practical relief and we dismissed the appeal as moot. Id., 738, 740. Likewise, in *Gagne* v. *Vaccaro*, 311 Conn. 649, 652, 90 A.3d 196 (2014), we determined that the parties' dispute over whether the Appellate Court properly concluded that a trial court judge should have recused himself was moot. In that case, the defendant had failed to challenge on appeal the trial court's ruling that his motion to disqualify was procedurally deficient. Id., 660. Therefore, in *Gagne*, as in *Wyatt Energy, Inc.*, we were unable to grant the defendant any practical relief due to the binding effect of the trial court's unchallenged ruling, which served as an alternative basis on which to affirm the judgment. Id.

The procedural facts in the present appeal are analogous to those presented in both *Wyatt Energy, Inc.*, and *Gagne*. In her appeal from the trial court's order, the defendant submits that the court erroneously

applied § 52-212 rather than § 49-15. Despite the defendant's arguments to the contrary, § 49-15 clearly provides that it applies only to the opening of judgments of strict foreclosure before title vests, rather than judgments of foreclosure by sale. See *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 257, 260, 708 A.2d 1378 (1998); *Society for Savings* v. *Stramaglia*, 225 Conn. 105, 108, 110, 621 A.2d 1317 (1993).

Even if § 49-15 applied to the judgment of foreclosure by sale at issue in the present case, the defendant would still be without a viable avenue for relief. As is evident from the trial court's order, the court concluded that the defendant's particular case did not warrant the invocation of its equitable powers—under either § 52-212 or § 49-15—to provide relief. A court's determination that equitable principles do not justify the opening of a judgment precludes relief under § 49-15 or otherwise. The trial court found that the defendant's "negligence or inattention" in failing to respond and appear in the foreclosure action both failed to provide good cause under § 52-212 and weighed against using its powers of equity to open the judgment. Although the defendant correctly asserts that trial courts presiding over foreclosure actions may rely on their equitable powers, the defendant did not challenge on appeal the trial court's decision to not invoke its power under the specific facts of the defendant's case.[4] Accordingly, the defendant is still bound by the trial court's order determining that this case is not one that merits the use of equitable powers to open a judgment. Even if she were to prevail on her claim regarding the application of § 49-15, rather than § 52-212, to her case, the trial court found that

[4] Mootness aside, we observe that the defendant's failure to adequately raise this issue on appeal would also render it unreviewable before this court. We generally do not consider claims raised for the first time on appeal. See Practice Book § 60-5; *Alexandre* v. *Commissioner of Revenue Services*, 300 Conn. 566, 585–86, 22 A.3d 518 (2011).

there was no good cause to warrant the opening of the judgment against her. Consequently, the defendant can be afforded no practical relief if we were to remand the matter to the trial court. As a result, we conclude that the defendant's appeal is moot.

The appeal is dismissed.

In this opinion the other justices concurred.

E AND F ASSOCIATES, LLC *v.* ZONING BOARD OF APPEALS OF THE TOWN OF FAIRFIELD ET AL. (SC 19325)

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

Syllabus

Pursuant to statute (§ 8-6 [a] [3]), a zoning board of appeals may grant a variance from zoning regulations when, due to conditions especially affecting a parcel of land but not affecting generally the district in which the land is situated, a literal enforcement of the regulations would result in exceptional difficulty or unusual hardship.

The plaintiff property owner appealed from the decision by the defendant town zoning board of appeals granting an application for certain variances to the defendant abutting property owner, P Co., allowing for the vertical expansion of a single story building on P Co.'s property. The building, which was located in a business district zone, had been constructed before the adoption of the town zoning regulations and was nonconforming with respect to several of those regulations, including certain setback requirements. P Co. sought the variances pursuant to § 8-6 (a) (3) to add a second story to the building because it wanted to lease the property to a restaurant business, and it claimed that the existing building lacked sufficient storage and office space for that purpose. P Co. conceded that it had received numerous offers to lease the existing space to fast food retailers and other high turnover establishments, but P Co. claimed that it was not in its best interests or those of the town to entertain those offers because of the existing high intensity traffic in the town center. The plaintiff had opposed the variances claiming that the strict application of the zoning regulations did not render P Co.'s property unusable or subject P Co. to a unique hardship. After a hearing, the zoning board granted the variance application without explaining the reasons for doing so. In an appeal to the trial court, the plaintiff claimed, inter alia, that the zoning board could not reasonably

have found that an unusual hardship existed because the property had several uses without the variances. The trial court concluded that because the configuration of the property and building precluded P Co. from expanding the building vertically without running afoul of the setback regulations, application of the regulations produced a hardship justifying the variances. The trial court therefore rendered judgment dismissing the plaintiff's appeal, and the plaintiff, on the granting of certification, appealed. *Held* that the trial court improperly dismissed the plaintiff's appeal, the zoning board having improperly granted P Co.'s application for the variances because the property had economic value even if the variances were denied; a review of the record revealed no basis for the zoning board's decision, this court previously has held that proof that a property has a peculiar characteristic that makes it difficult for a particular use to comply with the zoning regulations does not justify the granting of a variance when the owner, like P Co. here, has made no showing that the property could not reasonably be developed for some other use permitted in the district or that the effect of limiting the property to the permitted uses only would be confiscatory or arbitrary, and the fact that a peculiar characteristic makes compliance with the zoning regulations exceptionally difficult if the property were put to a more valuable or desirable use does not constitute either an exceptional difficulty or unusual hardship for purposes of § 8-6 (a).

Stillman v. *Zoning Board of Appeals* (25 Conn. App. 631), to the extent that it held that in the absence of a showing that the denial of a variance will cause unusual hardship, a variance may be granted if literal enforcement of a zoning regulation causes exceptional difficulty or hardship because of some unusual or peculiar characteristic of the property, overruled.

Argued October 5—officially released December 22, 2015

Procedural History

Appeal from the decision of the named defendant granting the application for variances filed by the defendant 1460 Post Road, LLC, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Radcliffe, J.*; judgment dismissing the plaintiff's appeal, from which the plaintiff, on the granting of certification, appealed to the Appellate Court; thereafter, the appeal was transferred to this court. *Reversed; judgment directed.*

Joel Z. Green, with whom was *Linda Pesce Laske*, for the appellant (plaintiff).

Stanton H. Lesser, for the appellee (named defendant).

Opinion

ROGERS, C. J. The issue that we must decide in this appeal is whether the defendant Zoning Board of Appeals of the Town of Fairfield (board) properly granted an application for zoning variances to the defendant 1460 Post Road, LLC (applicant), which allowed the vertical expansion of a nonconforming building, when there was no showing that the strict application of the zoning regulations would destroy the property's value for any of the uses to which it could reasonably be put. The plaintiff, E & F Associates, LLC, appealed to the trial court from the board's decision granting the variances claiming that: (1) the board improperly had concluded that the strict application of the zoning regulations would produce an unusual hardship even though the subject property would have economic value without the variances; and (2) the board's decision was illegal and void because a member of the Fairfield Board of Selectmen, who was an ex officio member of the board, represented the applicant in the proceedings before the board. The trial court rejected both claims and dismissed the plaintiff's appeal. The plaintiff then filed this appeal,[1] in which it contends that the trial court improperly resolved both claims. We conclude that the trial court improperly determined that the strict application of the zoning regulations would produce an undue hardship for the applicant, justifying the variances. Accordingly, we reverse the judgment of the trial court on this ground, and we need not address the plaintiff's second claim.

The record reveals the following facts, which were either found by the trial court or are undisputed, and

[1] The Appellate Court granted the plaintiff's petition for certification to appeal from the judgment of the trial court pursuant to General Statutes § 8-8 (o), and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

procedural history. The applicant owns property located at 1460–1462 Post Road (property) in the town of Fairfield (town). The property is situated at the corner of Post Road and Sanford Road and is in the center designed business district zone,[2] which consists of a small area in the center of the town's downtown. A single story building is situated on the property and has frontage on both Post Road and Sanford Road. The building was constructed before the town adopted its zoning regulations and is nonconforming with respect to several of those regulations, including setback requirements. Specifically, the town's zoning regulations require that buildings in the center designed business district be set back at least ten feet from the street line and ten feet from the rear property line. The building, however, extends to the street lines on both Post Road and Sanford Street and is set back only six inches from the rear property line.

In 2012, the applicant filed an application with the board seeking variances of the street line and rear property line setback requirements to add a second story to the building.[3] In its variance application, the applicant represented that it wanted to lease the building to a "quality restaurant," and the existing building lacked sufficient storage and office space for that use. The applicant also represented that it had received "numerous offers [to lease the existing building] from a major coffee/donut shop, several national fast food retailers and other high turnover food establishments," but that it "[did] not believe that it would be in the best interests of itself, the [town] and the Fairfield [c]enter merchants

[2] The trial court referred to the "[c]ommercial [d]esigned [b]usiness [d]istrict." The zoning regulations, however, refer to the zone as the "[c]enter [d]esigned [b]usiness [d]istrict." Fairfield Zoning Regs., § 12.3.

[3] Neither the applicant nor the board has ever disputed that the variances were required because the vertical expansion of the building within the applicable setbacks constituted a prohibited expansion of the nonconforming use under the town's zoning regulations.

to entertain such offers as they would provide a much higher intensity in traffic in the already bustling Fairfield [c]enter."

The board held a public hearing on the variance application on March 1, 2012. Counsel for the plaintiff, which owns property on Post Road abutting the applicant's property, appeared at the hearing and argued that the applicant was not entitled to the variances because the strict application of the zoning regulations did not render the applicant's property unusable or subject the applicant to a unique hardship. The board voted to approve the variance application, but did not explain the reasons for its approval.

The plaintiff appealed from the board's decision to the trial court claiming, among other things, that the board could not reasonably have found that the strict application of the zoning regulations would produce unusual hardship when the property had several uses even without the variances, and the board had "relied upon improper influences and upon considerations that did not provide a valid basis [for its decision] as a matter of law . . . ." Relying on the Appellate Court's decision in *Stillman* v. *Zoning Board of Appeals*, 25 Conn. App. 631, 596 A.2d 1, cert. denied, 220 Conn. 923, 598 A.2d 365 (1991), the trial court concluded that, because the configuration of the property and the building precluded the applicant from expanding the building vertically without running afoul of the setback regulations, the regulations produced a hardship justifying the approval of the variance application. See id., 636–37 (zoning board of appeals properly granted variance from setback requirements when placement of well and septic system prevented applicant from building addition to house anywhere except in setback). Accordingly, the trial court dismissed the appeal.

This appeal followed. The plaintiff claims that the trial court improperly concluded that the board prop-

erly granted the variances when the applicant had failed to demonstrate that the property would have no economic value without the variances.[4] We agree with the plaintiff.

"The standard of review on appeal from a zoning board's decision to grant or deny a variance [pursuant to General Statutes § 8-6 (a)][5] is well established. We must determine whether the trial court correctly concluded that the board's act was not arbitrary, illegal or an abuse of discretion." (Footnote added; internal quotation marks omitted.) *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 23–24, 966 A.2d 722 (2009). "Because the plaintiffs' appeal to the trial court is based solely on the record, the scope of the trial court's review of the board's decision and the scope of our review of that decision are the same." *Hescock* v. *Zoning Board of Appeals*, 112 Conn. App. 239, 244, 962 A.2d 177 (2009). In the present case, the question of whether the board had authority to grant a variance pursuant to § 8-6 (a) when the property would not lack economic value even

[4] The plaintiff also claims that the trial court improperly rejected its claim that the board's decision was illegal and void because the applicant had been represented in the proceedings before the board by an attorney who was an ex officio member of the board. Because we agree with the plaintiff's claim that the board should have rejected the application for variances when the property would have economic value if the variances were denied, we need not address this claim.

[5] General Statutes § 8-6 (a) provides in relevant part: "The zoning board of appeals shall have the following powers and duties . . . (3) to determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured, provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed. . . ."

if the variance were denied is a question of law. Accordingly, our review is plenary. *Hasychak* v. *Zoning Board of Appeals*, 296 Conn. 434, 442, 994 A.2d 1270 (2010). "The burden of proof to demonstrate that the board acted improperly is upon the plaintiffs." (Internal quotation marks omitted.) *Moon* v. *Zoning Board of Appeals*, supra, 24.

"A variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town. . . . It is well established, however, that the granting of a variance must be reserved for unusual or exceptional circumstances. . . . An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone. . . . Accordingly, we have interpreted [§ 8-6 (a) (3)] to authorize a zoning board of appeals to grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan. . . . Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance." (Internal quotation marks omitted.) Id., 24–25.

"Financial considerations are relevant [to the question of whether a variance is justified] only if the application of the regulation or ordinance practically destroys the value of the property for any use to which it may be put and the regulation or ordinance as applied to the subject property bears little relationship to the purposes of the zoning plan." *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 210, 658 A.2d 559 (1995);

see also *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 295, 947 A.2d 944 (2008) ("considerations of financial disadvantage—or, rather, the denial of a financial advantage—do not constitute hardship, unless the zoning restriction greatly decreases or practically destroys [the property's] value for any of the uses to which it could reasonably be put" [internal quotation marks omitted]); *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 561, 916 A.2d 5 (2007) ("[f]inancial considerations are relevant only in those exceptional situations where a board could reasonably find that the application of the regulations to the property greatly decreases or practically destroys its value for any of the uses to which it could reasonably be put and where the regulations, as applied, bear so little relationship to the purposes of zoning that, as to particular premises, the regulations have a confiscatory or arbitrary effect" [internal quotation marks omitted]). "A zoning regulation that prevents land from being used for its greatest economic potential . . . does not create the exceptional kind of financial hardship that we have deemed to have a confiscatory or arbitrary effect." (Internal quotation marks omitted.) *Grillo* v. *Zoning Board of Appeals*, 206 Conn. 362, 370, 537 A.2d 1030 (1988); see also *Dolan* v. *Zoning Board of Appeals*, 156 Conn. 426, 430–31, 242 A.2d 713 (1968) ("[i]t is not a proper function of a zoning board of appeals to vary the application of zoning regulations merely because the regulations hinder landowners and entrepreneurs from putting their property to a more profitable use"); *Krejpcio* v. *Zoning Board of Appeals*, 152 Conn. 657, 662, 211 A.2d 687 (1965) ("[d]isappointment in the use of property does not constitute exceptional difficulty or unusual hardship").

"In order to determine whether the board properly granted the subject variance, we must first consider whether the board gave reasons for its action. . . .

Where a zoning board of appeals does not formally state the reasons for its decision . . . the [reviewing] court must search the record for a basis for the board's decision." (Internal quotation marks omitted.) *Moon* v. *Zoning Board of Appeals*, supra, 291 Conn. 25.

In the present case, our search of the record has revealed no basis for the board's decision granting the applicant's variance application under the foregoing legal standards. With respect to economic hardship, the applicant conceded in its variance application and at the hearing before the board that it had received numerous offers from a variety of sources to lease the existing building. Accordingly, there is no evidence that the strict application of the zoning regulations would have a confiscatory effect. Indeed, the board makes no claim that the applicant was entitled to the variances because a denial would cause economic hardship. Rather, the board claims that, because most of the properties in the central design business district have two stories and the building on the applicant's property has only one story, and because the building is on a corner lot subject to two separate street setbacks, the property has peculiar characteristics that render the strict application of the zoning regulations unduly harsh because it would prevent the construction of a second story. Even if we were to assume that the placement of the building on a corner lot and the fact that it has only one story are characteristics that are not shared by other properties in the central designed business district, however, this court previously has held that proof that a property has a "peculiar characteristic"; id., 24; that has made it difficult for a particular use to comply with the zoning regulations does not justify the granting of a variance when the owner has "made no showing that [the property] could not reasonably be developed for some other use permitted in the [zoning district] or that the effect of limiting the parcel to the permitted

uses only would be confiscatory or arbitrary." *Miclon* v. *Zoning Board of Appeals*, 173 Conn. 420, 423, 378 A.2d 531 (1977); id. (difficulties created by difficulties of access and topography of property did not justify variance in absence of proof that application of zoning regulations would be confiscatory or arbitrary); see also *Bloom* v. *Zoning Board of Appeals*, supra, 233 Conn. 210 (zoning board of appeals improperly granted variance because "limitations imposed by the shape of the lot do not in themselves create a hardship," and there was no evidence that property would be worthless if variance were denied [internal quotation marks omitted]); *Dolan* v. *Zoning Board of Appeals*, supra, 156 Conn. 431 (no evidence in record demonstrating diminishing effect regulation had on value of property); *Krejpcio* v. *Zoning Board of Appeals*, supra, 152 Conn. 662 (that it would be to applicant's financial advantage to secure variance did not warrant relaxation of zoning regulations). Accordingly, the fact that the peculiar characteristics of the applicant's property made it difficult to construct a second story on the building that would comply with setback requirements did not justify the granting of the variance when the evidence established that the property would have economic value if the variance were denied.

As we previously have indicated, in support of its conclusion to the contrary, the trial court in the present case relied on the Appellate Court's decision in *Stillman* v. *Zoning Board of Appeals*, supra, 25 Conn. App. 631. In *Stillman*, the defendant landowner sought a variance of the town of Redding's coverage and setback regulations in order to build an addition to her house, which the Zoning Board of Appeals of the Town of Redding granted. Id., 632. The defendant landowner had claimed that a hardship existed because the location of a well and septic system on her property prevented her from building the addition anywhere except on an area where

it was prohibited by the setback requirement. Id., 636. The plaintiff, an abutting landowner, appealed to the trial court, which reversed the decision of the Zoning Board of Appeals of the Town of Redding on the ground that the defendant landowner had failed to establish a hardship because the record was "devoid of evidence that the property has little or no value because of the setback regulations . . . ." Id., 635–36. The defendant landowner then appealed to the Appellate Court, which concluded that the trial court had applied an improper test. Id., 636. Specifically, the Appellate Court concluded that, although the "[economic hardship] test is a valid means of establishing a hardship, it is not exclusive." Id. Rather, even in the absence of a showing that the denial of the variance will cause economic hardship, "[a] variance may be granted if the literal enforcement of a regulation causes exceptional difficulty or hardship because of some unusual characteristic of the property."[6] Id. The Appellate Court further concluded that this test was met in *Stillman* because of the location of the well and septic system on the defendant landowner's property. Id., 636–37. Accordingly, the court concluded that the board properly had granted the variance. Id.; see also *Jersey* v. *Zoning Board of Appeals*, 101 Conn. App. 350, 360, 921 A.2d 683 (2007) (variance may be granted when hardship has been established even if property would have economic value if zoning regulations were strictly applied); *Giarrantano* v. *Zoning Board of Appeals*, 60 Conn. App. 446, 453, 760 A.2d 132 (2000) (variance may be granted when strict application

[6] The Appellate Court in *Stillman* v. *Zoning Board of Appeals*, supra, 25 Conn. App. 636, relied on this court's decisions in *Whittaker* v. *Zoning Board of Appeals*, 179 Conn. 650, 658, 427 A.2d 1346 (1980), and *Garibaldi* v. *Zoning Board of Appeals*, 163 Conn. 235, 238, 303 A.2d 743 (1972). Neither *Whittaker* nor *Garibaldi*, however, directly addressed the question of whether a peculiar characteristic of a property that makes compliance with zoning regulations difficult is sufficient to justify the granting of a variance when the property would have economic value even if the zoning regulations were strictly enforced.

of zoning regulations would deprive landowner of particular use of property that is allowed in zoning district even when property would have economic value without variance).[7]

This court, however, has criticized the Appellate Court's decision in *Stillman*. In *Bloom* v. *Zoning Board of Appeals*, supra, 233 Conn. 210–11 n.13, this court stated that, contrary to the holding in *Stillman*, "the fact that an owner is prohibited from adding new structures to the property does not constitute a legally cognizable hardship. If it is a hardship to not be able to use one's property as one wishes, then most setback variance applications would have to be granted. . . . Although we distinguish *Stillman* from this case, we do not necessarily endorse its holding." (Citation omitted; internal quotation marks omitted.)

Moreover, *Stillman* is inconsistent with our cases holding that, when a property would have economic value even if the zoning regulations were strictly enforced, the fact that a peculiar characteristic of the property would make compliance with the zoning regulations exceptionally difficult if the property were put to a more valuable or desirable use does not constitute either an "exceptional difficulty" or an unusual hardship for purposes of § 8-6 (a). *Krejpcio* v. *Zoning Board of*

[7] But see *Vine* v. *Zoning Board of Appeals*, 93 Conn. App. 1, 9 n.14, 887 A.2d 442 (2006), rev'd on other grounds, 281 Conn. 553, 916 A.2d 5 (2007). In *Vine*, the Appellate Court attempted to explain that its decision in *Giarrantano* did not stand for the proposition that a variance is justified whenever strict application of the zoning regulations would deprive the applicant of a use of the property that was allowed in the zoning district. Id. The peculiar characteristics of the property had created a hardship in *Giarrantano*, however, only because the landowner wanted to put the land to a particular use. *Giarrantano* v. *Zoning Board of Appeals*, supra, 60 Conn. App. 448–49. Those characteristics would not have prevented other uses of the property that had economic value. Id. It is clear to us, therefore, that the court in *Giarrantano* concluded that the landowner was entitled to a variance because, otherwise, he would have been deprived of a use of the property that was allowed in the zoning district.

Appeals, supra, 152 Conn. 662 ("[d]isappointment in the use of property does not constitute exceptional difficulty or unusual hardship"); see also *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 295 (denial of financial advantage generally does not constitute hardship); *Grillo* v. *Zoning Board of Appeals*, supra, 206 Conn. 370 (regulation preventing land from use for greatest economic potential does not create exceptional financial hardship); *Miclon* v. *Zoning Board of Appeals*, supra, 173 Conn. 423 (no hardship when landowner made no showing that property could not reasonably be developed for some other use permitted in zone); *Dolan* v. *Zoning Board of Appeals*, supra, 156 Conn. 430–31 (application of zoning regulations not varied merely because they hinder landowners from putting property to more profitable use). We continue to find the reasoning of these cases persuasive. "This court has many times held that the power to grant variances must be exercised sparingly . . . ." *Krejpcio* v. *Zoning Board of Appeals*, supra, 661. If the fact that a peculiar characteristic of a property prevented a landowner from putting the property to a particular use that is allowed in the zoning district justified the granting of a variance in and of itself, even when the property would have economic value if the variance were denied, "the whole fabric of town- and city-wide zoning [would] be worn through in spots and raveled at the edges until its purpose in protecting the property values and securing the orderly development of the community [would be] completely thwarted." (Internal quotation marks omitted.) *Pleasant View Farms Development, Inc.* v. *Zoning Board of Appeals*, 218 Conn. 265, 270–71, 588 A.2d 1372 (1991). Accordingly, we conclude that *Stillman* and its progeny must be overruled. Because *Stillman* provided the sole basis for the trial court's ruling in the present case and denial of the variances will cause no unusual hardship, we conclude that the

board improperly granted the applicant's application for variances and the trial court improperly dismissed the plaintiff's appeal.

The judgment is reversed and the case is remanded to the trial court with direction to sustain the plaintiff's appeal and to remand the case to the board with direction to deny the applicant's application for the variances.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* SHELVONN JONES
(SC 19097)
(SC 19098)

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

Syllabus

Convicted of the crime of assault in the second degree in connection with an altercation in which the defendant stabbed the victim, H, with a knife, the defendant appealed to the Appellate Court, claiming, inter alia, that the prosecutor violated the rule, set forth in *State* v. *Singh* (259 Conn. 693), prohibiting a prosecutor from asking a witness to characterize another witness' testimony as a lie, mistaken or wrong. After two prior encounters between the defendant and H in which the defendant allegedly had threatened H, H, while riding his bicycle, saw the defendant and asked him "what the problem was." The defendant then swung a knife at H, and, as H tried to escape, the defendant stabbed him. H then ran into the defendant with his bicycle, knocking him to the ground. H subdued the defendant for a short period of time and then ran home. Police officers responded to the scene and found the defendant standing in the roadway, visibly intoxicated. The defendant told the officers that another man had tussled with him and had taken his money. The defendant asked the officers for a ride home, and they agreed. Before the defendant entered the police cruiser, an officer stated to the defendant that, in accordance with police procedure, he would have to pat down the defendant to ensure that he did not have any weapons. The defendant informed the officer that he had a knife and voluntarily handed it to the officer, who placed it in the glove compartment. After the officer dropped the defendant off at his home, the officer indicated that he would hold the knife for safekeeping and that the

defendant could retrieve it when he was sober. After H reported to the police that he had been assaulted and provided a description of his assailant, the defendant was arrested. The Appellate Court accepted the state's concession that the prosecutor had violated the rule in *Singh* when he asked the defendant, who testified at his trial, to comment on the veracity of H's testimony and the testimony of certain police officers, and when the prosecutor, during closing argument, paraphrased the defendant's testimony so as to suggest that the defendant was stating that the police were lying. Contrary to the state's claim that those improprieties were harmless, however, the Appellate Court determined that the *Singh* violations deprived the defendant of his right to a fair trial and ordered a new trial. The Appellate Court also rejected the defendant's claim that the trial court improperly had denied his motion to suppress the knife that he had used to stab H. The state and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court improperly concluded that the *Singh* violations substantially prejudiced the defendant and deprived him of his right to a fair trial: defense counsel did not object to any of the *Singh* violations during trial, indicating that counsel did not perceive them as seriously jeopardizing the defendant's fair trial rights; the *Singh* violations were neither pervasive nor confined to a discrete portion of the trial but, rather, consisted of four remarks spread over the course of a five day trial; although defense counsel sought no curative measures, the trial court instructed the jurors that a police officer's testimony is entitled to no special or exclusive weight and that they must determine an officer's credibility in the same way that they would with respect to any other witness; the more serious *Singh* violations, which pitted the defendant's credibility against that of the testifying police officers, were directed at a drug charge of which the defendant was acquitted rather than the assault charge of which the defendant was convicted, and no police officer provided material testimony with respect to the assault charge; and, although the *Singh* violation involving the prosecutor's question to the defendant whether H was lying was potentially prejudicial, where H's version of the events was directly at odds with the defendant's version, and there was no way to reconcile their testimony except to conclude that one of them was lying, it was unlikely that asking the defendant whether H was lying could be so prejudicial as to amount to a denial of due process because, in such circumstances, the risks that ordinarily are associated with such a question were not present.

(*Two justices dissenting in one opinion*)

2. The defendant could not prevail on his claim, as an alternative ground for affirming the Appellate Court's judgment, that the trial court improperly had instructed the jury on the initial aggressor exception to self-defense when it instructed that "the initial aggressor can be the first person who appeared to threaten the imminent use of physical force,"

there having been no reasonable possibility that the jury was misled by the challenged instruction: contrary to the defendant's contention that such an instruction suggested that the jury could find that the defendant was the initial aggressor if it found that H subjectively believed that the defendant intended to use physical force against him, even if that belief was not reasonable, the trial court's entire instructions on the initial aggressor exception to self-defense conveyed to the jury that, in order for a defendant to claim that he acted in self-defense, the defendant's belief that the other actor was about to use physical force must be a reasonable one; moreover, because the jury could consider whether the defendant acted in self-defense only if it found that the defendant intentionally caused physical injury to H with a knife, and because the defendant's testimony that he must have accidentally cut H with the knife would not have supported such a finding, there was no reasonable possibility that the defendant was prejudiced by the fact that the court's instruction failed to clarify that the jury could not find that the defendant was the initial aggressor on the basis of words alone.

3. The defendant could not prevail on his claim that the Appellate Court improperly upheld the trial court's denial of the defendant's motion to suppress the knife on the ground that the safekeeping rationale for maintaining temporary possession of the knife did not alone justify its continued, warrantless retention by the police for use as evidence against him in his criminal case; the warrantless retention of the knife beyond the initial, temporary period of safekeeping, while the defendant was intoxicated, was reasonable because the police lawfully had the knife in their possession when they obtained probable cause to believe that the defendant had used the knife to assault H.

Argued April 21—officially released December 22, 2015

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit assault in the first degree, assault in the second degree and possession of marijuana, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the court, *Pavia*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before the court, *Pavia*, *J.*; verdict and judgment of guilty of assault in the second degree, from which the defendant appealed to the Appellate Court, *Lavine*, *Beach* and *Alvord*, *Js.*, which reversed the judgment of the trial court and remanded the case for a new trial, and the state and the defendant,

on the granting of certification, filed separate appeals with this court. *Reversed*; *judgment directed.*

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *David Holzbach*, former senior assistant state's attorney, for the appellant in Docket No. SC 19097 and the appellee in Docket No. SC 19098 (state).

James B. Streeto, assistant public defender, for the appellee in Docket No. SC 19097 and the appellant in Docket No. SC 19098 (defendant).

Opinion

PALMER, J. The state and the defendant, Shelvonn Jones, appeal from the judgment of the Appellate Court, which reversed the judgment of conviction, rendered after a jury trial, of assault in the second degree in violation of General Statutes § 53a-60 (a) (2). See *State* v. *Jones*, 139 Conn. App. 469, 470, 487, 56 A.3d 724 (2012). The state claims that the Appellate Court improperly concluded that the defendant was denied his right to a fair trial due to certain alleged improprieties that the senior assistant state's attorney (prosecutor) committed during his cross-examination of the defendant and in closing argument. The defendant claims that the Appellate Court incorrectly concluded that the trial court properly had denied his motion to suppress evidence of the knife that was used in the commission of the assault. The defendant also raises a claim that the Appellate Court did not address, namely, that the trial court improperly instructed the jury on the initial aggressor exception to self-defense. Because we agree with the state's claim and reject the defendant's claims, we reverse the judgment of the Appellate Court and remand the case to that court with direction to affirm the judgment of the trial court.

The following evidence was adduced by the state at trial. On May 20, 2009, the fifty-three year old victim, George Harris, who resided on New Street in the city of Danbury with his sister and niece, arrived home from work and saw the thirty-two year old defendant standing in his driveway, arguing with Harris' sister, Mary Ann Harrison, and Larry Johnson, a private security guard employed by Harrison. Johnson told the defendant to leave the property, but the defendant would not do so. Harris turned to his niece and asked whether the defendant was the man she previously had told to stay off their property, and she responded in the affirmative. Harris then reiterated Johnson's directive that the defendant leave the property immediately. As the defendant was leaving, he turned to Harris and stated, "I'll get you."

On June 9, 2009, at approximately 6 p.m., Harris was walking home from work on Kennedy Avenue in Danbury when the defendant approached him in front of the bus station, displayed a knife,[1] and said, "[w]hat's up, Old School?" Harris was frightened by the defendant's gesture and kept walking.

About one hour after arriving home, Harris decided to go for a bike ride. While riding down Beaver Street in Danbury, he saw a man walking toward him. As the man got closer, Harris realized that it was the defendant. Harris was still upset about their earlier encounter and stopped his bicycle to ask the defendant, "what the problem was." As Harris approached him, however, the defendant began swinging the knife at him "like a wild man."

Harris tried to run away, but the defendant pursued him and slashed his back. Harris jumped back on his bicycle, but, instead of heading home, which would

[1] The defendant apparently used a box cutter containing a razor blade. In the interest of simplicity, we refer to the box cutter as a knife.

have required Harris to pedal uphill with his back exposed to the defendant, he rode the bicycle downhill into the defendant, knocking him to the ground. He then jumped off of the bicycle and was able to subdue the defendant by pulling the defendant's sweatshirt over his arms and head. By this time, traffic in the street had backed up, and a number of drivers were blowing their horns and using their cell phones to call the police. Harris, who never had previously been in any trouble with the law, feared being arrested, so he released the defendant and ran home.

Officers Michael Reo and David Williams of the Danbury Police Department, who were the first officers to arrive on the scene, found the defendant standing in the roadway, visibly intoxicated. The defendant informed them that he had been in the neighborhood looking for some marijuana when a man approached him on a bicycle and asked if he could change a $50 bill. The defendant told the police that he handed the man two $20 bills but then was unable to find any smaller bills, so he asked the man to return the two $20 bills. The man refused, and the two men tussled until they heard the sound of police sirens, at which point the man ran off with the defendant's money. After relating his story, the defendant asked the officers if they would drive him home. Reo agreed to give the defendant a ride because he considered the defendant to be the victim of a crime and because the defendant was intoxicated.

Meanwhile, when Harris arrived home, he realized that he had sustained serious cuts to his chest and back. After consulting with his sister, Harris decided to call the police. The responding officer summoned paramedics to transport Harris to the hospital, where he received eighteen stitches in his chest and several in his back. The responding officer also broadcast the defendant's name over the police radio system, identifying him as Harris' assailant. When Reo heard the broadcast, he

returned to the defendant's residence and placed him under arrest.

Officer Matthew Georgoulis of the Danbury Police Department assisted in arresting the defendant. According to Georgoulis, before placing the defendant into the back of his vehicle, Georgoulis performed a routine pat down of the defendant for weapons but did not have him empty his pockets. Later, while leading the defendant into the police station, Georgoulis noticed the defendant glance back at the vehicle, which struck Georgoulis as suspicious. Georgoulis further stated that he subsequently searched the backseat of his vehicle and discovered a small plastic baggie containing marijuana under the seat. Georgoulis testified that the baggie had not been there when he inspected the vehicle prior to his shift, and no one had ridden in the backseat before the defendant had done so.

The defendant was charged with attempt to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-49 (a) (2), assault in the second degree in violation of § 53a-60 (a) (2), and possession of marijuana in violation of General Statutes § 21a-279 (c). At trial, the defendant testified in his own defense and provided the following account of his encounters with Harris. On the night in question, approximately one hour before the altercation, the defendant was standing on Spring Street in Danbury when Harris approached him and asked if he had any crack cocaine for sale. The defendant told Harris that he was not a drug dealer and "to get the 'F' out of here," which, according to the defendant, angered Harris. The defendant testified that he had never laid eyes on Harris before that moment but previously had "bumped heads" with members of Harris' family and was acquainted with Johnson, the private security guard who worked for Harris' sister. The defendant also testified that he

did not display a knife during his initial encounter with Harris.

Approximately one hour later, the defendant was walking up Beaver Street in an extremely intoxicated state when he saw Harris coming toward him on a bicycle. According to the defendant, Harris stopped and commented about "the situation" between them earlier that evening, to which the defendant replied, "I apologize man, I want no problems . . . ." The defendant testified that Harris then asked him if he had change for a $50 bill because he needed it to buy some crack cocaine. The defendant stated that he handed Harris two $20 bills and, while searching his pockets for additional change, saw Harris place the two $20 bills in his pocket. A tussle ensued, and Harris threw his bicycle at the defendant, which caused the defendant to fall to the ground. When the defendant stood up, he pulled a knife out of his pocket and told Harris, "listen, I don't want no problems, just leave me alone, you got the money, go about your business." The defendant stated that it was never his intention to harm Harris with the knife, only to scare him away, and that he had no idea how Harris received the cuts to his chest and back. The defendant surmised that Harris might have sustained the wounds when the two men were scuffling on the ground. According to the defendant, shortly after the fight started, drivers began to blow their horns. When the defendant turned to look at them, Harris rushed toward him, knocked him to the ground and subdued him by pulling his sweatshirt over his head. Throughout the struggle, the defendant held tightly to the knife so that Harris could not take it away and use it against him, which he believed Harris was trying to do. The defendant denied ever telling the police that he was in the area to buy marijuana. The defendant also denied ever being on Kennedy Avenue or anywhere near the

bus station on the evening in question, as Harris had testified.

After the defense rested its case, Harris was recalled by the state as a rebuttal witness and stated that, contrary to the defendant's assertions, he did not seek to purchase drugs from the defendant on the night in question. Harris also explained that he had not taken any illegal drugs since graduating from high school, explaining that his former employer of thirty years, Kimberly-Clark Corporation, had a mandatory drug testing policy. The state also called Harrison and Johnson as rebuttal witnesses. Both of them testified, contrary to the defendant's testimony that he had never seen Harris before the night of the altercation, that the defendant had threatened Harris approximately one month before the encounter in Harris' driveway. In closing arguments, both the prosecutor and defense counsel maintained that the assault charges boiled down to a credibility contest between the defendant and Harris that required the jury to determine which one of them was telling the truth about the circumstances surrounding their altercation. In particular, the prosecutor argued that the defendant had fabricated the story about the larceny and Harris' purported attempt to purchase drugs from him because the police had arrived before the defendant could flee the scene, and he needed to explain his presence there. Defense counsel, on the other hand, asserted that the jury should discredit Harris' testimony that he was not a drug user and that he just happened to encounter the defendant while Harris was riding his bicycle. Counsel further argued, among other things, that a normal person would not ride his bicycle through a "drug infested" area and that Harris' real reason for being there was to buy drugs and to confront the defendant about his refusal to sell him drugs earlier that evening. The jury subsequently found the defendant not guilty of attempt to commit assault

in the first degree and possession of marijuana but found him guilty of assault in the second degree. Thereafter, the trial court rendered judgment in accordance with the verdict and sentenced the defendant to a prison term of four years and nine months.

On appeal to the Appellate Court, the defendant claimed, inter alia, that the prosecutor violated the proscription, first articulated by this court in *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002), against asking a witness "to characterize another witness' testimony as a lie, mistaken or wrong." Id., 712. In support of this claim, the defendant identified three questions posed by the prosecutor on cross-examination that compelled the defendant to comment on the veracity of Harris and certain police officers. The three questions were: (1) "[A]ll this testimony from . . . Harris then about the bus stop; that was a lie?" (2) "And all the police officers' testimony [about the robbery] is a lie?" (3) "So, what Officer Georgoulis testified to today [about finding marijuana in the backseat of his police car] is all false?" In addition, during closing argument, the prosecutor paraphrased the defendant's answer when the defendant was asked whether he had told the police that he was trying to buy marijuana prior to the altercation as, "I never said that; the police are lying apparently." The state conceded that the challenged questions and closing argument were improper under *Singh* but argued that they were not so prejudicial as to deprive the defendant of a fair trial.

The Appellate Court accepted the state's concession of impropriety but disagreed with its claim that the improprieties were harmless. See *State* v. *Jones*, supra, 139 Conn. App. 475–77. In reaching its determination, the Appellate Court applied the six factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), for determining whether the prosecutorial improprieties were sufficiently serious as to amount to

a denial of due process.[2] See *State* v. *Jones*, supra, 477–85. The Appellate Court reasoned that, although the improprieties at issue were not pervasive and defense counsel had not objected to any of them; see id., 477–78, 482; the improprieties were severe because the prosecutor had compelled the defendant to comment on the veracity of Harris and the police officers; see id., 478–79; the improprieties bore directly on the central issue in the case, namely, the defendant's credibility versus that of the state's witnesses; id., 480–81; the state's case was not particularly strong; id., 482; the improprieties were not invited by the defense; id.; and no curative instructions were given. Id. The Appellate Court observed that when these same *Williams* factors were present in other cases involving a violation of *Singh*; see, e.g., *State* v. *Ceballos*, 266 Conn. 364, 414–15, 832 A.2d 14 (2003); this court had concluded that the defendants in those cases had been denied their right to a fair trial. See *State* v. *Jones*, supra, 483–84.

In light of its determination that the defendant was entitled to a new trial due to the *Singh* violations, the Appellate Court did not address the defendant's claims that the prosecutor had engaged in several other instances of impropriety and that the trial court improperly had instructed the jury on the initial aggressor exception to self-defense. Id., 471 n.2, 477. Because the issue was likely to arise again at a retrial, however, the Appellate Court did consider the defendant's contention that the trial court improperly had denied his motion to suppress evidence of the knife that he had used in

[2] In *Williams*, we identified the following six factors that courts should consider in determining whether prosecutorial impropriety deprived a defendant of a fair trial: (1) the extent to which the impropriety was invited by defense conduct or argument; (2) the severity of the impropriety; (3) the frequency of the impropriety; (4) the centrality of the impropriety to the critical issues in the case; (5) whether any curative measures were taken by the trial court; and (6) the strength of the state's case. *State* v. *Williams*, supra, 204 Conn. 540.

his altercation with Harris. Id., 470–71. The Appellate Court rejected this claim, concluding that the record supported the trial court's finding that the defendant had voluntarily surrendered the knife to Reo prior to getting into the police car for a ride home and that the police did not exceed the scope of that initial consent. Id., 485–86. The state's and the defendant's certified appeals followed.[3]

On appeal, the state claims that the Appellate Court incorrectly concluded that the defendant was substantially prejudiced by the improprieties at issue in this case. Specifically, the state argues that the Appellate Court's analysis of the prejudicial effect of the improprieties was seriously flawed because that court (1) failed to consider that two of the improprieties were directed at the drug charge and thus were unlikely to have prejudiced the defendant in view of the fact that the jury had found him not guilty of that charge, (2) never considered the reduced prejudicial effect of the "were they lying" questions in a case that presents a "pure credibility contest" between a defendant and the state's witness, and (3) mistakenly assumed that such improprieties jeopardized the jurors' understanding of the state's burden of proof in all cases.

[3] We granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine that the prosecutor's improprieties during cross-examination and final argument violated the defendant's due process rights?" *State* v. *Jones*, 307 Conn. 957, 59 A.3d 1192 (2013).

We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly affirm the trial court's denial of the defendant's motion to suppress?" *State* v. *Jones*, 307 Conn. 958, 59 A.3d 1192 (2013).

After we granted the parties' petitions for certification to appeal, the defendant filed a preliminary statement of the issues pursuant to Practice Book § 63-4 (a) (1), expressing his intention to present a claim, as an alternative ground for affirmance, that the trial court improperly had instructed the jury on the initial aggressor exception to self-defense.

In his appeal, the defendant claims that the trial court's charge to the jury improperly broadened the initial aggressor doctrine and deprived him of his right to assert a defense of self-defense in that it failed to instruct the jury (1) to analyze Harris' perceptions from the perspective of a reasonable person, and (2) that a person cannot become an initial aggressor on the basis of words alone. The defendant also claims that the Appellate Court was incorrect in concluding that the trial court properly denied his motion to suppress the knife that he had used in his altercation with Harris.

I

STATE'S APPEAL

We first address the state's claim that the Appellate Court incorrectly concluded that prosecutorial improprieties deprived the defendant of a fair trial. Before addressing the merits of this claim, we set forth the standard of review and legal principles governing claims of prosecutorial impropriety. "In analyzing claims of prosecutorial impropriety, we engage in a two step process. . . . First, we must determine whether any impropriety in fact occurred; second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial. . . . To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair . . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Internal quotation marks omitted.) *State* v. *Gould*, 290 Conn. 70, 77–78, 961 A.2d 975 (2009). Accordingly, it is not the prosecutorial impro-

prieties themselves but, rather, the nature and extent of the prejudice resulting therefrom that determines whether a defendant is entitled to a new trial. See id.

In *State* v. *Singh*, supra, 259 Conn. 693, this court held, in accordance with the majority rule in other jurisdictions, "that it is improper to ask a witness to comment on another witness' veracity." Id., 706. "Several reasons underlie the prohibition on [asking] such questions. First, it is well established that determinations of credibility are for the jury, and not for witnesses. . . . Consequently, questions that ask a defendant to comment on another witness' veracity invade the province of the jury. . . . Moreover, [a]s a general rule, [such] questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." (Citations omitted; internal quotation marks omitted.) Id., 707–708.

"Second, questions of this sort also create the risk that the jury may conclude that, in order to [find] the defendant [not guilty], it [first] must find that the witness has lied. . . . This risk is especially acute when the witness is a government agent in a criminal case. . . . A witness' testimony, however, can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved . . . such as [in cases involving] misrecollection, failure of recollection or other innocent reason[s]." (Citations omitted; internal quotation marks omitted.) Id., 708.

"Similarly, courts have long admonished prosecutors to avoid statements to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied. . . . The reason for this restriction is that [t]his form of argument . . . involves a distortion of the gov-

ernment's burden of proof. . . . Moreover, like the problem inherent in asking a defendant to comment on the veracity of another witness, such arguments preclude the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 709–10; see also *State* v. *Emmett*, 839 P.2d 781, 787 (Utah 1992) (asking defendant to comment on another witness' veracity is unfairly prejudicial because it suggests that "[the] witness is committing perjury even though there are other explanations for the inconsistency . . . [and such questioning] puts the defendant in the untenable position of commenting on the character and motivations of another witness who may appear sympathetic to the jury").

In light of the state's concession that the prosecutor violated *Singh* first by asking the defendant to comment on the veracity of other witnesses and then by referring to the defendant's response to one of those questions in closing argument, we need only determine whether these improprieties deprived the defendant of a fair trial. In addressing this question, we focus on the factors set forth in *State* v. *Williams*, supra, 204 Conn. 540; see footnote 2 of this opinion; namely, the extent to which the improprieties were invited by the defense, the severity and frequency of the improprieties and their centrality to the critical issues in the case, and the strength both of the state's case and of any curative measures taken by the court.

We further note that, "[r]egardless of whether the defendant has objected to an . . . [impropriety], a reviewing court must apply [these] . . . factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial." (Internal quotation marks omitted.)

State v. *Maguire*, 310 Conn. 535, 560, 78 A.3d 828 (2013). "This does not mean, however, that the absence of an objection at trial does not play a significant role in the application of the [foregoing] factors. To the contrary, the determination of whether a new trial or proceeding is warranted depends, in part, on whether defense counsel has made a timely objection to any [incident] of the prosecutor's improper [conduct]. When defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) Id., 560–61.

Finally, "when a defendant raises on appeal a claim that improper remarks by the prosecutor deprived [him] of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process."[4] *State* v.

[4] The dissent asserts that the defendant has established that the improprieties at issue in the present case violated his "right to testify and present a defense," in violation of the fifth, sixth and fourteenth amendments to the United States constitution, and, as a consequence, the state bears the burden of establishing that the improprieties were harmless beyond a reasonable doubt. See, e.g., *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012) (explaining that, when improper remarks by prosecutor implicate defendant's due process rights, defendant must prove that remarks were both improper *and* harmful, but that, upon showing by defendant that prosecutor's improper remarks violate specifically enumerated constitutional right, such as defendant's right to remain silent or to present defense, burden falls on state to establish harmlessness beyond reasonable doubt). In support of this assertion, the dissent explains that the improprieties in the present case so "weaken[ed]" the defendant's credibility as to constitute an unconstitutional "impinge[ment]" on his right to testify in his own defense. The dissent, however, cites no case law or other support for this conclusory assertion, and, to our knowledge, no court ever has concluded that a violation of *Singh* infringes impermissibly on an accused's constitutional right to testify. Because the sole issue we must decide is whether the improprieties amounted to a deprivation of due process, the defendant bears the burden of establishing that they were so serious as to render his trial fundamentally unfair.

Payne, 303 Conn. 538, 562–63, 34 A.3d 370 (2012). It is also well established that, when there are multiple charges in a case, the reviewing court must consider the effect of the prosecutorial impropriety on each charge separately because, "[d]epending on the outcome of the analysis, the conviction on some charges may be allowed to stand, while others may be reversed." *State* v. *Spencer*, 275 Conn. 171, 182, 881 A.2d 209 (2005).

Applying the foregoing principles to the present case, we agree with the state that the Appellate Court incorrectly determined that the *Singh* violations deprived the defendant of a fair trial. We reach this conclusion for several reasons. First, in considering the severity of such improprieties, we accord considerable weight to the fact that defense counsel did not object to any of those improprieties, a strong indicator that counsel did not perceive them as seriously jeopardizing the defendant's fair trial rights. See, e.g., *State* v. *Ceballos*, supra, 266 Conn. 414 (emphasizing "that counsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments [did] not rise to the magnitude of constitutional error" [emphasis omitted]); see also *State* v. *Warholic*, 278 Conn. 354, 402, 897 A.2d 569 (2006) (defendant who fails to object to improper remarks bears significant responsibility for fact that alleged improprieties went uncured). Second, and more important, as the Appellate Court observed, the improprieties at issue were neither pervasive nor confined to a discrete portion of the trial; *State* v. *Jones*, supra, 139 Conn. App. 482; but, rather, consisted of four remarks spread over the course of a five day trial. Moreover, although defense counsel sought no curative measures, the trial court, both at the commencement and at the conclusion of the trial, instructed the jury that the "testimony of a police officer is entitled to no special or exclusive weight merely because it comes

from a police official," and that the jurors therefore "must determine the credibility of police officers in the same way as you would any other witness[es] . . . ."[5] These instructions, which the jury is presumed to have followed, would have ameliorated the harmful effect of all but one of the improprieties.

Perhaps the most significant reason why the defendant in the present case was not unduly prejudiced by the prosecutor's *Singh* violations is that two of them—arguably the two most serious violations because they pitted the defendant's credibility directly against that of the police—were not directed at the assault charge

[5] Specifically, the trial court instructed the jury at the commencement of trial as follows: "Now, your function as the jury is to determine the facts. You are the sole and exclusive judges of the facts, and you alone determine the weight and effect, the value of the evidence, as well as the credibility of the witnesses. You must weigh the testimony of all witnesses who appear before you, and you alone are to determine whether to believe any witness and the extent to which any witness should be believed.

* * *

"Now, police officers will testify in this case. You must determine the credibility of police officers in the same way as you would any other witness[es], and testimony of a police officer is entitled to no special or exclusive weight merely because it comes from a police official. You should recall his or her demeanor on the stand, the manner of testifying, and weigh and balance it just as carefully as you would the testimony of any other witness. You should neither believe nor disbelieve the testimony of a police official simply because he or she is, in fact, a police officer."

At the conclusion of the trial, the trial court reiterated the role of the jury in assessing the credibility of police officers, stating: "You are entitled to . . . accept any testimony which you believe to be true and to reject, either wholly or in part, the testimony of any witness you believe has testified untruthfully or erroneously. The credit that you will give to the testimony offered is, as I have told you, something which you alone must determine.

* * *

"As you will recall, there was testimony here from police officers. The testimony of a police officer is entitled to no special [or] exclusive credibility merely because it comes from a police officer. A police officer who takes the witness stand subjects his testimony to the same tests that any other witness does. You should not automatically believe or disbelieve them merely because they are police officers. . . . You should weigh their testimony just as you would that of any other witness[es]."

but, rather, at the drug charge, which resulted in an acquittal. Specifically, on cross-examination, the prosecutor asked the defendant, "[s]o, what Officer Georgoulis testified to today [about finding marijuana in the backseat of his police car] is all false?" The defendant responded: "Yes, sir."[6] Relatedly, in his closing argument, the prosecutor paraphrased the defendant's denial that he had told the police that he was trying to buy marijuana on the night of the altercation as, "I never said that; the police are lying apparently."[7] Because the jury found the defendant not guilty of the drug charge, however, those two improprieties could not have prejudiced the defendant unduly with respect to that charge. Cf. *State* v. *Ciullo*, 314 Conn. 28, 60, 100 A.3d 779 (2014) ("[e]ven if all of the statements had affected a determination of credibility, the defendant was acquitted of some of the charges against him, clearly demonstrating the jurors' ability to filter out the allegedly improper

[6] The prosecutor cross-examined the defendant as follows:

"Q. . . . [I]t's your testimony that you didn't have any marijuana?

"A. No, sir, I did not have any marijuana.

"Q. So, what Officer Georgoulis testified to today is all false?

"A. Yes, sir."

[7] During closing argument, the prosecutor stated as follows: "I ask you to . . . look at the way these witnesses testified; think about whether or not any of them have reasons to alter their testimony or falsely testify before the court. The officers have nothing to gain. . . . Harris is not go[ing] [to] gain anything. He's not trying to avoid any kind of criminal charges; none [was] ever filed because the police found there weren't any to be charged . . . . What we do have is [the defendant], who has every reason in the world not to want to agree with . . . the correct factual scenario. . . . So, he started concocting his version of the events, and his version became a robbery where he's the victim . . . .

"[The defendant], before he was able to create this story, even told Officer Reo, 'I was in the area to buy marijuana.' Ooh, now that's a bad statement when, two hours later, the police are arresting him, and, all of a sudden, he's got a bag of marijuana in his pocket. . . . Things are unraveling; one story won't work now. So, what's the answer; the answer is, I never said that; the police are lying apparently.

"[The defendant] then has to explain, hmmm, how I'm gonna, you know, how I'm gonna say I couldn't just turn around and run away from . . . Harris, who was coming after me."

statements and make independent assessments of credibility").

Nor can we conclude that those improprieties prejudiced the defendant with respect to the assault charge because it is undisputed that no police officer provided material testimony with respect to that charge. See *State* v. *Spencer*, supra, 275 Conn. 182 (reviewing court must consider prejudicial impact of impropriety on each individual charge). As we previously noted, by the time the police arrived at the scene of the altercation, the fight between the defendant and Harris had already ended. The officers' testimony regarding the altercation, therefore, was limited to repeating what the defendant had told them when they arrived, namely, that he had just been robbed by a man on a bicycle who had asked him to make change for a $50 bill. In considering the evidence related to the assault charge, therefore, the jury never was required to reconcile the defendant's testimony with the contradictory testimony of any police officer, a paramount concern under *Singh*.[8]

[8] We note that the dissent, in reaching a contrary determination, adopts the conclusion of the Appellate Court that three of the four *Singh* violations were especially harmful because, in those instances, "the defendant was compelled to comment directly on the veracity of police witnesses"; *State* v. *Jones*, supra, 139 Conn. App. 478; and "[the] risk [that *Singh* violations pose] is especially acute when the witness is a government agent in a criminal case. . . . Indeed, Connecticut courts routinely instruct juries that they should evaluate the credibility of a police officer in the same way that they evaluate the testimony of any other witness . . . no doubt to check the heightened credibility that government agents are afforded by some jurors." (Citation omitted; internal quotation marks omitted.) Id. As the state maintains, however, the Appellate Court failed to distinguish between the assault and the drug charges and, as a result, failed to consider what, if any, prejudicial effect the improprieties relating to the drug charge had on the assault charge, as it was required to do in assessing harmfulness. Indeed, neither the Appellate Court nor the dissent offers an explanation as to why *Singh*'s concern regarding the heightened credibility that jurors may afford police officers bears any relevance at all in a case, like the present one, in which the police provided no material testimony with respect to the charge of which the defendant was convicted.

Indeed, if anything, we believe that the officers' testimony would have bolstered the defendant's testimony by demonstrating that the defendant's account of the altercation remained consistent over time.[9]

For this reason, we also conclude that the third *Singh* violation, which ostensibly *did* pit the defendant's testimony against that of the police officers with respect to the assault charge, did not prejudice the defendant. During cross-examination, the prosecutor asked the defendant whether "all of the police officers' testimony [contradicting everything about the larceny] is a lie?"[10] The prosecutor apparently was referring to the defendant's testimony that the altercation began when Harris

[9] The dissent asserts that we are "missing the point" in concluding that the *Singh* violations were necessarily harmless insofar as they related to the police testimony because the *purpose* of that improper questioning was to undermine the defendant's credibility generally. Whatever the intent of the prosecutor, however, the issue that we must address is whether that questioning was, in fact, harmful. The questioning pertaining to the police testimony was demonstrably *not* harmful because, as we have explained, the jury verdict of not guilty on the drug charge reflects the fact that, the *Singh* violations notwithstanding, the jury refused to credit the testimony of the police officers over that of the defendant. In such circumstances, the *potential* for harm that a *Singh* violation creates simply is not realized.

[10] The following is the relevant portion of the prosecutor's cross-examination of the defendant:

"Q. . . . [D]id . . . Harris ask you for change so that he could get narcotics?

"A. Yes, he did.

"Q. This is after you told him to 'F' off in front of the grocery store earlier that night?

"A. Yes, it is.

"Q. Now, all this testimony from . . . Harris then about the bus stop; that was a lie?

"A. Yes, it was.

"Q. And, all the police officers' testimony is a lie?

"A. I didn't say that. What part of their testimony?

"Q. The part of the testimony that contradicts everything about a robbery. . . . [I]sn't it true that your whole story is made up to fit the fact that you were caught by the police before you could get away from the scene?

* * *

"A. No, that's not true."

stole $40 from him. The defendant responded, "I didn't say that. What part of their testimony?" The defendant was understandably confused by the prosecutor's question because, as we have explained, the officers' testimony about the assault and the alleged larceny did not in any way conflict with that of the defendant's testimony, a fact that could not have been lost on the jury. In light of the foregoing, we cannot discern how the prosecutor's question, improper though it may have been, prejudiced the defendant with respect to the assault charge.[11]

Indeed, the principal reason why a prosecutor may not ask a defendant about the truthfulness of an officer's contradictory testimony is to reduce the risk that the jury will resolve material conflicts between the testimony of the defendant and the officer in favor of the state, out of a concern that to do otherwise would reflect adversely on the honesty of the officer. See, e.g., *State* v. *Singh*, supra, 259 Conn. 708–709. It is axiomatic, however, that, when, as in the present case, the jury is *not* required to resolve any such conflict, the harm that might otherwise ensue from such a question will be significantly reduced if not completely avoided. Furthermore, this court has never had a case in which a *Singh* violation, standing alone, was deemed sufficiently egregious to entitle the defendant to a new trial. Rather, in every case in which a defendant has claimed that the prosecutor improperly asked him to characterize another witness' testimony as a lie, mistaken or wrong, including *Singh* itself, it was the cumulative effect of the *Singh* violation and the other prosecutorial improprieties that ultimately was deemed to entitle the

[11] Indeed, a review of the record suggests that the prosecutor may have misspoken or been momentarily confused when he posed the question. The defendant obviously was confused by the question because he asked what the prosecutor was talking about and flatly denied ever having said or suggested that the officers had lied about the larceny.

defendant to a new trial.[12] See, e.g., *State* v. *Ceballos*, supra, 266 Conn. 390–93 (prosecutor's repeated reference to religion and possible divine consequences that awaited defendant as result of his actions was inflammatory and improperly invaded province of jury); *State* v. *Singh*, supra, 710–18 (prosecutor improperly conveyed his personal views regarding evidence, referred to facts not in evidence, and argued that, to find defendant not guilty, jury must find that five government witnesses had lied).

We turn, therefore, to the final impropriety, which, as the state acknowledges, was potentially prejudicial to the defendant because it compelled him to comment on Harris' veracity. As we previously indicated, immediately before the prosecutor questioned the defendant as to whether the officers had lied about the robbery, he also asked him: "Now, all this testimony from . . . Harris then about the bus stop; that was a lie?" The prosecutor apparently was referring to Harris' testimony that, approximately one hour before the altercation, as he was coming home from work, the defendant had approached him in front of the bus station and displayed a knife. The defendant denied ever having been near the bus station on the night in question and called Harris' testimony to the contrary a lie. He maintained, rather, that the first time he saw Harris was on Spring Street, when Harris approached him and asked to buy drugs. We agree with the state that, under the circumstances of this case, which required the jury to decide whether the defendant or Harris was telling the truth, questioning the defendant directly about whether Harris had lied during his testimony was necessarily harmless.

[12] Of course, we do not foreclose the possibility that, in a particular case, *Singh* violations alone would result in sufficient prejudice to the defendant to warrant a new trial.

In reaching our determination, we acknowledge that the state's case against the defendant was not particularly strong insofar as it turned entirely on Harris' testimony.[13] We also recognize that the risk that a defendant will be prejudiced by a *Singh* violation may be especially acute when the state's case is founded on the credibility of its witnesses. Cf. *State* v. *Alexander*, 254 Conn. 290, 305, 755 A.2d 868 (2000) (prosecutorial vouching "is especially significant . . . [when] the credibility of the victim and the defendant comprise[s] the principal issue of the case"). As the present case demonstrates, however, that general proposition is not a universal truth. In a case that pits the testimony of the defendant against that of the victim, such that the victim's version of events is directly at odds with the defendant's account of the facts, and there is no way to reconcile their conflicting testimony except to conclude that one of them is lying, it is unlikely that asking the defendant directly whether the victim is lying ever could be so prejudicial as to amount to a denial of due process. Cf. *State* v. *Fauci*, 282 Conn. 23, 39, 917 A.2d 978 (2007) ("in a case that essentially reduces to which of two conflicting stories is true, it may be reasonable to infer, and thus to argue, that one of the two sides is lying" [internal quotation marks omitted]). To be sure, as we explained in *State* v. *Singh*, supra, 259 Conn. 707–10, such questioning is never appropriate, and we consistently have declined the state's invitation to carve out an exception to the prohibition against "are they lying" questions in cases involving pure credibility contests. We have done so, however, not because we disagreed with the underlying rationale for such an exception but, rather, because of the difficulty of determining, in the midst of trial, whether the case presents a pure credibil-

[13] Thus, the *Singh* violations pertained to a central issue in the case. In addition, there is nothing in the record to suggest that those violations were invited by defense counsel.

ity contest or whether the testimonial discrepancies between the two witnesses may be explained by reasons other than perjury or deceit. See, e.g., *State* v. *Ciullo*, supra, 314 Conn. 46 n.14 ("[a] determination of a 'pure credibility case' is an inquiry that may be answered differently depending on the point of view of the inquiring party"); *State* v. *Singh*, supra, 711 ("[i]t would be unwise . . . to make the application of this exception predicated on such a difficult distinction, which is relegated properly to the jury").

Our refusal to adopt the exception advanced by the state, however, does not preclude us from acknowledging the logic that underlies that proposed exception in determining whether the defendant was *prejudiced* by the prosecutor's questioning, an inquiry that, under *Williams* and its progeny, is separate and distinct from the issue of whether the questioning was improper in the first place. Indeed, because *Williams* requires that we determine whether the prosecutorial impropriety prejudiced the defendant by evaluating the impropriety in the context of the entire trial, we must consider whether it was possible for the jury to reconcile the testimony of the defendant and Harris without concluding that one of them was lying. When, as in the present case, it is not possible to do so, there is no reasonable possibility that asking the defendant whether the victim testified truthfully would render the trial so unfair as to rise to the level of a due process violation because, in such circumstances, the risks that ordinarily attend such a question simply are not present. For example, asking the defendant in the present case whether Harris was lying could not have led the jurors to overlook the various, possible, innocent reasons for discrediting Harris' testimony because the evidence and the parties' arguments did not allow for any such reasons. Moreover, there was no likelihood that the question invaded the province of the jury or reduced or distorted the state's burden of proof because, in order to

decide the case, the jury itself was required to determine which of the two witnesses, Harris or the defendant, was lying. Thus, the answer that the defendant gave in response to the prosecutor's improper "is he lying" question, although irrelevant, could not have caused the defendant undue harm.[14]

[14] The dissent indicates that we have failed to consider the cumulative effect of the *Singh* violations in evaluating whether the defendant was harmed by those violations. We have done no such thing. If we appear to have "parse[d] [the] improprieties by the charge," as the dissent alleges, it is only because we are *required* to consider the effect of the *Singh* violations on the individual charges; see *State* v. *Spencer*, supra, 275 Conn. 182; and because the present case presents the unusual scenario in which the jury found the defendant not guilty of the charge that was associated with the most serious *Singh* violations, a fact that we must accord significant weight in evaluating whether the improprieties as a whole deprived the defendant of a fair trial.

We note, moreover, that "are they lying" questions are prohibited not because they are so inherently prejudicial as to *always* require a new trial; they are barred, rather, to reduce the risk of the occurrence of specific harms, such as dilution of the state's burden of proof. See, e.g., *State* v. *Singh*, supra, 259 Conn. 707–10 (identifying risks attendant to asking witness to comment on veracity of other witnesses). Rather than explain why we are mistaken in our conclusion that, for reasons unique to the present case, none of those harms is implicated, the dissent appears to take the position that simply asking a defendant whether another witness has lied always will be harmful in a case that pits the defendant's testimony against that of another witness, even if the witness on whose veracity the defendant is asked to opine provided no material testimony in the case. For example, the dissent states that, "if we consider these questions improper and have clearly stated that prohibition so that prosecutors, who are officers of the court, know that they are improper, we must hold such officers of the court accountable," and that, "on three separate occasions, the prosecutor deliberately violated *Singh* by explicitly asking the defendant to comment on the veracity of other witnesses . . . ." In taking such a position, the dissent misapplies *Singh* by improperly conflating the issue of whether an impropriety occurred with the separate and distinct issue of whether that impropriety deprived the defendant of a fair trial. Furthermore, in seeking to hold the prosecutor accountable for the *Singh* violations by reversing the judgment of conviction, the dissent contravenes the well established rule that "[t]he fairness of the trial and not the culpability of the prosecutor is the standard for analyzing the constitutional due process claims of criminal defendants alleging prosecutorial [impropriety]." (Internal quotation marks omitted.) *State* v. *Paul B.*, 315 Conn. 19, 36, 105 A.3d 130 (2014).

Finally, the dissent asserts that we have "essentially overrule[d]" *Singh* in light of our determination that any possible prejudice that might inure to a defendant by virtue of a *Singh* violation is minimal when, as in the

Of course, we do not condone questioning in violation of *Singh*, even when, in light of the facts, the jury necessarily must determine whether the defendant or another witness is lying. In addition, as we previously noted; see footnote 12 of this opinion; *Singh* violations may be so serious, either standing alone or in combination with other improprieties, as to require a new trial. For the reasons that we previously discussed, however, the violations in the present case did not so taint the defendant's trial as to render it fundamentally unfair. We therefore conclude that the Appellate Court incorrectly determined that the improprieties deprived the defendant of his right to due process.[15]

present case, either the defendant or the witness on whose credibility the defendant has been asked to comment is, in fact, lying. On the contrary, we expressly reaffirm *Singh*'s prohibition against "are they lying" questions. We simply conclude that, under the circumstances of this case, in which the defendant's sole claim with respect to the assault charge was that Harris was untruthful, asking the defendant directly whether the victim was lying, although improper, gave rise to no material harm.

[15] The defendant raises several additional claims of prosecutorial impropriety that the Appellate Court declined to address; see *State* v. *Jones*, supra, 139 Conn. App. 477; none of which is persuasive. For example, the defendant contends that it was improper for the prosecutor to argue that, when the police arrived on the scene, the defendant had to concoct a story about a robbery in order to divert suspicion away from him. The defendant also contends that it was improper for the prosecutor to argue that the state's witnesses had nothing to gain from testifying untruthfully whereas the defendant had everything to gain from doing so. As we previously have explained, however, "in a case that essentially reduces to which of two conflicting stories is true, it may be reasonable to infer, and thus to argue, that one of the two sides is lying." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 52. As we also have stated previously, it is not improper for a prosecutor to argue that the victim and the police had no reason to lie whereas the defendant did when, as in the present case, the argument merely underscores an inference that the jury readily could have drawn entirely on its own. See *State* v. *Stevenson*, 269 Conn. 563, 584–86, 849 A.2d 626 (2004). The defendant further argues that the prosecutor was unnecessarily sarcastic and "made veiled assertions against [the defendant's] character" by arguing, among other things, that the defendant, by his own admission, frequents an area "known for drug activity" with "large sums of money" just to "hang out" and "apparently, is a very nice person who is willing to make change for people in a drug area . . . . He's even so trusting as to be willing to hand that person the money while he looks for the rest

II

DEFENDANT'S APPEAL

A

Instructions on Initial Aggressor Exception to Self-Defense

We next address the defendant's claim that the Appellate Court's judgment may be affirmed on the alternative ground that the trial court improperly instructed the jury on the initial aggressor exception to self-defense.[16]

of the change . . . ." Although this court neither encourages nor condones the use of sarcasm because its needless or excessive use may improperly influence the jury; see, e.g., *State* v. *Salamon*, 287 Conn. 509, 564, 949 A.2d 1092 (2008); we do not believe that the remarks at issue exceeded the bounds of fair argument. We conclude, rather, that the prosecutor simply was urging the jury to draw an inference supported by the evidence, namely, that the defendant's account of the circumstances surrounding the assault was manifestly unbelievable. Cf. *State* v. *Stevenson*, supra, 584 (prosecutor's remark during closing argument describing defendant's explanation as " 'totally unbelievable' " was "a comment on the evidence presented at trial, and it posited a reasonable inference that the jury itself could have drawn").

Finally, the defendant contends that, on several occasions, the prosecutor argued facts that were not in evidence. For example, the defendant claims that the prosecutor improperly argued: "If [Harris is] a drug user, wouldn't he know where to get the drugs from? Would he walk up to somebody, a stranger such as [the defendant], and say, hey, can I buy crack cocaine? We know . . . Harris is not a drug user. He did in high school, and he admitted that to everybody right there on the stand, yep, high school; [he] tried marijuana. But . . . Harris also has proof that he hasn't been using marijuana or any other drug since then. Thirty-one years with Kimberly-Clark [Corporation], which has a drug policy testing program; he's clear." We reject this claim because the prosecutor's argument was adequately rooted in the evidence. Although it is true, as the defendant asserts, that the state presented no direct proof, apart from Harris' own testimony, that Harris had not used drugs in more than thirty years, it is clear that the "proof" to which the prosecutor referred was, in fact, Harris' testimony concerning his former employer's mandatory drug testing policy, which Harris had cited as the reason he did not use drugs. If the jurors had credited this testimony, as they were free to do, they reasonably could have found that Harris was not a drug user and that the defendant's assertions to the contrary were false.

[16] The Appellate Court did not address this claim because it concluded that the defendant was entitled to a new trial on the basis of his prosecutorial

According to the defendant, the trial court's instruction misled the jury by failing to clarify that the jury could not find that the defendant was the initial aggressor on the basis of words alone, and by suggesting that the jury could find that the defendant was the initial aggressor if it found that Harris subjectively believed that the defendant intended to use physical force against him, even if that belief was not reasonable. We agree with the state that there is no reasonable possibility that the jury was misled by the challenged instructions.[17]

The following additional facts and procedural history are relevant to this claim. The defendant timely filed a request to charge that included instructions on self-defense and the initial aggressor exception but not on the definition of initial aggressor. The state requested that the trial court instruct the jury on the initial aggressor exception consistent with the model instruction available on the Judicial Branch website.[18] During the trial court's final charge to the jury, after explaining general principles governing the use of force in self-defense, the court gave an instruction on the initial aggressor exception that was identical to the model instruction in all relevant respects. In relevant part, the trial court instructed the jury: "[T]he state can prove that the defendant was not justified in using physical force in self-defense by proving beyond a reasonable doubt that he was the initial aggressor in this encounter with . . . Harris and that he neither withdrew from

impropriety claims. See *State* v. *Jones*, supra, 139 Conn. App. 471 n.2. After we granted the state's petition for certification, the defendant filed a statement pursuant to Practice Book § 63-4 (a) (1) indicating that he intended to present his instructional claim as an alternative ground for affirmance.

[17] The defendant contends that he preserved this claim for appellate review by virtue of the jury instructions that the defense requested in the trial court, and the state does not contest this assertion.

[18] See Connecticut Criminal Jury Instructions § 2.8-2 (B), available at https://www.jud.ct.gov/JI/criminal/part2/2.8-2.htm#B (last visited December 4, 2015).

that encounter nor effectively communicated his intent to do so before using physical force against . . . Harris. To . . . prove that the defendant was the initial aggressor in this encounter with . . . Harris, the state need not prove that the defendant was the first person to use physical force in that encounter. The initial aggressor can be the first person who threatened to use physical force or even the first person who appeared to threaten the imminent use of physical force under [the] circumstances. . . . The defendant has no burden whatsoever to prove that he was not the initial aggressor or that he withdrew from the encounter and communicated his intent to do so before he used physical force against . . . Harris. To the contrary, you may only reject his defense on the basis of the statutory disqualification if you find that the state has proved beyond a reasonable doubt that he was the initial aggressor, did not withdraw from the encounter, and did not communicate his intent to withdraw before using physical force."

On appeal, the defendant claims that the trial court's instruction that "[t]he initial aggressor can be . . . the first person who appeared to threaten the imminent use of physical force" did not clarify that the jury could not find that the defendant was the initial aggressor on the basis of words alone. The defendant contends that the jury may have found that he was the initial aggressor on the basis of mere words because there was evidence that the defendant verbally threatened Harris on two occasions prior to the altercation that led to the assault charge. First, there was testimony from several witnesses that, when Harris ordered the defendant to leave his property several weeks before the altercation, the defendant looked at Harris and said "I'll get you." Second, when the defendant saw Harris on Kennedy Avenue prior to the assault, he displayed a knife and said, "[w]hat's up, Old School?" According to the defendant, the trial court's failure to expressly instruct the jury

that it could not find that he was the initial aggressor solely on the basis of a verbal threat allowed the jury to credit his version of the events surrounding the altercation in its entirety, but the jury nevertheless found him guilty of the assault because it determined that he was the initial aggressor on the basis of these earlier verbal threats. In a similar vein, the defendant also contends that the trial court's instruction failed to convey to the jury that it could find that he was the initial aggressor only if Harris had a reasonable belief that the defendant was about to use physical force. The defendant maintains that the jury may have rejected his self-defense claim on the ground that, due to the previous encounters in which the defendant had threatened Harris, Harris subjectively believed that the defendant intended to attack him, even if that belief was not a reasonable one.

Before discussing the merits of the defendant's claims, we briefly set forth the legal principles that govern our review. "A fundamental element of due process is the right of a defendant charged with a crime to establish a defense. . . . This fundamental constitutional right includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified." (Citations omitted; internal quotation marks omitted.) *State* v. *Jimenez*, 228 Conn. 335, 339, 636 A.2d 782 (1994). Thus, "[a]n improper instruction on a defense, like an improper instruction on an element of an offense, is of constitutional dimension." (Internal quotation marks omitted.) *State* v. *Singleton*, 292 Conn. 734, 745, 974 A.2d 679 (2009). "It is well established that a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled." (Internal quotation marks omitted.) *State* v.

Fields, 302 Conn. 236, 245, 24 A.3d 1243 (2011). In evaluating a claim of instructional impropriety, however, "we must view the court's jury instructions as a whole, without focusing unduly on one isolated aspect of the charge. . . . In determining whether a jury instruction is improper, the charge . . . is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect [on] the jury in guiding [it] to a correct verdict in the case." (Citation omitted; internal quotation marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 845, 100 A.3d 361 (2014). Finally, because a challenge to the validity of a jury instruction presents a question of law, we exercise plenary review. E.g., *State* v. *Singleton*, supra, 746.

General Statutes § 53a-19 (c) provides in relevant part that "a person is not justified in using physical force when . . . (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force . . . ." Although the term "initial aggressor" is not defined by statute, in *State* v. *Jimenez*, supra, 228 Conn. 335, we stated that "[i]t is not the law . . . that the person who first uses physical force is necessarily the initial aggressor under § 53a-19 (c) (2)." Id., 340. Rather, "§ 53a-19 contemplates that a person may respond with physical force to a reasonably perceived threat of physical force without becoming the initial aggressor and forfeiting the defense of self-defense. Otherwise, in order to avoid being labeled the aggressor, a person would have to stand by meekly and wait until an assailant struck the first blow before responding." Id., 341. Thus, we have approved of instructions defining initial aggressor as "the person who first acts in such

a manner that creates a reasonable belief in another person's mind that physical force is about to be used [on] that other person . . . ." (Internal quotation marks omitted.) *State* v. *Singleton*, supra, 292 Conn. 763.

With respect to the nature of the conduct required to create a reasonably perceived threat of physical force, we previously have indicated that the mere use of offensive words, without more, is insufficient to qualify a defendant as the initial aggressor. See, e.g., *State* v. *Whitford*, 260 Conn. 610, 621, 799 A.2d 1034 (2002) ("the discussion of a subject as to which animus existed between the parties . . . does not by itself make . . . [one] the aggressor" [internal quotation marks omitted]), quoting *State* v. *Corchado*, 188 Conn. 653, 667 n.15, 453 A.2d 427 (1982). This is consistent with the well established principle that the use of physical force in defense of oneself is justified only if the person claiming self-defense honestly and reasonably believes that an attack is imminent. See, e.g., *State* v. *Lewis*, 220 Conn. 602, 620, 600 A.2d 1330 (1991) ("[t]he defense of self-defense does not encompass a preemptive strike"); *State* v. *Peters*, 40 Conn. App. 805, 814–15, 673 A.2d 1158 ("the defendant must entertain an honest belief that the other person is using or is about to use physical force, and the defendant's decision to use defensive force must be based on this sincere belief as opposed to anger, malice or revenge"), cert. denied, 237 Conn. 925, 677 A.2d 949 (1996).

For several reasons, we are not persuaded that there is any reasonable possibility that the trial court's instruction on the initial aggressor exception misled the jury to the detriment of the defendant's self-defense claim. First, as we recently explained in addressing the identical contention in *State* v. *Revels*, 313 Conn. 762, 785, 99 A.3d 1130 (2014), when assessing whether an instruction adequately conveyed to the jury the principles governing the initial aggressor exception, we must

look to the entirety of the court's self-defense instruction. In *Revels*, we observed that, "[a]t other points in the court's instructions relating to self-defense, the court properly and thoroughly explained that in order for a defendant to claim that he has acted in self-defense, the defendant's belief that the other actor is about to use physical force must be a reasonable one." Id. We further explained that "[t]he court's definition of 'initial aggressor' must be understood therefore to incorporate the notion that only actions that *reasonably* appear to threaten the imminent use of physical force will make the defendant an initial aggressor."[19] (Emphasis in original.) Id. In the present case, the trial court repeatedly explained the principle that one cannot use physical force against another unless his subjective belief that that person is about to use physical force against him was reasonable under the circumstances. In addition, the trial court, in instructing the jury that the determination of whether the defendant acted in self-defense did not require that Harris actually intended to use physical force, but only that the defendant perceived that Harris was about to use physical force, again explained that the defendant's perception regarding the threat of force must have been reasonable. In view of the fact that the trial court thoroughly instructed the jury regarding the subjective-objective inquiry with respect to the use of force in self-defense, the court's instruction that the initial aggressor may be "the first person who appeared to threaten the imminent use of physical force" must be understood to have incorporated the reasonableness requirement.

[19] We recognize that, because the defendant in *Revels* claimed that the trial court's instruction was plain error; *State* v. *Revels*, supra, 313 Conn. 782–83; this court's review of his claim arguably was more limited than our review under the plenary standard that applies in the present case. See id., 783–84. We nevertheless rely on our reasoning in *Revels* because our analysis therein with respect to the issue of whether the trial court's instruction misled the jury is no less applicable to our consideration of the instructions in the present case.

Moreover, contrary to the defendant's contention, the jury could not have credited his testimony regarding the altercation and still have found him guilty of the assault. As the state observes, the trial court instructed the jury that it should consider self-defense only if it first determined that the state had "prove[n] beyond a reasonable doubt each element of [the] crime . . . . If you find that the . . . state has been able to prove beyond a reasonable doubt each and every element necessary, you then move onto the issue of self-defense." With respect to the elements of assault in the second degree; see General Statutes § 53a-60 (a) (2); the trial court instructed the jury that, in order to find the defendant guilty of that crime, it had to find that he "had the specific intent to cause physical injury to . . . Harris, [that he] did cause physical injury to . . . Harris, and [that he] caused the injury by means of a dangerous instrument . . . ." Thus, before the jury considered whether the state proved that the defendant had not acted in self-defense, it first must have found that he intentionally caused physical injury to Harris with the knife.

Only Harris' testimony, however, provided the jury with an account by which it reasonably could have found that the defendant intentionally caused physical injury to Harris. As we previously indicated, Harris testified that, when he saw the defendant on Beaver Street, he got off his bicycle and approached him to ask "what the problem was." Harris further testified that the defendant immediately started swinging the knife "like a wild man" and that, as he ran away, the defendant pursued him and cut him across the lower back.[20] Finally, Harris testified that he knocked the defendant down by riding

[20] We disagree with the defendant's contention that Harris' testimony was equivocal on this point. As the state observes, Harris clearly and unequivocally testified that the defendant started attacking him almost immediately after he approached him on Beaver Street.

his bicycle into him and that the defendant continued to slash at him with the knife until Harris was able to subdue him.

The defendant, in stark contrast, testified that he did not intentionally cut or stab Harris with the knife. He explained, rather, that, after Harris knocked him down with the bicycle, the defendant removed the knife from his pocket only to discourage Harris from attacking him, and that he must have accidentally cut Harris during the ensuing scuffle. This testimony, therefore, would not have supported a finding that the defendant intentionally caused physical injury to Harris, as required under § 53a-60 (a) (2). Thus, if the jury had credited the defendant's testimony, it could not have found that he was the initial aggressor because the jury would not have reached his self-defense claim in the first instance.

Finally, because Harris' testimony provided the only factual basis for the jury's verdict, we must presume that the jury credited that testimony with respect to the assault.[21] In view of Harris' testimony that the defendant intentionally assaulted him after chasing him and swinging the knife in his direction almost immediately after they encountered each other on Beaver Street, there is no reasonable possibility that the defendant was prejudiced by the fact that the jury was not instructed that words alone cannot support an initial aggressor finding.

Finally, nothing in the state's closing argument suggested to the jury that it could find that the defendant

[21] As we explained previously; see part I of this opinion; the defendant's testimony concerning his altercation with Harris was diametrically opposed to Harris' testimony about that encounter. Consequently, the jury was required to decide which one was telling the truth and which one was not, and the jury obviously credited the testimony of Harris over that of the defendant. Although it is theoretically possible that the jury did not credit all of Harris' testimony with respect to the precise manner in which the assault occurred, there is nothing in the record to suggest that the jury did not credit his testimony in all material respects.

was the initial aggressor on the basis of his previous verbal threats, and, in fact, neither party referred to the initial aggressor principle at any time during their respective closing arguments. See *State* v. *Singleton*, supra, 292 Conn. 763–64 (court did not improperly fail to instruct jury that person cannot be initial aggressor on basis of words alone when neither state nor defendant indicated during closing argument that it could find defendant was initial aggressor on that basis). In addressing the jury during his initial closing argument, the prosecutor attempted to counter the defendant's testimony that he accidentally cut Harris during the scuffle. The prosecutor referred to the previous incident at Harrison's property several weeks prior to the assault and argued that "[t]his wasn't somebody who made a mistake. [The defendant] wanted to hurt . . . Harris" because he was angry about their previous encounter. The prosecutor then argued that the defendant's claim that he accidentally cut Harris during the struggle did not make sense, noting that the defendant's testimony suggested that "[t]he cut on [Harris'] back [occurred] somehow while . . . Harris is holding [the defendant's] hands" and that "[t]he cut across the chest is, apparently, self-inflicted by . . . Harris holding [the defendant's] hands and, apparently, ripping the knife clean across him with [the defendant] holding the knife. . . . You're not [going to] do that to yourself; you can't do that to yourself. There had to be some force behind that, such as a swing and a slash, not [an] impalement as [the defendant] would like to describe it."

For his part, defense counsel argued to the jury that the defendant displayed the knife in an effort to ward off Harris' attack because the defendant "felt . . . that he was being overpowered" and that he accidentally cut Harris during the struggle. Defense counsel argued that, after the defendant displayed the knife, Harris "lunge[d] at [the defendant] and [grabbed the defen-

dant] by both hands . . . so [the defendant did] not have any control over his own hands." Counsel maintained that the evidence regarding Harris' injuries, as well as Harris' lack of defensive wounds, supported the defendant's claim that he cut Harris accidentally during the struggle, explaining that "[i]t's all very plausible how these injuries have occurred. Harris [did not] know . . . that he was hit; [the defendant did not] know that he cut him." In rebuttal closing argument, the prosecutor did not assert that the defendant was the initial aggressor because he previously had threatened Harris. Rather, the prosecutor focused exclusively on the physical altercation in attempting to rebut the defendant's testimony that he was too intoxicated to flee or to defend himself without the knife.

Thus, although the defendant is correct in the abstract that, as a matter of law, the jury could not have determined that he was the initial aggressor solely on the basis of his utterance of certain words or solely on the basis of Harris' subjective fear that the defendant was intent on attacking him, we previously have recognized that "[t]he mere fact that the defendant properly cites to a proposition of law related to the claim of self-defense . . . does not entitle him to an instruction thereon." *State* v. *Whitford*, supra, 260 Conn. 621–22. Rather, "[a]s long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 809, 91 A.3d 384 (2014). In the present case, it is apparent that the jury rejected the only testimony from which it reasonably could have found that the defendant was the initial aggressor predicated solely on his previous verbal threats or on Harris' subjective but unreasonable belief that the defendant intended to use physical force against him as evidenced by those threats. Rather, as we discussed previously,

Harris' testimony regarding the assault—which is the only version of the incident that supports the jury's verdict on that charge—establishes that the defendant charged at Harris while the defendant was swinging the knife in Harris' direction almost as soon as Harris approached the defendant on Beaver Street. In such circumstances, where the jury credited Harris' testimony characterizing the defendant's attack against him as wholly unprovoked, there is no reasonable possibility that the jury found that the defendant was the initial aggressor on the basis of the verbal threats he made during their previous encounters. Accordingly, there also is no reasonable possibility that the jury was misled by the challenged instruction.

B

Motion to Suppress

The defendant next challenges the Appellate Court's conclusion that the trial court properly denied his motion to suppress evidence of the knife that he used during the assault. The defendant claims that the seizure of the knife violated the fourth amendment to the United States constitution.[22] We are not persuaded.

The following facts and procedural history are relevant to this claim. At the hearing on the defendant's

[22] The fourth amendment to the United States constitution provides: "The right of the people to be secure 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."

The defendant also makes a claim under article first, § 7, of the Connecticut constitution. He does not contend, however, that article first, § 7, provides broader protection than the fourth amendment under the circumstances presented, and, in fact, he has not separately briefed and analyzed his state constitutional claim. Accordingly, we address the defendant's federal constitutional claim only. See, e.g., *In re Kevin K.*, 299 Conn. 107, 126 n.11, 7 A.3d 898 (2010) (deeming state constitutional claim abandoned because it was not separately briefed and analyzed).

motion to suppress, Officer Reo testified that he and Officer Williams responded to reports of criminal activity in the area of Beaver Street and Rose Street in Danbury at approximately 7:30 p.m. on the night in question. Upon arriving at the scene, the officers encountered the defendant in the street, and the defendant reported, inter alia, that another man had taken money from him. The defendant also provided a description of the alleged perpetrator. The officers canvassed the area and detained several potential suspects, but the defendant did not identify any of them as the perpetrator. The defendant then asked the officers for a ride home, and Reo accommodated the defendant's request because, at that point in time, he considered the defendant to be a victim, and he did not want the defendant, who appeared to be intoxicated, to walk home. Reo informed the defendant that, in accordance with Danbury Police Department procedure, he would have to be patted down before entering the police car to ensure that he did not have any weapons on him. The defendant then informed Reo that he had a knife in his pocket, and he voluntarily handed it to Reo, who placed it in the glove compartment of his police car. Reo testified that, when they arrived at the defendant's home, he was uncomfortable giving the knife back to the defendant due to the fact that he was intoxicated. Reo therefore told the defendant that he would hold the knife for safekeeping and that the defendant could retrieve it at police headquarters when he was sober.

Shortly after dropping the defendant off at his home, Reo heard a broadcast over the police radio system indicating that the defendant had been involved in an assault in the area of Beaver Street and Rose Street, and that a knife had been used in the assault. Reo, along with several other officers, returned to the defendant's home and took him into custody. At that point, Reo considered the knife to be evidence of the assault and,

upon returning to headquarters, processed the knife as evidence. Reo testified that, according to police records, the knife was logged into evidence at 11:20 p.m. that evening.

Prior to trial, the defendant filed a motion to suppress the knife as the product of an unreasonable, and therefore unconstitutional, seizure. The defense conceded that Reo properly seized the knife before allowing him to enter the police cruiser and that Reo properly retained the knife for safekeeping when he dropped the defendant off at his home. The defense maintained, however, that, once the police considered the knife to be evidence of the assault, they were required to obtain a warrant before retaining the knife as evidence, and that the failure to do so rendered the seizure unreasonable. The trial court denied the motion to suppress, concluding that Reo properly seized the knife before allowing the defendant into the police cruiser because "the police had an interest in protecting their well-being" while giving the defendant a ride home, the defendant consented to the seizure by voluntarily handing the knife over, and "the scope of that consent was not abused or exceeded . . . ." On appeal following the defendant's conviction, the Appellate Court rejected the defendant's claim of a constitutional violation, concluding that "[t]he [trial] court found that the defendant consented and handed the knife over voluntarily, and that the police did not exceed the scope of that consent," and, further, that "[t]he record supports this finding, which is not clearly erroneous." *State* v. *Jones*, supra, 139 Conn. App. 486.

On appeal to this court, the defendant challenges the Appellate Court's determination that the trial court properly denied his motion to suppress on the ground that he consented to the continued retention of the knife by the police. Specifically, the defendant contends that the safekeeping rationale for maintaining tempo-

rary possession of the knife did not justify its continued, warrantless retention by the police for use as evidence against him in his criminal case. According to the defendant, the initial justification for the seizure expired when the police decided to retain the knife for an investigatory or evidentiary purpose, and, because no exception to the warrant requirement is applicable under the facts presented, the retention of the knife as evidence constituted an unreasonable seizure in violation of the fourth amendment, thereby requiring its suppression. The state argues that the seizure was reasonable because the knife was lawfully in the possession of the police at the time they obtained probable cause to believe that it was used in the assault. Although we agree with the defendant that the initial temporary seizure of the knife for safety reasons did not alone justify its further retention for evidentiary purposes, we also conclude that such retention was reasonable because the police had probable cause to believe that the defendant used the knife in the commission of the assault.

The following well settled legal principles govern our review of the defendant's claim. "[T]he standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] . . . 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 [found by the

trial court] . . . .'' (Internal quotation marks omitted.) *State* v. *Jackson*, 304 Conn. 383, 394, 40 A.3d 290 (2012).

"The fourth amendment to the United States constitution, made applicable to the states through the [due process clause of the] fourteenth amendment, prohibits unreasonable searches and seizures by government agents." *State* v. *Eady*, 249 Conn. 431, 436, 733 A.2d 112, cert. denied, 528 U.S. 1030, 120 S. Ct. 551, 145 L. Ed. 2d 428 (1999). "A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. . . . If a seizure has occurred, then the court must engage in a complex inquiry to determine whether that seizure was reasonable. . . .

"With regard to the reasonableness requirement, [i]n the ordinary case, the [United States Supreme] Court has viewed a seizure of personal property as per se unreasonable within the meaning of the [f]ourth [a]mendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. . . . The . . . [c]ourt has nonetheless made it clear that there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the [c]ourt has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." (Citations omitted; internal quotation marks omitted.) *Fleming* v. *Bridgeport*, 284 Conn. 502, 520–21, 935 A.2d 126 (2007).

As we discussed previously, the defendant contends that, although the initial temporary seizure of the knife for safekeeping was reasonable, and therefore lawful, the seizure became unreasonable for fourth amendment purposes when the police thereafter retained the knife as evidence of the assault without obtaining a warrant.

Although implicitly acknowledging that the defendant's consent did not extend beyond the next morning, at which time the defendant presumably had become sober,[23] the state argues that the seizure was reasonable because the police had probable cause to believe that the knife was used in the assault. Thus, we must decide whether the police, having lawfully seized personal property without a warrant on a temporary basis for a noninvestigatory purpose and having subsequently developed, while the item was still in their possession, probable cause to believe that it is evidence of a crime, are required to obtain a warrant if they wish to retain the item as evidence.

As the parties acknowledge, there is little case law addressing the issue of whether it is reasonable for police to extend a temporary, warrantless seizure of personal property on the basis of a justification that differs from that on which the initial seizure was founded. In other contexts, however, the United States Supreme Court has recognized "the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." *Texas* v. *Brown*, 460 U.S. 730, 739, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (opinion announcing judgment). As the state observes, one context in which this general rule applies is the plain view exception to the warrant requirement, which recognizes that, "under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (plurality opinion). Under the plain

[23] In doing so, the state also implicitly acknowledges that the trial court and the Appellate Court incorrectly concluded that the police did not exceed the scope of the defendant's initial consent when, without obtaining a warrant, they retained the knife as evidence in connection with his assault against Harris. We agree with the state that the defendant's consent to temporarily turning over the knife to the police for safekeeping does not extend to the state's retention of the knife for use as evidence against him.

view exception, "[t]he warrantless seizure of contraband that is in plain view is reasonable under the fourth amendment if two requirements are met: (1) the initial intrusion that enabled the police to view the items seized must have been lawful; and (2) the police must have had probable cause to believe that these items were contraband or stolen goods." (Internal quotation marks omitted.) *State* v. *Eady*, supra, 249 Conn. 437.

Although the plain view exception generally arises when the police inadvertently discover contraband during the course of a lawful search, the United States Supreme Court has indicated that the nature of the activity that leads to the discovery of the item is constitutionally insignificant, as long as the police involvement in that activity itself satisfies the requirements of the fourth amendment. Thus, "plain view provides grounds for seizure of an item when an officer's access to an object has *some prior justification under the* [*f*]*ourth* [*a*]*mendment.* Plain view is perhaps better understood, therefore, not as an independent exception to the [w]arrant [c]lause, but simply as an extension of *whatever the prior justification for an officer's access to an object may be*." (Emphasis added; footnote omitted; internal quotation marks omitted.) *Texas* v. *Brown*, supra, 460 U.S. 738–39 (opinion announcing judgment). "The principle is grounded on the recognition that when a police officer has observed an object in plain view, the owner's remaining interests in the object are merely those of possession and ownership . . . ." (Citation omitted; internal quotation marks omitted.) Id., 739 (opinion announcing judgment). In other words, if police have lawful access to an item that they reasonably believe constitutes evidence of criminal activity, and, in light of the circumstances presented, the defendant has no reasonable expectation of privacy in the item, the police may seize it without obtaining a warrant. See, e.g., *United States* v. *Jacobsen*, 466 U.S. 109,

121–22, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) ("it is constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant").

Relying on this principle, courts have concluded that the warrantless seizure of personal property founded on probable cause was reasonable in a variety of circumstances in which the police had lawful access to the property in question. For example, "it is . . . well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Payton* v. *New York*, 445 U.S. 573, 586–87, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Courts also have upheld warrantless seizures predicated on probable cause when evidence is observed during the course of a routine traffic stop; see, e.g., *Texas* v. *Brown*, supra, 460 U.S. 739–44 (opinion announcing judgment) (warrantless seizure of balloon containing heroin during routine driver's license check was deemed to be lawful because officer had probable cause to believe balloon contained narcotics); *United States* v. *Spoerke*, 568 F.3d 1236, 1249 (11th Cir. 2009) (warrantless seizure of homemade explosive devices from car during traffic stop was lawful because devices were in plain view); when government agents inspect the contents of a package following a search by employees of a private common carrier; *United States* v. *Jacobsen*, supra, 466 U.S. 120–22 (warrant was not necessary to seize contents of package searched by employees of private common carrier because federal agents had probable cause to believe package contained narcotics); and when a law enforcement officer engages in legitimate questioning during a *Terry*[24] stop. See, e.g.,

[24] *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *Terry*, the United States Supreme Court concluded that police officers may

United States v. *Jones*, 187 F.3d 210, 219–21 (1st Cir. 1999) (warrantless seizure of counterfeit currency discovered during *Terry* stop after suspect removed it from pocket was justified because seizure was based on probable cause).

Contrary to the defendant's contention, this principle is no less applicable when the initial intrusion pursuant to which the police gained access to the contraband in question is not investigatory in nature. For example, this court previously has concluded that "evidence of crimes . . . when observed in plain view by fire officials who are lawfully present on the premises, also may be seized without a warrant." *State* v. *Eady*, supra, 249 Conn. 438; see also *United States* v. *Green*, 474 F.2d 1385, 1389–90 (5th Cir.), cert. denied, 414 U.S. 829, 94 S. Ct. 55, 38 L. Ed. 2d 63 (1973). Similarly, police may seize contraband that they observe while acting pursuant to their community caretaking function or while rendering aid to a person in distress. See, e.g., *United States* v. *Johnson*, 410 F.3d 137, 141–42, 144–45 (4th Cir.) (seizure of gun was upheld when officer acting pursuant to community caretaking function found gun while searching glove compartment for identification after finding defendant unresponsive in vehicle), cert. denied, 546 U.S. 952, 126 S. Ct. 461, 163 L. Ed. 2d 250 (2005); *State* v. *Kuskowski*, 200 Conn. 82, 84–85, 510 A.2d 172 (1986) (police officer properly seized narcotics in plain view after observing them while assisting defendant who was passed out in vehicle with propane torch burning in his lap).

In *State* v. *Lane*, 328 N.C. 598, 403 S.E.2d 267, cert. denied, 502 U.S. 915, 112 S. Ct. 319, 116 L. Ed. 2d 261 (1991), the Supreme Court of North Carolina applied this principle in a factual context similar to the present

briefly detain an individual if they have reasonable and articulable suspicion to believe that he is involved in criminal activity. See id., 22.

case. In *Lane*, the police responded to a report of a suicide threat and found the defendant, Albert Lee Lane, armed with a pistol. Id., 603. The police spoke with Lane, who voluntarily gave the pistol and its ammunition to the police. Id., 603, 611. While the police still had possession of the pistol, they obtained probable cause to believe that Lane was involved in a murder and that the pistol was the murder weapon. See id., 611. Lane sought to suppress the pistol and ammunition, contending that, although he consented to the initial seizure when the police responded to the report of a suicide threat, the seizure became unreasonable when the police retained the pistol and ammunition as evidence of the murder. See id., 610–11. On appeal, the Supreme Court of North Carolina upheld the trial court's decision not to suppress the pistol and ammunition, concluding that, "since the pistol and ammunition were already lawfully in the possession of the police officer, he was not required to return [them] to the owner [because there was] probable cause to retain [them]." Id., 611; see also 4 W. LaFave, Search and Seizure (5th Ed. 2012) § 8.1 (c), pp. 58–61 ("a consent to a seizure can be withdrawn by requesting return of the seized article, *which however need not be complied with if there is then probable cause to retain it as evidence*" [emphasis added; footnote omitted]).

As the foregoing demonstrates, when police have lawful access to an item for which they have probable cause to believe is evidence of a crime, it is not unreasonable for them to seize that item without a warrant, and this principle applies equally when the police have access to the item in question due to an antecedent seizure rather than a search.[25] As we discussed pre-

[25] In support of his contrary contention, the defendant relies on cases in which courts have indicated that a warrant is required when the subsequent search or seizure involves a greater intrusion on the defendant's privacy interests. See, e.g., *Reedy* v. *Evanson*, 615 F.3d 197, 227–30 (3d Cir. 2010) (plaintiff agreed to have her blood tested "for the purpose of evaluating the extent of her injuries and risk of disease from a sexual assault, and for the

viously, there is no dispute, for purposes of this appeal, that Reo lawfully had the knife in his possession when he heard the broadcast indicating that the defendant was wanted in connection with the assault. The question, then, is whether Reo had probable cause to justify retaining the knife as evidence.[26]

"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. . . . In other words, because [t]he probable cause determination is, simply, an analysis of probabilities . . .

purpose of gathering physical evidence to prosecute her assailant," but police violated her fourth amendment rights by conducting additional drug testing for investigative purposes because that testing fell outside scope of her consent, and plaintiff "indisputably had a reasonable expectation of privacy in her blood when it was drawn, and she did nothing to forfeit that expectation"), cert. denied, 562 U.S. 1256, 131 S. Ct. 1571, 179 L. Ed. 2d 474 (2011); cf. *State* v. *Jackson*, supra, 304 Conn. 404 (New Haven police obtained defendant's clothing from New York City police and subjected it to DNA testing, but no fourth amendment violation occurred because "the mere transfer of the defendant's lawfully seized clothes . . . did not result in any greater intrusion into the defendant's privacy than had occurred during the initial lawful seizure, and the New Haven police obtained a search warrant before they subjected the clothes to forensic testing"). In the present case, the mere retention of the knife involved no further intrusion into the defendant's privacy interests than did the initial seizure, and no forensic testing was conducted on the knife that would have brought this case within the ambit of the cases on which the defendant relies.

[26] Although the trial court did not address the issue of whether the police had probable cause, we may do so on appeal because whether a set of facts is sufficient to satisfy the probable cause standard is subject to plenary review; e.g., *State* v. *Johnson*, 286 Conn. 427, 433, 944 A.2d 297, cert. denied, 555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144 (2008); and the record of the motion to suppress contains undisputed facts sufficient for our consideration of that issue. Cf. *State* v. *Torres*, 230 Conn. 372, 379, 380, 645 A.2d 529 (1994) (addressing unpreserved claim that police lacked reasonable suspicion to justify canine sniff of automobile because "the question of whether reasonable and articulable suspicion arises from an underlying set of facts is a legal conclusion that, if made by a trial court, is subject to plenary review," and "the record contain[ed] undisputed facts sufficient to [address that claim]"). We further note that, for present purposes, the defendant does not contend that the record is inadequate for our resolution of this issue.

[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." (Citations omitted; internal quotation marks omitted.) *State* v. *Shields*, 308 Conn. 678, 690, 69 A.3d 293 (2013), cert. denied, 571 U.S. 1176, 134 S. Ct. 1040, 188 L. Ed. 2d 123 (2014). On the basis of Reo's testimony at the hearing on the defendant's motion to suppress, it is evident that the facts were more than sufficient to lead a reasonable person to believe that the knife was evidence of a crime. When Reo responded to the area of Beaver Street and Rose Street, he found that the defendant was "irritated" and "appeared to be intoxicated . . . ." The defendant eventually asked for a ride home, at which time the defendant informed Reo that he had a knife in his pocket, which he voluntarily handed to Reo. After dropping the defendant off at his home, Reo heard a broadcast over the police radio system indicating that the defendant was wanted for an assault with a knife in the area of Beaver Street and Rose Street, the same location at which Reo originally encountered the defendant. At that time, Reo had sufficient information to believe that the knife was used in the assault, and he was justified in retaining the knife as evidence. Accordingly, the trial court properly denied the defendant's motion to suppress.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion ROGERS, C. J., and ZARELLA, ESPINOSA and ROBINSON, Js., concurred.

EVELEIGH, J., with whom McDONALD, J., joins, dissenting. I respectfully disagree with the majority's conclusion that the Appellate Court incorrectly determined that the violations of *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002), in the present case deprived the

defendant, Shelvonn Jones, of a fair trial. I further disagree with the majority's conclusion that "[i]n a case that pits the testimony of the defendant against that of the [complainant in the present case, George Harris], such that the [complainant's] version of events is directly at odds with the defendant's account of the facts, and there is no way to reconcile their conflicting testimony except to conclude that one of them is lying, it is unlikely that asking the defendant directly whether the [complainant] is lying ever could be so prejudicial as to amount to a denial of due process." The majority acknowledges that questioning in which the prosecution asks a defendant to comment on the veracity of other witnesses "is never appropriate" and that "we consistently have declined the state's invitation to carve out an exception to the prohibition against 'are they lying' questions in cases involving pure credibility contests." Nevertheless, the majority seems to carve out that explicit exception for purposes of analyzing whether the defendant was harmed by the improper questioning, reasoning that "[o]ur refusal to adopt the exception advanced by the state, however, does not preclude us from acknowledging the logic that underlies that proposed exception in determining whether the defendant was *prejudiced* by the prosecutor's questioning . . . ." (Emphasis in original.) In doing so, the majority weakens, if not, destroys the *Singh* doctrine. Indeed, I cannot now discern a situation wherein we will hold any *Singh* violation to be harmful. In my view, if we consider these questions improper and have clearly stated that prohibition so that prosecutors, who are officers of the court, know that they are improper, we must hold such officers of the court accountable. We cannot weaken the harmless error analysis of such improprieties so as to make the *Singh* doctrine a paper tiger not only unworthy of respect, but also totally disregarded by some prosecutors. I would

conclude that the Appellate Court properly applied the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), and properly concluded that the improprieties, the existence of which the state concedes, deprived the defendant of a fair trial. Accordingly, I respectfully dissent.

I agree with the facts and procedural history set forth by the majority. I therefore begin by reciting the relevant principles of law. As the majority explains: "In analyzing claims of prosecutorial impropriety, we engage in a two step process. . . . First, we must determine whether any impropriety in fact occurred; second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial. . . . To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair . . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Internal quotation marks omitted.) *State* v. *Gould*, 290 Conn. 70, 77–78, 961 A.2d 975 (2009).

"Under the well established analysis of *State* v. *Williams*, supra, 204 Conn. 540, we consider: (1) the extent to which the [impropriety] was invited by defense conduct or argument; (2) the severity of the [impropriety]; (3) the frequency of the [impropriety]; (4) the centrality of the [impropriety] to the critical issues in the case; (5) the strength of the curative measures adopted; and (6) the strength of the state's case. In determining whether the defendant was denied a fair trial [by virtue of prosecutorial impropriety] we must view the prosecutor's comments in the context of the entire trial. . . . The

question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 287–88, 973 A.2d 1207 (2009).

In *State* v. *Payne*, 303 Conn. 539, 562–63, 34 A.3d 370 (2012), we clarified "that, when a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process. . . . On the other hand . . . if the defendant raises a claim that the prosecutorial improprieties infringed a specifically enumerated constitutional right, such as the fifth amendment right to remain silent or the sixth amendment right to confront one's accusers, and the defendant meets his burden of establishing the constitutional violation, the burden is then on the state to prove that the impropriety was harmless beyond a reasonable doubt." (Citation omitted.)

In the present case, the defendant asserts that the prosecutorial improprieties infringed on his right to testify and present a defense in violation of the fifth and sixth amendments to the United States constitution. See *Rock* v. *Arkansas*, 483 U.S. 44, 51–53, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (criminal defendant's right to testify guaranteed under fifth, sixth and fourteenth amendments to United States constitution). I agree with the defendant and would conclude that, because the improprieties infringed on the defendant's right to testify and present a defense, the state has the burden of proving that there is no reasonable likelihood that the jury's verdict would have been different in the absence

of the improprieties at issue in the present case.[1] Specifically, the defendant chose to exercise his right to testify in his own defense at trial, but the prosecutor impinged on that right by using his decision to testify as an opportunity to improperly weaken the defendant's credibility through its conceded and repetitious violation of *Singh*. Put another way, the defendant was not fully able to properly exercise his right to testify in his own defense because the prosecutor used the defendant's decision to exercise that fundamental constitutional right as an opportunity to improperly question him on the ultimate issue in the case—credibility.

"As is evident upon review of these factors, it is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole. . . . We are mindful throughout this inquiry, however, of the unique responsibilities of the prosecutor in our judicial system. A prosecutor is not only an officer of the court, like every other attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his [or her] office, [the prosecutor] usually exercises great influence upon jurors. [The prosecutor's] conduct and language in the trial of cases in which human life or liberty are at stake should be forceful, but fair, because he [or she] represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice or resentment. If the accused be guilty, he [or she] should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and [well established] rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon,

[1] Nevertheless, even if I were to conclude that the defendant had the burden in this case, I would conclude that he has met that burden.

or to suggest an inference from, facts not in evidence, or to present matters which the jury [has] no right to consider." (Citations omitted; internal quotation marks omitted.) *State* v. *Singh*, supra, 259 Conn. 701–702.

"Regardless of whether the defendant has objected to an . . . [impropriety], a reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial. The application of the *Williams* factors, therefore, is identical to the third and fourth prongs of *Golding*,[2] namely, whether the constitutional violation exists, and whether it was harmful. . . . [Thus], following a determination that prosecutorial [impropriety] has occurred, regardless of whether it was objected to, an appellate court must apply the *Williams* factors to the entire trial." (Footnote added; internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 280, 96 A.3d 1199 (2014).

In order to provide a background for my analysis, I provide a brief summary of *State* v. *Singh*, supra, 259 Conn. 693. In *Singh*, the defendant had been convicted of arson in the first degree after a jury trial. Id., 694–95. On appeal, the defendant asserted, inter alia, that the prosecutor had improperly asked the defendant to comment on the veracity of other witnesses and highlighted that testimony in the closing argument. Id., 702. Recognizing that this court "previously [had] not had the opportunity to address the well established evidentiary rule that it is improper to ask a witness to comment on another witness' veracity," this court explained that the majority of jurisdictions find such questions to be improper. Id., 706.

[2] *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

This court further explained the rationale behind the rule prohibiting prosecutors from asking a defendant to comment on the veracity of other witnesses. "First, it is well established that determinations of credibility are for the jury, and not for witnesses. . . . Consequently, questions that ask a defendant to comment on another witness' veracity invade the province of the jury. . . . Moreover, [a]s a general rule, [such] questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." (Citations omitted; internal quotation marks omitted.) Id., 707–708. "Second, questions of this sort also create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied. . . . This risk is especially acute when the witness is a government agent in a criminal case. . . . A witness' testimony, however, can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved . . . such as misrecollection, failure of recollection or other innocent reason." (Citations omitted; internal quotation marks omitted.) Id., 708. "Similarly, courts have long admonished prosecutors to avoid statements to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied. . . . The reason for this restriction is that [t]his form of argument . . . involves a distortion of the government's burden of proof. . . . Moreover, like the problem inherent in asking a defendant to comment on the veracity of another witness, such arguments preclude the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 709–10.

In *Singh*, this court concluded that the prosecutor's conduct in asking the defendant to comment on the

veracity of other witnesses and highlighting that testimony in the closing argument was improper. Id., 712. Further, this court concluded that the state had failed to demonstrate that there was not a reasonable likelihood that the jury's verdict would have been different in the absence of these and other improprieties. Id., 725. Accordingly, this court concluded that the defendant had been deprived of his right to a fair trial, reversed his conviction, and remanded the case for a new trial. Id.

In the present case, the state concedes that three questions and one statement in the prosecutor's closing argument were improper under *Singh*. As the majority properly explains, the conceded improprieties were as follows: "The three questions were: (1) '[A]ll this testimony from [the complainant] then about the bus stop; that was a lie?' (2) 'And, all the police officers' testimony [about the robbery] is a lie?' (3) 'So, what [a police officer] testified to today [about finding marijuana in the backseat of his police car] is all false?' In addition, during closing argument, the prosecutor paraphrased the defendant's answer when the defendant was asked whether he had told the police that he was trying to buy marijuana prior to the altercation as, 'I never said that; the police are lying apparently.' "

On the basis of the state's concession that the four statements were improper, I turn to the *Williams* factors to determine whether they were prejudicial. First, I consider whether the improprieties were invited by defense conduct or argument. *State* v. *Williams*, supra, 204 Conn. 540. Although the majority does not rely extensively on this *Williams* factor to support its conclusion, it does reason that "[i]n a case that pits the testimony of the defendant against that of the [complainant], such that the [complainant's] version of events is directly at odds with the defendant's account of the facts, and there is no way to reconcile their conflicting testimony except to conclude that one of

them is lying, it is unlikely that asking the defendant directly whether the [complainant] is lying ever could be so prejudicial as to amount to a denial of due process." In *State* v. *Ceballos*, 266 Conn. 364, 409, 832 A.2d 14 (2003), this court rejected a similar claim. In *Ceballos*, the state reasoned that the *Singh* violations were "invited by the ' "only possible" ' defense theory that [the complainant] had fabricated her claims." Id. This court rejected the state's claim concluding that "we reject the notion that, standing alone, a legitimate defense theory can be viewed as inviting improper conduct on the part of the [prosecutor]." Id. Similarly, in the present case, I would reject the notion that the mere fact that the testimony of the defendant and the testimony of the complainant are directly at odds with each other can mean that the defendant invited the impropriety or otherwise weigh in the state's favor under a *Williams* analysis.

I next turn to the severity and frequency of the improprieties. The state claims, and the majority concludes, that the improprieties were not severe or frequent. I disagree. The majority states that "[p]erhaps the most significant reason why the defendant in the present case was not unduly prejudiced by the prosecutor's *Singh* violations is that two of them—arguably the two most serious violations because they pitted the defendant's credibility directly against that of the police—were not directed at the assault charge but, rather, at the drug charge, which resulted in an acquittal. . . . Because the jury found the defendant not guilty of the drug charge, however, those two improprieties could not have prejudiced the defendant unduly with respect to that charge." (Footnotes omitted.) The majority further reasons that "[n]or can we conclude that those improprieties prejudiced the defendant with respect to the assault charge because it is undisputed that no police officer provided material testimony with respect

to that charge." I disagree. I recognize that this court has reasoned: "[T]he inquiry into whether there was a fair trial requires an examination of the impact of the [improprieties] on each conviction. Depending on the outcome of the analysis, the conviction on some charges may be allowed to stand, while others may be reversed." *State* v. *Spencer*, 275 Conn. 171, 182, 881 A.2d 209 (2005). This principle, however, does not mean that we parse improprieties by the charge to which they might be most directly related. The majority does not cite, and I cannot find, any case in which this principle has been applied in this way. Instead, the principle means that the sum total of the improprieties in a trial may be prejudicial to some charges that are particularly weak and have little physical evidence, but might not be prejudicial to other charges that are particularly strong, have physical evidence and do not involve credibility determinations.

In the present case, which ultimately involved a credibility determination, on three separate occasions the prosecutor deliberately violated *Singh* by explicitly asking the defendant to comment on the veracity of other witnesses and then emphasized that testimony in his closing argument. As we have recognized, the import of these improper questions is to distort the state's burden of proof and to make the jury feel like, in order to acquit the defendant, they must find that the other witnesses are lying. *State* v. *Singh*, supra, 259 Conn. 709. The majority focuses on the fact that three of the *Singh* violations related to the testimony of police officers and concludes that these *Singh* violations are, therefore, irrelevant because no police officer provided material testimony on the charge of assault, for which the defendant was convicted. I disagree and respectfully assert that the majority is missing the point. The prosecutor did not ask the defendant to comment on the veracity of the police officers to undermine the

credibility of those police officers, therefore, the fact that the defendant was acquitted of the marijuana charge is irrelevant. The prosecutor asked the defendant to comment on the veracity of the police officers to undermine the credibility of the defendant. These questions about the veracity of the police officers were part of an overall pattern that infected the fairness of the entire trial because they were an improper, yet integral part of the state's theory of the case—that the defendant is a liar. Therefore, the fact that the police officers did not provide material testimony on the assault charge is completely irrelevant. The *Singh* violations that related to the police officers contributed to the fundamental unfairness of the trial because they improperly undermined the credibility of the defendant. As this court has frequently recognized, "[b]ecause the inquiry must involve the entire trial, all incidents of [improprieties] must be viewed in relation to one another and within the context of the entire trial. The object of inquiry before a reviewing court in [due process] claims involving prosecutorial [impropriety], therefore, is . . . only the fairness of the entire trial, and not the specific incidents of [impropriety] themselves. Application of the *Williams* factors provides for such an analysis . . . ." (Internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 427, 902 A.2d 636 (2006).[3] Accordingly, I disagree with the majority that two of the four conceded violations are not relevant to our inquiry. As this court stated in *State* v. *Warholic*, 278 Conn. 354, 398, 897 A.2d 569 (2006), "the instances of prosecutorial [improprieties] were not isolated because they occurred during both the cross-examina-

[3] I recognize that we have relied on the fact that, if a defendant is acquitted of one charge, it is relevant to determining how prejudicial the improprieties are in a particular case. In the present case, however, I would conclude that the fact that the jury acquitted the defendant of the drug charge, although relevant to our inquiry, its relevancy is diminished by the fact that the drug charge was particularly weak in the present case.

tion of the defendant and the prosecutor's closing . . . arguments." In the present case, the improprieties involved the main witnesses in the trial and were repeated during the closing argument. Accordingly, I would conclude that this court must examine the prejudicial impact of all four improprieties as a whole and that, taken as a whole, they are severe.

The majority concludes as follows: "[B]ecause *Williams* requires that we determine whether the prosecutorial impropriety prejudiced the defendant by evaluating the impropriety in the context of the entire trial, we must consider whether it was possible for the jury to reconcile the testimony of the defendant and the [complainant] without concluding that one of them was lying. When, as in the present case, it is not possible to do so, there is no reasonable possibility that asking the defendant whether [another witness] testified truthfully would render the trial so unfair as to rise to the level of a due process violation because, in such circumstances, the risks that ordinarily attend such a question simply are not present. For example, asking the defendant in the present case whether [the complainant] was lying could not have led the jurors to overlook the various, possible, innocent reasons for discrediting [the complainant's] testimony because the evidence and the parties' arguments did not allow for any such reasons. Moreover, there was no likelihood that the question invaded the province of the jury or reduced or distorted the state's burden of proof because, in order to decide the case, the jury itself was required to determine which of the two witnesses, [the complainant] or the defendant, was lying. Thus, the answer that the defendant gave in response to the prosecutor's improper 'is he lying' question, although irrelevant, could not have caused the defendant undue harm." I disagree.

Although the majority recognizes that "*Williams* requires that we determine whether the prosecutorial

impropriety prejudiced the defendant by evaluating the impropriety in the context of the entire trial," the majority never conducts a thorough *Williams* analysis. Indeed, instead of using the six *Williams* factors to address all of the improprieties as a whole, the majority takes each of the four conceded improprieties and considers whether each individual impropriety, by itself, prejudiced the defendant. Such an analysis is incorrect. Instead, under *Williams*, we examine all of the improprieties together and the trial as a whole. *State* v. *Singh*, supra, 259 Conn. 723 ("whether the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process" [internal quotation marks omitted]). I respectfully disagree with the majority's approach and the majority's resultant conclusion.

In *Singh*, this court explicitly rejected the state's request to provide "an exception to the prohibition of questions and comments on witnesses' veracity when the defendant's testimony is the opposite of or contradicts the testimony of other witnesses, thereby presenting a basic issue of credibility . . . [that cannot] be attributed to defects or mistakes in a prior witness' perception or inaccuracy of memory, rather than to lying. . . . The state contends that such an exception is permissible because, under these circumstances, the jury's role is not usurped because it still must decide ultimately which testimony to believe." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 710–11. In rejecting the state's invitation to adopt such an exception, this court acknowledged that such an exception is unnecessary because the prosecutor may highlight inconsistencies "by other, proper means" and that it would be difficult to know when to apply such an exception because "testimony may be in direct conflict for reasons other than a witness' intent to deceive." Id., 711. In *Singh*, this court concluded that

the prosecutorial improprieties, as a whole, deprived the defendant of a fair trial. Id., 725. By concluding in the present case that it is not "possible for the jury to reconcile the testimony of the defendant and the [complainant] without concluding that one of them was lying," and that, in such a case, "there is no reasonable possibility that asking the defendant whether [another witness] testified truthfully" would render the trial fundamentally unfair, the majority essentially overrules *Singh*.

I next turn to whether the effect of the prosecutorial improprieties were mitigated by curative measures taken by the trial court. In the present case, I would agree with the Appellate Court that "no curative instructions were given because they were not requested . . . ." *State* v. *Jones*, 139 Conn. App. 469, 482, 56 A.3d 724 (2012).

As this court has explained "[w]hen defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Paul B.*, 315 Conn. 19, 37, 105 A.3d 130 (2014). "[W]e emphasize that counsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error . . . ." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 576, 849 A.2d 626 (2004). As this court concluded in *State* v. *Ceballos*, supra, 266 Conn. 415, "the prosecutorial [impropriety] in the present case . . . was sufficiently egregious to overcome the suggestion that defense counsel did not think it was unfair at the time." Accordingly, I would conclude that the lack of curative measures in the present case weighs in favor of the defendant.

The final two *Williams* factors are the centrality of the prosecutorial improprieties to the critical issues of the case, and the strength of the state's case. I consider it appropriate in the present case to review these factors together. See id. The improprieties in the present case went to the central issue in the trial—the credibility of the witnesses. There were no witnesses to the assault besides the defendant and the complainant. The evidence regarding the assault charge consisted of the differing versions of events offered by the complainant and the defendant. The parties both agree, and the majority concludes, that the case turned on credibility.

I agree with the Appellate Court when it reasoned as follows: "In light of the specific facts of this case, however, the significance of the [prosecutor's] improper conduct increases considerably. . . . First, the defendant was compelled to comment directly on the veracity of police witnesses. Th[e] risk [*Singh* violations pose] is especially acute when the witness is a government agent in a criminal case. . . . Indeed, Connecticut courts routinely instruct juries that they should evaluate the credibility of a police officer in the same way that they evaluate the testimony of any other witness . . . no doubt to check the heightened credibility that government agents are afforded by some jurors. . . . Second, the defendant was compelled to comment directly on the veracity of the complainant. This elevated the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied. . . . Our Supreme Court has recognized that these dangers [involve] a distortion of the government's burden of proof." (Citations omitted; internal quotation marks omitted.) *State* v. *Jones*, supra, 139 Conn. App. 478–79. "Third, the prosecutor subtly but unmistakably mischaracterized the defendant's responses in a manner that 'emphasized the improper nature of the questions he had forced [the defendant] to answer.' . . . In clos-

ing argument, the prosecutor summed up the defendant's testimony by stating: 'Things are unraveling; one story won't work now. So what's the answer; the answer is, "I never said that; the police are lying apparently." ' But in responding to the prosecutor's improper question, the defendant specifically did *not* testify that police were lying. He did testify that the complainant lied. And he did testify that one officer's testimony was 'false'—but that is to be distinguished from 'lying,' which means a deliberate falsehood. A witness' testimony . . . can be . . . wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved . . . such as misrecollection, failure of recollection or other innocent reason. . . . The prosecutor's mischaracterization of the defendant's testimony elevated the risk of 'preclud[ing] the possibility that the witness' testimony conflict[ed] with that of the defendant for a reason other than deceit.' " (Citations omitted; emphasis altered; footnotes omitted.) Id., 479–80.

The only evidence the state introduced as to who initiated the altercation was the complainant's testimony. The parties agree that the case entirely turned on credibility. There can be no question that the conceded improprieties go directly to the credibility of the defendant as compared to the complainant and police officers, nor is there any debate that credibility was the central issue at trial. The complainant's rendition of events was contrary to the defendant, who maintained that it was the complainant who assaulted him.

This court has repeatedly concluded that prosecutorial improprieties are prejudicial when they impact the central issue in the case, such as a credibility issue between the victim and the defendant. For instance, in *State* v. *Ceballos*, supra, 266 Conn. 416, in examining the impact of prosecutorial improprieties in a case involving sexual assault where there was no physical evidence, this court concluded that "when the prosecu-

tion's case rests on the credibility of the victim, it is 'not particularly strong . . . .' " This court further reasoned that "all of the improprieties were connected directly to the critical issue, indeed the only disputed issue at trial [credibility] . . . ." (Internal quotation marks omitted.) Id., 416. This court concluded that "without independent physical evidence to prove that the defendant had sexually assaulted [the victim], or even that [the victim] had been sexually assaulted at all, the significance of the [prosecutor's] improper conduct increases considerably." Id., 416–17. Similarly, in *State* v. *Alexander*, 254 Conn. 290, 291–92, 755 A.2d 868 (2000), the defendant was convicted of sexual assault in the fourth degree and risk of injury to a child. In that case we relied on the fact that the "improper comments directly addressed the critical issue in this case, the credibility of the victim and the defendant." Id., 308. We concluded that the prosecutorial impropriety deprived the defendant of a fair trial. Id. "There were no curative measures adopted, and the state's case was not particularly strong in that it rested on the credibility of the victim." Id.; see also *State* v. *Angel T.*, supra, 292 Conn. 295 (prosecutorial impropriety deprived defendant of fair trial when case was "a credibility contest between the defendant and his accusers"). In the present case, the prosecutorial improprieties went to the central issue in the case and the state's case was not strong.

I would assert that the final *Williams* factor, the strength of the state's case, weighs most strongly in favor of the defendant. The state and majority concede that the entire case against the defendant on the assault charge relied on the testimony of the defendant against the testimony of the complainant. There was not only no physical evidence, but also there was no eyewitness testimony. It is axiomatic that in making the determination of whether an impropriety is harmless, we must

look to what other evidence, not tainted by the impropriety, was admitted to support the jury's conclusion. See, e.g., *State* v. *Thompson*, 266 Conn. 440, 456, 832 A.2d 626 (2003) (concluding that, although admission of certain testimony was abuse of discretion, it was harmless error because, inter alia, prosecutor did not emphasize or rely upon testimony during closing argument and there was significant other evidence of defendant's guilt); *State* v. *Hafford*, 252 Conn. 274, 297, 746 A.2d 150 ("[t]his court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt" [internal quotation marks omitted]), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000). In the present case, it is undisputed that there was no other evidence regarding the assault charge besides the testimony of the defendant and the complainant. Therefore, the state's case was weak and there was absolutely no evidence to support the defendant's conviction that was not tainted by the improprieties. Accordingly, I would conclude that this *Williams* factor very strongly weighs in favor of the defendant, and that an overall analysis of the *Williams* factors favors a remand to the trial court for a new trial.

Having reviewed all of the *Williams* factors, I would conclude that the state has not demonstrated, beyond a reasonable doubt, the reasonable likelihood that the jury's verdict would not have been different absent the sum total of the improprieties in the present case. *State* v. *Luster*, supra, 279 Conn. 442. The prosecutorial improprieties deprived the defendant of a fair trial because they was pervasive, uninvited by the defendant and were not subjected to specific curative measures. Moreover, the lack of physical evidence in the present case reduced the present case to a credibility contest between the defendant and the complainant, indicating

that the jury may well have been unduly influenced by the improprieties. Accordingly, I agree with the Appellate Court's decision to order a new trial in the present case.

Therefore, I respectfully dissent.

VILLAGES, LLC *v.* ENFIELD PLANNING AND ZONING COMMISSION

(SC 19334)

(SC 19335)

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

Argued November 6—officially released December 29, 2015

Procedural History

Appeal, in the first case, from the defendant's decision denying the plaintiff's subdivision application, and appeal, in the second case, from the defendant's decision denying the plaintiff's application for a special use permit, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. Richard M. Rittenband*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgments sustaining the plaintiff's appeals, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Lavine* and *Dupont*, *Js.*, which affirmed the trial court's judgments, and the defendant, on the granting of certification, appealed to this court. *Appeals dismissed.*

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

Kevin M. Deneen, town attorney, with whom, on the brief, was *Maria S. Elsden*, senior assistant town attorney, for the appellant (defendant).

Gwendolyn S. Bishop, with whom, on the brief, was *Paul Timothy Smith*, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, the Enfield Planning and Zoning Commission, appeals, upon our grant of its petitions for certification, from the judgment of the Appellate Court affirming the judgments of the trial court sustaining the land use appeals of the plaintiff, Villages, LLC.[1] *Villages, LLC* v. *Enfield Planning & Zoning Commission*, 149 Conn. App. 448, 450, 89 A.3d 405 (2014). On appeal to this court, the defendant contends that the Appellate Court improperly upheld the trial court's determination that the defendant's decisions to deny the plaintiff's applications for a special use permit and an open space subdivision permit were not "honest, legal, and fair" because one of its commissioners was biased against the plaintiff, and had engaged in improper ex parte communications concerning the applications. Id., 455.

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeals in these cases should be dismissed on the ground that certification was improvidently granted.

The appeals are dismissed.

[1] In two separate orders, we granted the defendant's petitions for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine that the trial court correctly sustained the plaintiff's appeals from the determinations of the defendant, the Enfield Planning and Zoning Commission?" *Villages, LLC* v. *Enfield Planning & Zoning Commission*, 312 Conn. 913, 913–14, 93 A.3d 596 (2014).

As in the Appellate Court, the defendant's claims in each of the certified appeals are identical and are presented in a single brief. See *Villages, LLC* v. *Enfield Planning & Zoning Commission*, 149 Conn. App. 448, 450 n.1, 89 A.3d 405 (2014).

J.E. ROBERT COMPANY, INC. *v.* SIGNATURE PROPERTIES, LLC, ET AL.
(SC 19483)

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

Syllabus

The plaintiff, J Co., sought to foreclose a mortgage on certain of the named defendant's commercial property and, thereafter, assigned its interest in the mortgage and a promissory note that was executed to secure the mortgage to S Co., which was substituted as the plaintiff. The note and the mortgage were guaranteed by, among others, the defendants A and M. After the trial court rendered a judgment of strict foreclosure, S Co. sought a deficiency judgment against the named defendant, A and M. At a hearing on the deficiency judgment, S Co. offered the testimony of B, an appraiser, and B's appraisal report. B testified, consistent with his report, that the market value of the leased fee interest in the subject property was $5.3 million as of the date title to the property vested in S Co., which occurred after the court rendered the judgment of strict foreclosure. B also testified that there would be no significant difference in the valuation of the leased fee interest and the fee simple interest because the contract rents for the leased space on the property were similar to the market rent for comparable commercial space. On the basis of B's testimony and his report, the court found that the fair market value of the property was $5.3 million when title vested in S Co. and rendered a deficiency judgment in favor of S Co. A and M appealed, claiming that the trial court improperly relied on B's testimony and his appraisal report in determining fair market value because B valued the leased fee interest of the property rather than the fee simple interest. *Held* that the trial court properly relied on B's testimony and his appraisal report in determining fair market value, and this court could not conclude that the trial court's fair market value finding was erroneous or improper, or that S Co. did not satisfy its burden of establishing the value of the subject property; when contract rents for leased commercial space are at market rates for comparable commercial space, the value of the leased fee interest and the fee simple interest in the property is equal, and the trial court found that the contract rates for the subject property and the market rates were similar.

Argued October 8, 2015—officially released January 5, 2016

Procedural History

Action to foreclose a mortgage, and for other relief, brought to the Superior Court in the judicial district of

New London, where Shaw's New London, LLC, was substituted as the plaintiff; thereafter, the case was transferred to the judicial district of Hartford, Complex Litigation Docket, where the court, *Bright*, *J.*, rendered judgment of strict foreclosure, and the named defendant et al. filed separate appeals with the Appellate Court, which were consolidated and transferred to this court; subsequently, this court affirmed the trial court's judgment; thereafter, the trial court, *Sheridan*, *J.*, granted the substitute plaintiff's motion for a deficiency judgment and rendered judgment thereon, from which the defendants Andrew J. Julian and Michael Murray appealed. *Affirmed*.

Richard J. Buturla, with whom was *Brian A. Lema*, for the appellants (defendants Andrew J. Julian and Michael Murray).

Eric S. Goldstein, with whom, on the brief, was *Patrick M. Fahey*, for the appellee (substitute plaintiff Shaw's New London, LLC).

Opinion

ZARELLA, J. In this appeal, we are asked to determine whether the trial court properly relied on the appraisal submitted by the substitute plaintiff, Shaw's New London, LLC (plaintiff), and the testimony of the plaintiff's appraiser in granting the plaintiff's motion for a deficiency judgment against the named defendant, Signature Properties, LLC (Signature), and the defendants Andrew J. Julian, Maureen Julian, and Michael Murray.[1] The defendants Andrew J. Julian and Murray (defen-

[1] Stephanie Lord Drake and 280 Atlantic Street, LLC, also were named as defendants. Drake was, along with Andrew J. Julian, Maureen Julian and Murray, one of the guarantors of the note executed by Signature. The plaintiff did not pursue a deficiency judgment against Drake, however, because her liability was discharged in bankruptcy. She is not a party to this appeal. Moreover, 280 Atlantic Street, LLC, was defaulted for failure to appear and also is not a party to this appeal.

dants) appeal from the trial court's judgment and claim that it was improper to rely on the appraisal and the appraiser's testimony because they expressed an opinion on the value of the leased fee interest in the mortgaged property and the plaintiff was required to establish the value of the fee simple interest. The defendants further argue that the value of the leased fee interest and fee simple interest of the mortgaged property are not equivalent. The plaintiff responds that it was proper to appraise the value of the leased fee interest in the mortgaged property because the day title to the property vested in the plaintiff, it was encumbered by three leases.[2] Alternatively, the plaintiff contends that the value of the leased fee and fee simple interests in the mortgaged property are equal because the leases were at market rates. We conclude that the trial court's reliance on the appraisal and the appraiser's testimony was proper and affirm its judgment.

On April 13, 2005, Signature executed a promissory note secured by a mortgage and security agreement on Signature's property at 6 Shaw's Cove in the city of New London.[3] The note and mortgage were guaranteed by Andrew J. Julian, Maureen Julian, and Murray (guarantors). In August, 2007, an action was commenced to foreclose the mortgage, and, on February 3, 2010, the trial court, *Shapiro*, *J.*, granted the plaintiff's motion for partial summary judgment. The court granted the plaintiff, among other things, the relief of foreclosure and an order permitting the plaintiff to seek a deficiency judgment against the guarantors. The trial court, *Bright*, *J.*, rendered a judgment of strict foreclosure on October 20, 2011, which was affirmed by this court on July 16,

[2] We need not reach this argument because we decide this case on the plaintiff's alternative argument.

[3] The original note was payable to the order of JPMorgan Chase Bank, N.A. It was assigned, along with the mortgage and security agreement, to the plaintiff, Shaw's New London, LLC, on October 17, 2007.

2013. See *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 342, 71 A.3d 492 (2013). The trial court, *Sheridan, J.*, then granted the plaintiff's motion to open the judgment of strict foreclosure and set new law days for Signature and the guarantors. Neither Signature nor the guarantors redeemed by their respective law days, and title to the foreclosed property vested in the plaintiff on September 27, 2013.

The plaintiff subsequently filed a timely motion seeking a deficiency judgment against Signature and the guarantors, and a hearing was scheduled. At the hearing, the plaintiff offered the testimony of Daniel Barber, the senior vice president of Northeast Property Group, Inc., the court-appointed receiver, and Mark Bates, the plaintiff's appraiser. The plaintiff also submitted nine exhibits, including Bates' appraisal report. Barber testified regarding the current conditions of the mortgaged property. On the basis of this testimony, the court found that the property had three tenants on September 27, 2013, the day title to the property vested in the plaintiff, who occupied approximately 60 percent of the building. The remaining 40 percent of the property was vacant, and it had been since 2008, despite Barber's efforts to lease the vacant space.

Bates' testimony and appraisal report "presented an opinion concerning 'the market value as is of the leased fee interest' of the mortgaged property . . . ." In reaching his opinion, Bates utilized the sales comparison and income capitalization approaches. The income capitalization approach employed two analyses, direct capitalization and discounted cash flow. To determine the projected income stream generated by the property, Bates utilized the contract rents for the occupied space, after determining they were at or near market rates,

and applied market rent to the vacant space.[4] Bates did not use the cost approach, determining that it would be an inappropriate methodology in this case due to the age of the building and limited comparable land transactions. Moreover, the cost approach is generally employed only when valuing new or nearly new properties. Bates concluded, after considering the value indications from the sales comparison and income capitalization approaches, "that the market value as is of the leased fee interest in the mortgaged property was $5.3 million as of September 27, 2013," the day title to the mortgaged property vested in the plaintiff. In addition, Bates testified that there would be no significant difference in the valuation of the leased fee interest and the fee simple interest because the current contract rents were close to the market rents.

The defendants did not present any evidence to contradict or discredit Bates' valuation of the property but, instead, argued that the valuation was flawed because it valued the leased fee interest, and not the fee simple interest, in the property. The trial court credited Bates' testimony that the contract rents for the leased space were similar to the market rent for comparable space and concluded: "Under those circumstances, the value of the leased fee estate will be equivalent to the value of the fee simple estate, and the court is justified in using the valuation as is of the leased fee interest in arriving at its determination of the fair market value of the mortgaged property." The court therefore found the fair market value of the mortgaged property to be $5.3 million and rendered a deficiency judgment in the amount of $13,264,318.57.

The defendants appealed, claiming, in essence, that the trial court improperly relied on Bates' appraisal and

[4] Bates concluded that the market rent for comparable space was $20 per square foot, and the contract rents for the leased space at the mortgaged property averaged $20.03 per square foot.

his testimony in determining the fair market value of the foreclosed property because they valued the leased fee interest of the property rather than the fee simple interest. The defendants make a number of arguments, but their arguments are all derivative of two underlying claims: (1) General Statutes § 49-14 (a) required the plaintiff to establish the fair market value of the fee simple interest of the mortgaged property; and (2) the valuation of the fee simple interest and leased fee interest of mortgaged property is not equal, even though the leases are at market rate.

We begin our analysis by setting forth the proper standard of review. It is in the trial court's province to determine the valuation of mortgaged property, usually guided by expert witnesses, relevant circumstances bearing on value, and its own knowledge. See, e.g., *Eichman* v. *J & J Building Co.*, 216 Conn. 443, 451, 582 A.2d 182 (1990). The trial court also determines the credibility and weight accorded to the witnesses, their testimony, and the evidence admitted. See, e.g., id., 451–52. Thus, the trial court's conclusion regarding the fair market value of the mortgaged property will be upheld "unless there was an error of law or a legal or logical inconsistency with the facts found." (Internal quotation marks omitted.) *New Haven Savings Bank* v. *West Haven Sound Development*, 190 Conn. 60, 70, 459 A.2d 999 (1983). Its determination of valuation will stand unless "it appears on the record . . . that the [trial] court misapplied or overlooked, or gave a wrong or improper effect to, any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) Id.

The defendants contend that § 49-14 (a) requires the plaintiff, in order to receive a deficiency judgment, to establish the fair market value of the fee simple interest of the mortgaged property on September 27, 2013, the date title vested in the plaintiff. Their argument is as

follows: First, § 49-14 (a) requires the party seeking a deficiency judgment to "establish a valuation for the *mortgaged property* . . . ." (Emphasis added.) Second, Connecticut follows the title theory of mortgages, meaning that, when a mortgage is executed, the mortgagee receives legal title to the property in the form of a vested fee simple subject to complete defeasance by the mortgagor's compliance with the mortgage conditions, i.e., timely payment of the debt secured by the mortgage. Third, "the mortgaged property" referred to in § 49-14 (a) is the fee simple interest because, under the title theory of mortgages, that is what vests in the mortgagee when the mortgage is executed. Therefore, § 49-14 (a) requires the plaintiff to establish the value of the fee simple, not the leased fee. We need not decide, however, whether § 49-14 (a) requires the plaintiff to establish the value of the fee simple interest in the mortgaged property because, as we discuss further in this opinion, when contract rents are at market rates, the value of the leased fee and fee simple interests of mortgaged property is equivalent.

In the trial court, the defendants argued that the plaintiff's appraisal was flawed because it valued the leased fee interest rather than the fee simple interest of the mortgaged property. The trial court responded that a "leased fee interest is simply the fee simple interest encumbered by a lease. If the lease is at market rent, then the leased fee value and the fee simple value are equal." The defendants now argue before this court that the trial court's statement was an incorrect conclusion of law. We do not agree.

When employing the income capitalization approach to value the fee simple interest in an income producing property, such as the property at issue in the present case, an appraiser utilizes market rents. See Appraisal Institute, The Appraisal of Real Estate (12th Ed. 2001) pp. 480, 500. By multiplying the market rent by all rent-

able space, the appraiser can estimate the income the property would generate. See id., p. 480. Similarly, to value owner occupied properties under the income capitalization approach, market rent estimates are utilized. Id., p. 500. To value the leased fee interest in such property, however, contract rents—that is, those determined by current leases—are used for space under existing leases and market rents are used for vacant space. Id. Thus, when market rents and contract rents are equal, the valuation of the fee simple interest in a particular property and the leased fee interest in the same property will likewise be equal. The authors of The Appraisal of Real Estate support this conclusion: "When an [appraisal] involves the valuation of a leased fee interest, the appraiser often must also appraise the fee simple interest. If the rent and/or terms of the lease are favorable to the landlord (lessor), the value of the leased fee interest will usually be greater than the value of the fee simple interest, resulting in a negative leasehold interest. If the rent and/or terms of the lease are favorable to the tenant (or lessee), the value of the leased fee interest will usually be less than the value of the fee simple interest, resulting in a positive leasehold interest . . . . *The negative or positive leasehold interests will cease if contract rent and/or terms equal market rent and/or terms any time during the lease or when the lease expires*." (Citation omitted; emphasis added.) Id., p. 82. Put another way, when contract rents are at market rates, the value of the leased fee and fee simple will be equal.

The holdings of other courts also support this conclusion. In *Walgreen Co.* v. *Madison*, 311 Wis. 2d 158, 752 N.W.2d 687 (2008), a tax assessment appeal, the Supreme Court of Wisconsin quoted with approval a state property assessment manual: "If the contract rent is at the same level as the market, the leased fee interest has the same value as a full interest (fee simple inter-

est)."[5] (Internal quotation marks omitted.) Id., 177; see also id., 176 ("[i]f the contract rents are at market levels . . . the leased fee interest is the same as a fee simple interest" [internal quotation marks omitted]). Similarly, in *In re Prieb Properties, L.L.C.*, 47 Kan. App. 2d 122, 275 P.3d 56 (2012), also a tax assessment appeal, the Court of Appeals of Kansas stated that "it is clear that the legislative intent underlying the statutory scheme of ad valorem taxation in [Kansas] has always been to appraise the property as if in fee simple, requiring property appraisal to use market rents instead of contract rents *if the rates are not equal*." (Emphasis added.) Id., 130. Implicit in the court's statement is the point that, when contract rents are equal to market rates, they do not affect the valuation of the fee simple interest in the appraised property. Our research has not uncovered any cases that hold to the contrary.

This conclusion is also consistent with our cases addressing valuation issues. For example, in *First Bethel Associates* v. *Bethel*, 231 Conn. 731, 651 A.2d 1279 (1995), we considered whether the contract rent a subject property receives should factor into the analysis of the market value of the property for tax assessment purposes. See id., 733. In *First Bethel Associates*, the defendant town contended that actual or contract rents should be considered only when they are equivalent to the market rents the property would command. Id., 740. We rejected that argument, explaining that such a rule "would mean that contract rent would factor

[5] We acknowledge that the Supreme Court of Wisconsin was relying on a 2007 state property assessment manual; see *Walgreen Co.* v. *Madison*, supra, 311 Wis. 2d 165 n.3; however, the authors of that manual draw on recognized practices of the appraisal profession. See, e.g., Wisconsin Dept. of Revenue, Wisconsin Property Assessment Manual (2014) introduction, available at https://www.revenue.wi.gov/slf/wpam/wpam14.pdf (last visited December 18, 2015). Moreover, the court also relied on the same edition of The Appraisal of Real Estate that we rely on in the present case. See, e.g., *Walgreen Co.* v. *Madison*, supra, 164–65, 168 and n.5.

into the analysis only if it had no effect on the overall valuation . . . .'' Id. Implicit in our statement is the understanding that, when contract rents are at market rates, they do not impact the fair market value of the property. It follows, then, that, because a leased fee interest is valued using contract rents for leased space and market rents for vacant space, and a fee simple interest is valued using market rents for all rental space, when contract rents are at market rates, the leased fee and fee simple value will be equal.

The defendants cite to *First Fiscal Fund Corp.* v. *Manchester*, Superior Court, judicial district of Hartford-New Britain, Docket No. CV-91-0396739 (April 4, 1996), in support of their contention that the value of the leased fee interest and the fee simple interest in the subject property are not, as a matter of law, equivalent. That case, however, is inapposite. *First Fiscal Fund Corp.* was an appeal from the Board of Tax Review of the Town of Manchester and concerned the valuation of property located in Manchester. The plaintiffs' appraiser in that case valued both the leased fee interest and the fee simple interest in the subject property under the income capitalization approach. The appraiser valued the fee simple interest at $5.75 million and the leased fee interest at $4.12 million. The defendants in the present case point to this difference as evidence that the trial court's conclusion that the values of the leased fee interest and fee simple interest are equal when contract rents are at market rates is incorrect. What the defendants overlook, however, is that the market rents and contract rents in *First Fiscal Fund Corp.* were *not* equal, as they are in the present case. That does not matter, the defendants assert, because the variance in the rents was only one difference that distinguished the appraisal of the fee simple interest from that of the leased fee interest. The defendants argue that, in addition to the different rent rates utilized in valuing the fee simple and leased fee interests in *First Fiscal Fund Corp.*, the appraiser also employed

different assumptions under the fee simple valuation than he did under the leased fee valuation. There is nothing in *First Fiscal Fund Corp.*, however, to suggest that the different assumptions were based on the difference in the interest valued (fee simple or leased fee) rather than the difference in market lease rent rates and lease terms, and the actual rent rates and lease terms in that case.

At oral argument, the defendants contended that the valuation of the fee simple interest and leased fee interest would not be equal, even if rents are at market rates, because valuation of the leased fee interest ignores the possibility that the property may be purchased by an owner-occupier. The defendants explained that, if the property was purchased to be occupied by the owner, there would be no need for certain adjustments. We assume the defendants are referring to the lease-up expenses and the vacancy and collection loss. They provide no support for their argument, however, and we have found none. In fact, The Appraisal of Real Estate notes that, when valuing the fee simple interest in owner occupied properties under the income capitalization approach, the appraiser should use market rent estimates for the space. Appraisal Institute, supra, p. 500. Further, it indicates that it is appropriate "to make a deduction in the forecast time for the market to achieve 100 [percent] use and occupancy of the building. (This is analogous to the lease-up time needed to achieve stabilized occupancy in the tenanted properties.)" Id. Thus, when market rents and contract rents are equal, the valuation of the fee simple interest of an owner occupied property will be the same as the valuation of the leased fee interest in the property.[6]

Finally, the defendants claim that the trial court's finding of the fee simple value of the subject property was clearly erroneous because the plaintiff submitted

[6] It is important to note that there does not appear to be any reason why Bates should have valued the subject property as an owner occupied facility.

no evidence of the value of the fee simple interest, that the plaintiff did not meet its burden of establishing the fair market value of the mortgaged property, and, therefore, that it is not entitled to a deficiency judgment. At trial, the plaintiff presented Bates' appraisal report and testimony, both of which noted that the value of the as is leased fee interest in the mortgaged property was $5.3 million. Bates also testified that the contract rents for leased space at the mortgaged property were at market rates. The trial court credited Bates' appraisal report and his testimony.[7] In light of our conclusion that, when contract rents are at market rates, the value of the leased fee interest and fee simple interest in property is equal, and given the finding of the trial court that the terms of the existing leases in this case were similar to market terms, we cannot say that the trial court's fair market value finding was erroneous or improper, or that the plaintiff did not satisfy its burden of establishing the value of the mortgaged property.[8]

The judgment is affirmed.

In this opinion the other justices concurred.

He concluded that the most likely buyer for the subject property would be an investor, and the defendants did not offer any evidence to contradict that conclusion.

[7] The defendants did not present any evidence to contradict Bates' testimony on this matter, or any other fact, and they do not challenge the trial court's finding that the contract terms were similar to the market terms.

[8] The defendants also argue that the trial court appears to have credited Bates' testimony that there would be no significant difference in the value of the leased fee interest and fee simple interest in the subject property and that crediting such testimony was clearly erroneous because Bates did not value the fee simple interest. After examining the trial court's memorandum of decision, however, we believe that the trial court credited Bates' testimony that the contract and market rents were equal and concluded, as a matter of law, that, under such circumstances, the value of the leased fee and fee simple will be equal. Thus, we do not address this argument.

We also conclude that the defendants' argument that the trial court's finding of fair market value was clearly erroneous because it was based on selected portions of the appraisal report is without merit. As we have explained, our examination of the trial court's memorandum of decision leads us to believe that its determination was based on the factual finding that market and contract rents were similar and the legal conclusion that,

SOUTHPORT CONGREGATIONAL CHURCH–UNITED CHURCH OF CHRIST *v.* BETTY ANN HADLEY, COEXECUTOR (ESTATE OF ALBERT L. HADLEY), ET AL.
(SC 19398)

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

Syllabus

Pursuant to statute (§ 45a-325), "[t]he court of probate having jurisdiction of the settlement of the estate of any deceased person may, concurrently with courts of equity, authorize the fiduciary of the estate to convey the title of the deceased in any real property to any person entitled to it by virtue of any contract of the deceased person . . . ."

The plaintiff church, which was specifically devised a certain parcel of real property under the will of the decedent, A, appealed to the trial court from a decree of the Probate Court granting an application by the defendant coexecutors of A's estate for permission to sell the property pursuant to § 45a-325. The coexecutors had sought permission to sell the property to a third party, W, pursuant to an unexecuted sales contract that had been signed by A shortly before his death. On appeal to the trial court, the plaintiff claimed that its consent was required to sell the property pursuant to the statute governing the sale of specifically devised property (§ 45a-428). In response, the coexecutors filed, inter alia, a counterclaim in the plaintiff's probate appeal seeking authorization to sell the property pursuant to § 45a-325 and a separate civil action seeking the same relief. After the trial court granted a motion to intervene filed by the defendant museum, which claimed to be entitled to the proceeds from the sale of the property to W as a result of a charitable pledge made by A prior to his death, the Probate Court amended its decree to require the plaintiff's consent prior to the sale and the plaintiff withdrew its appeal. The trial court subsequently rendered judgments authorizing the sale of the property pursuant to § 45a-325 in both the coexecutors' counterclaim in the probate appeal and their separate action. Thereafter, the plaintiff appealed to the Appellate Court, claiming that the trial court had improperly concluded that A's interest in the property terminated at the signing of the sales contract with W under the doctrine of equitable conversion and, therefore, did not pass under A's will. The plaintiff further claimed that, because the trial court had granted permission to sell the property in the separate action, the counterclaim was moot. The Appellate Court agreed with the plaintiff, reversed the judgments

under such circumstances, the leased fee and fee simple values are equal rather than on selected portions of the appraisal report.

of the trial court, and remanded the case with direction to deny the coexecutors' application for permission to sell the property in the separate action and to dismiss the coexecutors' counterclaim in the probate appeal. From that judgment, the museum, on the granting of certification, appealed to this court. *Held* that the Appellate Court incorrectly concluded that equitable conversion did not apply and, therefore, improperly reversed the judgment of the trial court in the coexecutors' separate action: the mortgage contingency clause in the sales contract, which made the sale of the property to W contingent on her obtaining a loan to purchase the property, did not constitute a condition precedent that prevented W from being able to immediately enforce the contract, the contingency clause having benefited W, who could have waived its protections and sought specific performance against A at any time, and the parties to the contract having intended it to be enforceable against both parties at the time of signing; moreover, application of equitable conversion was further supported by evidence indicating A's intent to provide the proceeds from the sale of the property to the museum.

Argued October 15, 2015—officially released January 5, 2016

Procedural History

Appeal from an order of the Probate Court for the district of Fairfield granting an application for the execution of a contract, to which the decedent was a party, for the sale of certain real property, brought to the Superior Court in the judicial district of Fairfield, where the named defendant et al. filed a counterclaim; thereafter, Cheekwood Botanical Garden and Museum of Art intervened as a defendant; subsequently, the plaintiff withdrew its appeal; thereafter, the court, *Radcliffe*, *J.*, granted the application filed by the named defendant et al. for authorization to sell the subject property and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court; subsequently, the court, *Radcliffe*, *J.*, granted the motion for summary judgment filed by the intervening defendant Cheekwood Botanical Garden and Museum of Art on the counterclaim and rendered judgment thereon, from which the plaintiff filed a separate appeal to the Appellate Court; thereafter, the Appellate Court, *Lavine*, *Sheldon* and *Bishop*, *Js.*, reversed the trial court's judgments and remanded the case with direction to deny the applica-

tion for authorization to sell the subject property and to dismiss the counterclaim, and the intervening defendant Cheekwood Botanical Garden and Museum of Art, on the granting of certification, appealed to this court. *Reversed in part; judgment directed.*

Daniel J. Krisch, with whom was *Jeffrey F. Gostyla*, for the appellant (intervening defendant Cheekwood Botanical Garden and Museum of Art).

John A. Farnsworth, for the appellee (plaintiff).

Opinion

ROBINSON, J. The principal issue in this certified appeal is whether title to real property passed to a buyer at the signing of a contract of sale under the doctrine of equitable conversion, when the seller died prior to the fulfillment or expiration of a mortgage contingency clause in the contract. The decedent in the present case, Albert L. Hadley, entered into a contract for the sale of a certain parcel of real property to Evelyn Winn. Before entering into the contract, the decedent had specifically devised the property to the plaintiff, Southport Congregational Church–United Church of Christ (church), in his will. The defendant Cheekwood Botanical Garden and Museum of Art (Cheekwood) claims entitlement to the proceeds from the sale of the property to Winn by the coexecutors of the decedent's estate, the defendants Betty Ann Hadley and Lee Snow, as a result of a charitable pledge made by the decedent prior to his death.[1] Cheekwood appeals, upon our grant of its petition for certification,[2] from the judgment of

[1] To avoid confusion between the defendants, we refer to Betty Ann Hadley and Lee Snow collectively as coexecutors. For the sake of simplicity, we refer to all the defendants individually by name.

[2] We granted Cheekwood's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly reverse the trial court's judgment that the subject real property did not automatically pass to the specific devisee of the property under a will upon the death of the decedent when, prior to the decedent's death, he had entered into a contract to sell the property to a third party?" *Southport Congregational Church–United Church of Christ* v. *Hadley*, 314 Conn. 933, 102 A.3d 84 (2014).

the Appellate Court reversing a judgment of the trial court, which had held that title to the property passed to Winn under the doctrine of equitable conversion at the signing of the contract. *Southport Congregational Church–United Church of Christ* v. *Hadley*, 152 Conn. App. 282, 298–300, 98 A.3d 99 (2014). On appeal, Cheekwood claims that the Appellate Court improperly concluded that equitable conversion did not apply because the contract was fully enforceable against the decedent at signing and could be terminated only by Winn within a specified period if she could not obtain financing. We agree and, accordingly, reverse in part the judgment of the Appellate Court.[3]

The record reveals the following facts and procedural history. On September 22, 2010, the decedent executed a will specifically devising the property, which is located at 504 Pequot Avenue in Southport, to the church. One and one-half years later, on March 21, 2012, the decedent contracted to sell the property to Winn. The sales contract, which was the standard form real estate contract provided by the Fairfield County Bar Association,[4] contained a mortgage contingency clause

[3] Shortly before the publication of this opinion, the church moved to dismiss the appeal as moot, claiming that Winn was no longer willing to purchase the property in accordance with the terms of the contract. According to the church, the parties had reached a settlement by which Winn would purchase the property at a lower price, and the church, Cheekwood, and the decedent's estate would all share in the proceeds. Cheekwood opposed the motion, however, arguing that the appeal was not moot because the settlement had not yet been consummated, and Winn had agreed to proceed with the sale in accordance with the contract, albeit at a lower price. We agreed with Cheekwood and denied the church's motion. See *Heyse* v. *Case*, 114 Conn. App. 640, 644, 971 A.2d 699 ("[t]here is no such thing as anticipatory mootness"), cert. denied, 293 Conn. 905, 976 A.2d 705 (2009).

[4] We note that the sales contract in the present case refers to the decedent as the seller and to Winn as the buyer. For the sake of simplicity, quotations within this opinion to the various provisions of this contract retain these designations.

stating: "This [a]greement is contingent upon BUYER obtaining a written commitment for a loan . . . . [If] BUYER is unable to obtain a written commitment for such a loan . . . and if BUYER so notifies SELLER or SELLER'S attorney, in writing, at or before 5:00 p.m., on April 16, 2012, then this [a]greement shall be null and void . . . . If SELLER or SELLER's attorney does not receive such written notice . . . this [a]greement shall remain in full force and effect." The decedent waived specific performance as a remedy under the contract and agreed to retain Winn's down payment as liquidated damages in the event of Winn's default.[5] By letter to Cheekwood's president dated March 6, 2012, the decedent pledged to donate the proceeds from the sale to Cheekwood.[6] The decedent died on March 30, 2012, nine days after signing the contract and before Winn had obtained financing or the mortgage contingency period had expired.

The decedent's will was admitted to probate in New York Surrogate's Court on May 10, 2012.[7] The coexecutors applied for ancillary jurisdiction and authorization to sell the property pursuant to General Statutes § 45a-325[8] in the Probate Court for the district of Fairfield. Cheekwood filed a claim to the proceeds from the sale. The Probate Court granted the coexecutors' application

[5] The contract states: "[If] BUYER is unable or unwilling to perform . . . SELLER's sole and exclusive remedy shall be the right to terminate this [a]greement by written notice to BUYER . . . and retain the down payment as reasonable liquidated damages . . . ."

[6] The plaintiff disputes Cheekwood's entitlement to the proceeds of the sale. This issue is not, however, part of the certified question. See *Southport Congregational Church–United Church of Christ* v. *Hadley*, 314 Conn. 933, 102 A.3d 84 (2014). Accordingly, we decline to address it.

[7] The decedent was a resident of the state of New York at the time of his death.

[8] General Statutes § 45a-325 provides: "The court . . . may . . . authorize the fiduciary of the estate to convey the title of the deceased in any real property to any person entitled to it by virtue of any contract of the deceased person . . . ."

for ancillary jurisdiction and for authorization to sell the property.[9]

The church appealed from the decision of the Probate Court to the trial court, claiming that, because it was the specific devisee of the property under the decedent's will, the coexecutors could not sell the property without its consent pursuant to General Statutes § 45a-428 (b).[10] The coexecutors responded to the probate appeal with an answer, special defense, and counterclaim seeking authorization to sell the property. The court granted Cheekwood's motion to intervene. During the pendency of this appeal, the Probate Court amended its decree to require the coexecutors to obtain the church's consent before selling the property. The church subsequently withdrew its probate appeal in light of this amendment. The coexecutors' counterclaim, however, remained pending.

The coexecutors then filed a second action in the trial court, in which they filed a separate application seeking authorization to sell the property pursuant to § 45a-325. Cheekwood again intervened and submitted a memorandum of law in support of the coexecutors' application, contending that § 45a-428 did not apply because the decedent's interest in the property terminated at the signing of the contract under the doctrine of equitable conversion, leaving him with only an interest in the expected proceeds from the sale at the time of his death. In response, the church asserted that equitable conversion did not apply because of the unfulfilled and unexpired mortgage contingency clause, and thus, the decedent retained his interest in the property at the

[9] The coexecutors agreed to hold the proceeds in escrow pending resolution of any competing claims. See footnote 6 of this opinion.

[10] General Statutes § 45a-428 (b) provides in relevant part: "[R]eal property of a decedent whose estate is solvent and . . . specifically devised by will . . . shall not be so ordered to be sold or mortgaged without the written consent of the specific devisees . . . ."

execution of the contract, which passed to the church. See *Zanoni* v. *Lynch*, 79 Conn. App. 309, 320, 830 A.2d 304 ("title to real estate vests immediately . . . in a deceased's . . . devisees upon the admission of a will to probate" [internal quotation marks omitted]), cert. denied, 266 Conn. 929, 837 A.2d 804 (2003). After an evidentiary hearing, the trial court granted the coexecutors' application for authorization to sell the property. The court then denied the church's motion to reargue, and the church appealed from that judgment to the Appellate Court under Docket No. AC 35289

With this appeal pending, Cheekwood moved for summary judgment on the coexecutors' counterclaim in the probate appeal. Cheekwood contended that the relief sought was identical to that which had already been granted by the trial court and, thus, judgment should be rendered in favor of the coexecutors. The church opposed the motion, claiming, inter alia, that the counterclaim had been rendered moot by the granting of the coexecutors' separate application for authorization to sell the property in the second action. The trial court rejected these arguments and granted Cheekwood's motion for summary judgment. The trial court denied the church's motion to reargue, and the church appealed from that judgment to the Appellate Court under Docket No. AC 36395.

The Appellate Court resolved the church's appeals together, because the central issue in both appeals—whether title passed to the buyer at the signing of the contract of sale via equitable conversion—was identical. *Southport Congregational Church–United Church of Christ* v. *Hadley*, supra, 152 Conn. App. 291–92. The church argued that equitable conversion did not apply because the unfulfilled and unexpired mortgage contingency clause prevented title from passing to Winn at the signing of the contract. Id., 296–97. The coexecutors and Cheekwood maintained in response that equitable

conversion occurred because the contract was specifically enforceable against the seller at the time of its execution. Id., 297. The Appellate Court agreed with the church that equitable conversion did not apply because of the unfulfilled and unexpired mortgage contingency clause. Id. The Appellate Court ultimately rendered judgment reversing the trial court's judgments, and remanded the cases to the trial court with direction to deny the coexecutors' separate application to sell the property, and to dismiss their counterclaim in the probate appeal seeking the same relief as moot. Id., 300. This certified appeal followed.[11]

On appeal, Cheekwood contends that the mortgage contingency clause did not preclude the equitable conversion of title because the parties intended for the contract to be fully enforceable at signing, subject only to the possible termination within a specified period by Winn if she could not obtain financing. In response, the church argues that the clause was an unsatisfied condition precedent to the contract and, thus, the contract was not yet enforceable and title could not have passed to Winn. We agree with Cheekwood that the mortgage contingency clause did not preclude the application of equitable conversion, and that equitable title passed to Winn at the execution of the contract.

We begin by setting forth our standard of review. "The determination of whether an equitable doctrine applies in a particular case is a question of law subject to plenary review." *Walpole Woodworkers, Inc.* v. *Manning*, 307 Conn. 582, 588, 57 A.3d 730 (2012). We similarly review the intent of the parties to an unambiguous

[11] We note that neither the certified question; see footnote 2 of this opinion; nor the briefing of the parties in the present case, relate to the Appellate Court's conclusion that the coexecutors' counterclaim was moot. See *Southport Congregational Church–United Church of Christ* v. *Hadley*, supra, 152 Conn. App. 300.

contract de novo. See, e.g., *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 811, 17 A.3d 40 (2011).

"[E]quitable conversion is a settled principle under which a contract for the sale of land vests equitable title in the [buyer]." (Internal quotation marks omitted.) *Salce* v. *Wolczek*, 314 Conn. 675, 687, 104 A.3d 694 (2014). "Under the doctrine of equitable conversion . . . the purchaser of land under an executory contract is regarded as the owner, subject to the vendor's lien for the unpaid purchase price, and the vendor holds the legal title in trust for the purchaser. . . . The vendor's interest thereafter in equity is in the unpaid purchase price, and is treated as personalty . . . while the purchaser's interest is in the land and is treated as realty." (Internal quotation marks omitted.) Id., 688. The doctrine is "rooted in the principle that equity views a transaction as being completed at the time the parties enter into the transaction, irrespective of whether a formal exchange of legal title has taken place." Id.

"The foundation for the doctrine of equitable conversion is [the] presumed intention of the owner, equity regarding as done that which ought to be done." (Internal quotation marks omitted.) *United States* v. *O'Dell*, 247 F.3d 655, 684 (6th Cir. 2001). The doctrine was "adopted for the purpose of carrying into effect, in spite of legal obstacles, the supposed intent of a testator or settlor." (Internal quotation marks omitted.) *Connelly* v. *Federal National Mortgage Assn.*, 251 F. Supp. 2d 1071, 1074 n.3 (D. Conn. 2003). Equitable conversion "is not a fixed rule of law, but proceeds on equitable principles that take into account the result to be accomplished. 27A Am. Jur. 2d Equitable Conversion § 1 [1996]." (Internal quotation marks omitted.) *United States* v. *74.05 Acres of Land*, 428 F. Supp. 2d 57, 62 (D. Conn. 2006).

Despite this apparent flexibility, the contract must be enforceable for equitable conversion to apply; otherwise, it cannot be said that the parties intended for

title to pass to the buyer at execution. See *Francini* v. *Farmington*, 557 F. Supp. 151, 155 (D. Conn. 1982); *Hadgkiss* v. *Bowe*, 21 Conn. App. 619, 620, 574 A.2d 1303 (1990). "The basis of [equitable conversion] is the existence of a duty . . . ." *Anderson* v. *Yaworski*, 120 Conn. 390, 393, 181 A. 205 (1935). "[T]here must, in fact, be a clear duty on the part of the seller to convey the property, a duty enforceable by an action for specific performance." *Noor* v. *Centreville Bank*, 193 Md. App. 160, 167, 996 A.2d 928, cert. granted, 415 Md. 607, 4 A.3d 512 (2010), appeal dismissed, 417 Md. 500, 10 A.3d 1180 (2011); see also *In re Walston*, 190 B.R. 855, 859 (Bankr. S.D. Ill. 1996). The doctrine is "firmly linked to the specific enforceability of the contract." (Internal quotation marks omitted.) *Benedict* v. *United States*, 881 F. Supp. 1532, 1548 (D. Utah 1995); see also *Steele* v. *Rosenfeld, LLC*, 936 So. 2d 488, 493 (Ala. 2005); *Parr-Richmond Industrial Corp.* v. *Boyd*, 43 Cal. 2d 157, 168, 272 P.2d 16 (1954); *O'Brien* v. *Paulsen*, 186 N.W. 440, 442 (Iowa 1922); *Horton* v. *Horton*, 2 N.J. Super. 155, 159–60, 62 A.2d 503 (Ch. 1948).

In accordance with this principle, the doctrine of equitable conversion does not apply when the seller's duty to convey title is subject to a condition precedent.[12]

[12] We recognize that the modern trend in contract law is to abandon the distinction between conditions precedent and conditions subsequent. See, e.g., *Gingras* v. *Avery*, 90 Conn. App. 585, 591 n.4, 878 A.2d 404 (2005). Nevertheless, our state's case law has previously recognized a difference between conditions precedent and conditions subsequent. See *Seymour Trust Co.* v. *Sullivan*, 152 Conn. 282, 286, 206 A.2d 420 (1964) (parties "forfeit[ed] their rights . . . by operation of a condition subsequent expressly provided for in the contract"); *Dolak* v. *Sullivan*, 145 Conn. 497, 503, 144 A.2d 312 (1958) ("obligations under [contract] were subject to extinguishment, in whole or in part, upon the happening of a condition subsequent"); *Westmoreland* v. *General Accident Fire & Life Assurance Corp.*, 144 Conn. 265, 272, 129 A.2d 623 (1957) (The contract "does not contemplate that [a condition] is a condition precedent to cancellation. If such adjustment is not a condition precedent, it certainly is not a condition subsequent . . . ."); *Detels* v. *Detels*, 79 Conn. App. 467, 473, 830 A.2d 381 (2003) ("the parties may have created a condition subsequent that would operate to discharge the plaintiff from his obligation").

See *In the Matter of Lefkas General Partners*, 112 F.3d 896, 901 (7th Cir. 1997); *In re Walston*, supra, 190 B.R. 859; *Noor* v. *Centreville Bank*, supra, 193 Md. App. 167–68. "A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance." *Lach* v. *Cahill*, 138 Conn. 418, 421, 85 A.2d 481 (1951). When the seller's duty to convey title is conditional, and does not arise at execution, the buyer cannot immediately enforce the contract. See id. Under such circumstances, it cannot be said that the parties intended for title to pass to the buyer at signing. See *Parker* v. *Averett*, 114 Ga. App. 401, 402, 151 S.E.2d 475 (1966); *Noor* v. *Centreville Bank*, supra, 167–68. "[E]quity can hardly regard that as presently done which the parties . . . have agreed shall be done only in the future." *Anderson* v. *Yaworski*, supra, 120 Conn. 393.

For example, in *Francini* v. *Farmington*, supra, 557 F. Supp. 155, the United States District Court for the District of Connecticut held that equitable conversion did not apply when the contract was conditioned on a town's approval of the buyer's application to subdivide the lot.[13] Title would have passed to the buyer "only upon performance of specific conditions," and, thus, the buyer's interest in the property "never amounted to more than an expectation . . . ." (Citation omitted.) Id. Similarly, in *Rockland-Rockport Lime Co.* v. *Leary*, 203 N.Y. 469, 479–80, 97 N.E. 43 (1911), the Court of Appeals of New York held that title did not pass to the buyer at the signing of a lease when the buyer had not yet exercised his option to purchase the property. Because the seller had no duty to convey title until the buyer exercised the option, equitable conversion did not apply at signing. Id., 480.

[13] The exact language of the contract at issue in *Francini* is unclear. See *Francini* v. *Farmington*, supra, 557 F. Supp. 152. The court merely states: "Completion of the contract was conditioned on approval by [a municipal planning and zoning commission] of [the buyer's] application to subdivide the land into four lots." Id.

If, however, the duty under the contract arises immediately at execution, subject to a condition subsequent, equitable conversion may apply. See *Salce* v. *Wolczek*, supra, 314 Conn. 689 n.6 ("preconditions in a sales contract *can* delay the transfer of equitable interest until those conditions are met" [emphasis added]). A condition subsequent creates a situation in which "an existing right is cut off by the nonperformance of the condition . . . ." *Bulkley* v. *Norwich & Westerly Railway Co.*, 81 Conn. 284, 287, 70 A. 1021 (1908). Conditions subsequent do not delay the seller's duty to convey title. See *Grant* v. *Kahn*, 198 Md. App. 421, 431–34, 18 A.3d 91 (2011). Because the contract takes full force and effect at execution, and the buyer immediately gains the right to enforce the contract against the seller, nothing prevents title from passing to the buyer at signing. See id.

For instance, in *Grant* v. *Kahn*, supra, 198 Md. App. 432, the Maryland Court of Special Appeals held that a mortgage contingency "consist[ing] of conditions subsequent" did not prevent title from passing to the buyer at execution of a contract.[14] The court noted that: (1) the buyer could specifically enforce the contract against the seller; (2) the contingency benefited the buyer, who could remove it at any time; and (3) the seller had no discretion not to convey the property at closing. Id., 431–32. "Neither party took advantage of the conditions permitting termination of the contract, so . . . the contract continued in effect." Id. The court added, "there is no rule providing that the existence of *any* contingency

[14] The clause stated that the contingency would continue indefinitely until the buyer notified the seller of its removal. *Grant* v. *Kahn*, supra, 198 Md. App. 431–32. If the buyer did not do so within forty-five days, the seller could terminate the contract by notice to the buyer, which would void the contract in three days unless the buyer addressed the contingency. Id. The buyer never removed the contingency and the seller never sought to terminate the contract. Id. The issue of ownership during the executory period arose when, several days before closing, a judgment entered against the property. Id., 432.

acts to prevent equitable conversion." (Emphasis in original.) Id., 434.

The Texas Court of Appeals similarly held in *Parson* v. *Wolfe*, 676 S.W.2d 689, 692 (Tex. App. 1984), that equitable conversion applied despite a mortgage contingency clause when the seller died prior to closing.[15] The court rejected the notion that the clause was a condition precedent to the contract, noting that the clause was "intended as a measure of the time that was reasonable for the buyer's performance, and not as a condition that, if unfulfilled, would bar specific performance." Id.

Thus, the relevant inquiry in the present case is whether the parties intended for the mortgage contingency clause to be a condition precedent to the decedent's duty to convey title. The proper interpretation of the clause requires us to determine the intent of the parties. *Kakalik* v. *Bernardo*, 184 Conn. 386, 393, 439 A.2d 1016 (1981). "The meaning properly to be ascribed to [a] mortgage commitment clause [is] . . . to be determined, as a matter of fact, from the language of the contract, the circumstances attending its negotiation, and the conduct of the parties in relation thereto." Id. Like other contracts, though, the meaning of unambiguous language in a mortgage contingency clause is determined as a matter of law. See, e.g., *FCM Group, Inc.* v. *Miller*, supra, 300 Conn. 811.

We conclude that the parties did not intend for the mortgage contingency clause to be a condition precedent to the decedent's duty to convey title. The unambiguous language of the clause states: "This [a]greement

[15] The clause at issue in *Parson* stated: "Purchaser will obtain a loan upon the security of the real property above described to provide a part of the consideration hereinabove provided for, the reasonable time hereinafter accorded purchaser for performance of the obligation required of him by this contract shall include a reasonable time for processing and consummation of such loan." (Internal quotation marks omitted.) *Parson* v. *Wolfe*, supra, 676 S.W.2d 692.

is contingent upon BUYER obtaining a written commitment for a loan . . . . [If] BUYER is unable to obtain a written commitment for such a loan . . . and if BUYER so notifies SELLER or SELLER'S attorney, in writing, at or before 5:00 p.m., on April 16, 2012, then this [a]greement shall be null and void . . . . If SELLER or SELLER's attorney does not receive such written notice . . . this [a]greement shall remain in full force and effect." This language plainly and unambiguously denotes the parties' intention for the sale to proceed as planned unless Winn notified the decedent that she could not obtain financing within twenty-one days.

Two phrases in the mortgage contingency clause, in particular, support this conclusion. First, the clause states that if Winn did not notify the decedent of her inability to obtain financing within twenty-one days, the contract would "*remain* in full force and effect." (Emphasis added.) If the contract was not already in effect, the use of the word "remain" would be inappropriate. Second, if Winn notifies the decedent that she is unable to obtain financing, the contract "shall be null and void . . . ." There would be no need to "void" or "nullify" anything if the contractual duty had not yet arisen. Although the contract was "contingent upon BUYER obtaining a written commitment for a loan," read in complete context, this clause limits only *Winn's* duty to purchase the property, rather than the contract in general.

We have previously interpreted several mortgage contingency clauses and determined them to be conditions precedent to the contract, but none of those cases involved a possible application of equitable conversion, and they do not control the present case. See *Loda* v. *H. K. Sargeant & Associates, Inc.*, 188 Conn. 69, 77–78, 448 A.2d 812 (1982); *Luttinger* v. *Rosen*, 164 Conn. 45,

47–48, 316 A.2d 757 (1972).[16] The mortgage contingency clauses in those cases were conditions precedent only to the *buyer's* duty to purchase the property. See *Loda* v. *H. K. Sargeant & Associates, Inc.*, supra, 77–78 (clause providing that sale of home would not occur unless buyers obtained mortgage commitment no later than specified date was condition precedent to contract; clause was imposed "for the protection and benefit of the [buyers]," such that *buyers* could waive the clause);[17] *Luttinger* v. *Rosen*, supra, 48 (clause allowing buyers to terminate contract within specified time if they could not obtain financing was condition precedent to contract; *buyers* entitled to refund of their deposit when they could not obtain financing);[18] see also *Dodson* v. *Nink*, 72 Ill. App. 3d 59, 65–66, 390 N.E.2d 546 (1979) (buyer's ability to sell own home within ninety days was condition precedent to *buyer's* duty to

[16] See also *Faloutico* v. *Maher*, 182 Conn. 448, 449, 438 A.2d 710 (1980) (per curiam); *Lach* v. *Cahill*, supra, 138 Conn. 421; *Barber* v. *Jacobs*, 58 Conn. App. 330, 335, 753 A.2d 430, cert. denied, 254 Conn. 920, 759 A.2d 1023 (2000).

[17] "The agreement was made contingent upon the buyers' obtaining a conventional mortgage of $59,000 for a term of twenty-five years at a rate not to exceed 11 percent. It also contained a clause which stated that the '[s]ale [is] contingent upon [b]uyer obtaining [a] mortgage commitment no later than March 12, 1979.' " *Loda* v. *H. K. Sargeant & Associates, Inc.*, supra, 188 Conn. 71. "Another clause, appearing directly below this clause, provided: 'If [b]uyer is unable to obtain such financing, he may, by written notice to the [s]eller, declare this agreement null and void and any payments made hereunder shall be returned to [b]uyer. Buyer agrees to apply for such financing immediately, and to pursue such application with diligence.' " Id., 77–78 n.9.

[18] This court described the clause by stating: "The contract was 'subject to and conditional upon the buyers obtaining first mortgage financing on said premises from a bank or other lending institution in an amount of $45,000 for a term of not less than twenty . . . years and at an interest rate which does not exceed [8.5 percent] per annum.' . . . The parties further agreed that if the plaintiffs were unsuccessful in obtaining financing as provided in the contract, and notified the seller within a specific time, all sums paid on the contract would be refunded and the contract terminated without further obligation of either party." *Luttinger* v. *Rosen*, supra, 164 Conn. 46.

purchase home; contract unenforceable against buyer when sale of her home fell through). In the context of equitable conversion, the crux of our inquiry is whether the *seller's* duty to convey title was contingent, since equitable conversion, at its core, depends on whether title passed to the buyer at signing. We did not decide in our previous cases whether the *seller's* duty to convey title was conditional.[19]

The present case more closely resembles *Grant* and *Parson*, in which the Maryland and Texas courts squarely addressed the effect of a mortgage contingency clause on the application of equitable conversion. See *Grant* v. *Kahn*, supra, 198 Md. App. 431–34; *Parson* v. *Wolfe*, supra, 676 S.W.2d 692. As in those cases, the mortgage contingency clause in this case benefited the buyer, who could waive it at any time and specifically enforce the contract against the seller. See *Grant* v. *Kahn*, supra, 431–34; *Parson* v. *Wolfe*, supra, 692. The facts of this case are similar to those in *Parson*, in which the seller died prior to closing, and the court held that the parties did not intend for the clause to delay the seller's duty to convey title. *Parson* v. *Wolfe*, supra, 692. The mortgage contingency clause is also similar to that in *Grant*, wherein the buyer could terminate the contract if he could not obtain financing within a specified period. See *Grant* v. *Kahn*, supra, 431–32. Although the clause in the present case differs slightly from that in *Grant*, those differences *more strongly* evidence the parties' intent for title to pass to Winn at signing. The contingency period in *Grant* continued

[19] This may have been the case in *Loda*, however. The clause in *Loda* stated that the sale would not go through *unless* the buyer secured a mortgage commitment by a particular date. *Loda* v. *H. K. Sargeant & Associates, Inc.*, supra, 188 Conn. 71. Thus, the seller's duty to convey title may have been conditional. Nonetheless, *Loda* does not control the present case because the present clause is distinguishable; the contract in this case *remained* in full force and effect unless the buyer terminated the contract within twenty-one days.

indefinitely in the absence of action by the parties. Id. In contrast, the contingency period in this case expired within twenty-one days, after which the contract "remain[ed] in full force and effect." Additionally, in *Grant*, the seller could terminate the contract upon notice to the buyer, which voided the contract in three days unless the buyer removed the contingency. *Grant* v. *Kahn*, supra, 432. In the present case, the decedent never had any discretion not to proceed with the sale.[20]

The church points to another clause in the contract —the decedent's waiver of specific performance—in arguing that equitable conversion should not apply in this case.[21] The church contends that equitable conversion cannot apply unless the contract is specifically enforceable against both parties. We disagree. As discussed previously, the key inquiry in an equitable conversion analysis is whether the contract is specifically enforceable against the *seller*. See *Noor* v. *Centreville Bank*, supra, 193 Md. App. 167–68 ("[T]here must, in fact, be a clear duty *on the part of the seller* to convey the property, a duty enforceable by an action for specific

[20] *Francini* and *Rockland-Rockport Lime Co.* are also instructive, but distinguishable from the present case. In those cases, the parties did not intend for the sale to proceed until a condition occurred. See *Francini* v. *Farmington*, supra, 557 F. Supp. 155 (approval of buyer's application to subdivide lot); *Rockland-Rockport Lime Co.* v. *Leary*, supra, 203 N.Y. 480 (lessee's exercise of option to purchase property). Here, the decedent's duty to convey title was not conditioned on Winn's ability to obtain a mortgage.

[21] The church also argues that a provision in the contract placing the risk of loss on the decedent until closing demonstrates that the parties did not intend for title to pass to Winn at signing. The church raised this argument for the first time in its brief to this court. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial." (Internal quotation marks omitted.) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 761, 95 A.3d 1031 (2014). Furthermore, "as a general rule, a party may not raise a claim in a certified appeal to this court that it failed to raise in the Appellate Court." *Mueller* v. *Tepler*, 312 Conn. 631, 643, 95 A.3d 1011 (2014). We therefore decline to address the church's contention with respect to the risk of loss provision.

performance. . . . If there is some condition or contingency *to the seller's duty to convey* . . . equitable conversion would not take effect until [the] condition or contingency is resolved . . . ." [Citation omitted; emphasis added.]); see also *Watson* v. *Watson*, 304 Md. 48, 61, 497 A.2d 794 (1985) ("an equitable conversion will place equitable title in the purchaser only if the contract is one under which the *vendor* would be subject to a decree for specific performance" [emphasis added]); *Butler* v. *Wilkinson*, 740 P.2d 1244, 1255 (Utah 1987) ("[t]he doctrine gives a *vendee* the right to obtain a decree of specific performance from a court of equity" [emphasis added]).[22] In the present case, Winn expressly retained the ability to specifically enforce the contract against the decedent.[23] Indeed, the Texas Court of Appeals rejected a nearly identical argument in *Parson*, reasoning that because the seller agreed to accept liquidated damages in lieu of specific performance or traditional damages in the event of the buyer's default, the

[22] The cases cited by the church in support of this argument did not involve contingencies and refer more generally to the maxim that the contract must be enforceable for equitable conversion to apply. See *Zaring* v. *Lavatta*, 36 Idaho 459, 211 P. 557 (1922) (contract unenforceable against seller when buyer's obligations under contract were "altogether indefinite and uncertain"); *Clark* v. *Potts*, 255 Ill. 183, 189, 99 N.E. 364 (1912) ("[t]he minds of the parties never met . . . [the seller] would have had a complete defense [to the enforceability of the contract], on the ground that the contract had never been accepted by him . . . [u]nless a contract can be specifically enforced as to all parties, equity will not interfere" [internal quotation marks omitted]); *Panushka* v. *Panushka*, 221 Or. 145, 149, 152, 349 P.2d 450 (1960) ("a test as to the existence of a conversion under an executory contract is the mutuality of the agreement, the purchaser agreeing to buy and the seller agreeing to sell, thereby vesting either party to such a contract with the right to specific performance" and "[a]n equitable conversion . . . takes place when a contract for the sale of real property becomes binding upon the parties"); *Tulin* v. *Johnston*, 152 Va. 587, 593, 147 S.E. 206 (1929) (infant could not specifically enforce contract when contract could not be specifically enforced against him).

[23] The contract states: "If SELLER defaults . . . BUYER shall have such remedies as BUYER shall be entitled to at law or in equity, including, but not limited to, specific performance."

seller had a remedy under the contract, and the contract was therefore enforceable against both parties. *Parson* v. *Wolfe*, supra, 676 S.W.2d 692. As we concluded previously in this opinion, Winn's ability to secure a mortgage was not a condition precedent to the contract, and the parties intended for the contract to be fully enforceable against both parties at signing.[24] The decedent's waiver of specific performance actually *supports* this notion; if the contract was not immediately enforceable, there would be no need for a clause protecting Winn from having to proceed with the sale in the event she could not obtain financing.

Finally, looking more broadly to the parties' intent, the decedent's goal to redirect his bequest from the church to Cheekwood is evident.[25] In deciding whether to apply equitable conversion, we must give due consideration to the " 'presumed intention of the owner' "; *United States* v. *O'Dell*, supra, 247 F.3d 684; and "the result to be accomplished." (Internal quotation marks omitted.) *United States* v. *74.05 Acres of Land*, supra, 428 F. Supp. 2d 62. The decedent's letter to the president of Cheekwood stated: "I hereby wish to memorialize and confirm my pledge to donate the proceeds from the sale of my . . . house . . . to . . . Cheekwood . . . . [I]f I have not given such proceeds to Cheekwood during my lifetime, my estate shall be obligated to give such proceeds to Cheekwood. . . . I understand that Cheekwood is relying on this pledge and, accordingly, I

[24] Winn assumed various obligations under the contract, such as the duty to "make prompt application for [a mortgage] and to pursue said application with diligence."

[25] Some jurisdictions have held that specific devises are adeemed pursuant to the doctrine of equitable conversion when the testator enters into a contract to sell the property to a third party during his or her lifetime. See, e.g., *In re Dwyer's Estate*, 159 Cal. 664, 675–76, 115 P. 235 (1911); *In re Estate of Krotzsch*, 60 Ill. 2d 342, 348–49, 326 N.E.2d 758 (1975); *Kelley* v. *Neilson*, 433 Mass. 706, 714–15, 745 N.E.2d 952 (2001); *Newport Water Works* v. *Sisson*, 18 R.I. 411, 411–12, 28 A. 336 (1893).

intend this pledge to be enforceable against and binding upon my estate, any provisions in my [w]ill to the contrary notwithstanding." Betty Ann Hadley also attested to the decedent's intent to redirect his bequest from the church to Cheekwood. Her affidavit states that the decedent "declared that he was redirecting the gift in his [w]ill from [the church] to Cheekwood." The affidavit continues to state the following: "He discussed this bequest many times over the weeks prior to signing it and he had several conversations with his attorney . . . about this change in his original will. It was his clear intention that the proceeds from the . . . home be given to Cheekwood as he had already been very generous to the [church] and he stated in my presence that he intended to give this gift to [Cheekwood] instead of the [church]."[26] Because the core of the doctrine of equitable conversion is the parties' intent, these statements further support the application of equitable conversion to this case. See *Connelly* v. *Federal National Mortgage Assn.*, supra, 251 F. Supp. 2d 1074 n.3.

Overall, courts have "wide discretion and broad equitable power" to effectuate the intent of the parties via equitable conversion. (Internal quotation marks omitted.) *Greco* v. *Greco*, 275 Conn. 348, 362, 880 A.2d 872 (2005); see *Parson* v. *Wolfe*, supra, 676 S.W.2d 691 ("the doctrine is used to carry out the intent of the testator who directs that certain realty be sold or purchased"). "[E]quitable remedies are not bound by a formula but are molded to the needs of justice." (Internal quotation marks omitted.) *Stratford* v. *Wilson*, 151 Conn. App. 39, 47, 94 A.3d 644, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014). "Flexibility rather than rigidity has distinguished [them]." (Internal quotation marks omitted.) *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312,

[26] The seller specifically devised $150,000 to Reverend Paul Whitmore and Laura Whitmore. Reverend Whitmore is the pastor of Southport Congregational Church–United Church of Christ.

102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982). We must "be ever diligent to grant relief against inequitable conduct." (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 459, 970 A.2d 592 (2009); see also *Holland* v. *Florida*, 560 U.S. 631, 649–50, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010).

The decedent in the present case "took every step necessary" on his part to effect a sale of the property to Winn. *Kelley* v. *Neilson*, 433 Mass. 706, 714–15, 745 N.E.2d 952 (2001). Moreover, his intent to sell the property and benefit Cheekwood is evident from the record, despite the fact that he died before the mortgage contingency period in the contract had expired or been waived by Winn.[27] Equitable conversion nonetheless occurred, and this fact should not prevent the sale from closing as the parties intended.

The judgment of the Appellate Court is reversed only with respect to AC 35289 and the case is remanded to the Appellate Court with direction to affirm the judgment of the trial court granting the coexecutors' application for authorization to sell the property.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* SHEILA DAVALLOO (SC 19416)

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

Syllabus

The defendant, who was convicted of murder after a jury trial, appealed to the Appellate Court, claiming that the trial court improperly determined

[27] Cheekwood argues that Winn waived the mortgage contingency clause before the decedent's death. However, because we hold that the clause did not prevent the application of equitable conversion regardless of whether Winn waived it, we need not address this contention.

that certain statements she made to her then husband, C, were not protected by the statutory (§ 54-84b) marital communications privilege. The defendant had become infatuated with a coworker, S, with whom she developed a sexual relationship. She told S that she was divorced, although she remained married to C. S also established a simultaneous relationship with the victim, R, who also was a coworker living in Stamford and with whom S spent most of his time. During the period of her relationship with S, the defendant concocted a story about a love triangle involving fictional coworkers and regularly recounted the story to C as well as to other friends. The individuals named by the defendant in the story were in actuality the defendant herself, S and R. After R was discovered dead in her apartment, and after S learned of a domestic dispute that occurred in the defendant's condominium resulting in the stabbing of C, S contacted the police, told them of his concurrent relationships with the defendant and R, and informed the police that they should consider the defendant as a suspect in R's death. The police subsequently contacted C regarding the death of R, and he gave them several written statements and the defendant's phone records. C survived his injuries and testified at the defendant's trial for the murder of R. Prior to the trial, the defendant filed a motion in limine, seeking to prevent C's testimony on the basis of the marital communications privilege. The state also filed a motion in limine, requesting a determination that certain statements and actions during the course of the defendant's marriage to C pertaining to the relevant events were admissible evidence. After a hearing on the motions, the trial court ruled that the defendant's statements to C were not made in furtherance of or ''induced by the affection, confidence, loyalty and integrity of the marital relationship'' as required by § 54-84b (a), and, therefore, that the statements were not protected. On appeal, the defendant claimed that the trial court improperly admitted her statements to C in violation of the marital communications privilege. The Appellate Court concluded that the trial court properly had focused on the nature of the communications and not on the quality of the parties' marriage, and determined that the defendant's statements clearly were intended to deceive C and to enable the defendant's affair with S to continue. Accordingly, the Appellate Court affirmed the trial court's judgment and the defendant, on the granting of certification, appealed to this court. *Held* that, on the basis of the undisputed facts of this case, the defendant's communications to C fell outside the scope of the marital communications privilege; in order for a communication to be privileged under § 54-84b, the communication must be made to a spouse during a marriage, must be confidential, and must be induced by the affection, confidence, loyalty and integrity of the marital relationship, and the defendant's purpose in making the statements at issue here was to further her extramarital affair with S and to ultimately eliminate R and C, whom she perceived as obstacles to that affair, and thus, those statements were not induced by affection or loyalty as required for application of the marital communications privilege.

Argued October 14, 2015—officially released January 12, 2016

Procedural History

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Comerford*, *J.*, granted the state's motion to admit certain evidence and denied the defendant's motion to preclude certain evidence; thereafter, the matter was tried to the jury before *Comerford*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Beach*, *Sheldon* and *Borden*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

Mark Rademacher, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *James M. Bernardi*, supervisory assistant state's attorney, and, on the brief, *David I. Cohen*, former state's attorney, and *Maureen Ornousky*, senior assistant state's attorney, for the appellee (state).

Opinion

ROGERS, C. J. This certified appeal addresses the scope of the marital communications privilege codified in General Statutes § 54-84b.[1] The defendant, Sheila

[1] General Statutes § 54-84b provides: "(a) For the purposes of this section, 'confidential communication' means any oral or written communication made between spouses during a marriage that is intended to be confidential and *is induced by the affection, confidence, loyalty and integrity of the marital relationship*.

"(b) Except as provided in subsection (c) of this section, in any criminal proceeding, a spouse shall not be (1) required to testify to a confidential communication made by one spouse to the other during the marriage, or (2) allowed to testify to a confidential communication made by one spouse to the other during the marriage, over the objection of the other spouse.

"(c) The testimony of a spouse regarding a confidential communication may be compelled, in the same manner as for any other witness, in a criminal proceeding against the other spouse for (1) joint participation with the spouse in what was, at the time the communication was made, criminal conduct or conspiracy to commit a crime, (2) bodily injury, sexual assault

Davalloo, was convicted, after a jury trial, of murder in violation of General Statutes § 53a-54a. The defendant appeals from the judgment of the Appellate Court affirming that conviction after concluding that her statements to her husband, Paul Christos, did not fall within the protection of § 54-84b. *State* v. *Davalloo*, 153 Conn. App. 419, 436, 449, 101 A.3d 355 (2014). Because we conclude that the defendant's statements were not "induced by the affection, confidence, loyalty and integrity of the marital relationship," as § 54-84b (a) requires, we hold that the statements were not protected by the marital communications privilege. Accordingly, we affirm the judgment of the Appellate Court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to the defendant's claim.[2] This case involves a love triangle that took a deadly turn. The defendant became infatuated with Nelson Sessler, her coworker at Purdue Pharma, Inc., a pharmaceutical company in Stamford. *State* v. *Davalloo*, supra, 153 Conn. App. 421. The victim, Anna Lisa Raymundo, also was a fellow Purdue Pharma, Inc., employee and the third member of the love triangle. Id. In late 2000, Sessler met Raymundo at an after work happy hour and, in the summer of 2001, Sessler met the defendant for the first time at another after work happy hour. The defendant told Sessler that she was divorced, although she was still married to Christos. Sessler began separate sexual relationships with both the defendant and Raymundo. Id.

During their relationship, the defendant and Sessler would rendezvous periodically at the defendant and

or other violence attempted, committed or threatened upon the spouse, or (3) bodily injury, sexual assault, risk of injury pursuant to section 53-21, or other violence attempted, committed or threatened upon the minor child of either spouse, or any minor child in the care or custody of either spouse." (Emphasis added.)

[2] The facts, while undisputed, have a direct bearing on the analysis of the privilege, which necessitates a longer discussion.

Christos' condominium unit in Pleasantville, New York. Before Sessler would visit, the defendant would tell Christos that her mentally ill brother was coming over and that Christos should leave and take his belongings with him because her brother would react badly if he found out that she was married. Id., 421–22. Christos believed this because he had been told by the defendant's parents that the defendant, in fact, had a mentally ill brother. Id., 422.

In the summer of 2002, Sessler focused his attentions on Raymundo, and the two became a couple. Id. Even though Sessler maintained his separate apartment in Stamford, "he spent the majority of [his] time at Raymundo's apartment, located at 123 Harbor Drive, apartment 105, in Stamford. . . . Sessler's relationship with Raymundo continued after Raymundo left Purdue Pharma [Inc.] in 2002 and began a new job at another pharmaceutical company, Pharmacia, in New Jersey. Despite working in New Jersey, Raymundo continued to live at her apartment in Stamford." Id.

Also in 2002, the defendant concocted a story about a love triangle among three fictional coworkers at Purdue Pharma, Inc.: "Melissa," "Jack," and "Anna Lisa." Id. Nearly every day, she recounted the tale to Christos from the perspective of her purported friend "Melissa." Id. In actuality, "Melissa" was the defendant; "Jack" was Sessler; and "Anna Lisa" was Raymundo. Id. The defendant told Christos intimate details about Melissa and Jack including that Melissa was upset when Jack rebuffed her sexual advances. Id., 422–23. Additionally, "[s]he once said that Melissa had discovered Jack's travel plans and had flown to Jack's destination. She then conveniently ran into him at the airport as he was boarding a plane home and sat next to him on the return

flight.[3] The defendant constantly asked Christos for advice 'on behalf' of Melissa with questions such as why Jack was in a relationship with two women and why Jack was cheating on one woman with the other. Christos listened to these stories to 'humor' the defendant.

"Eventually, the defendant told Christos that she 'wanted to go on a stakeout' with Melissa in order to 'spy on Jack.' Although Christos thought the proposed surveillance was 'a little odd,' he did not believe it would actually occur; he gave the defendant a pair of night vision binoculars. The defendant told Christos that she had purchased a lock pick set for Melissa because Melissa wanted to break into Anna Lisa's apartment to look at photographs in order to 'get a sense of the relationship between Jack and Anna Lisa.' The defendant practiced with the lock pick set on the front door of their Pleasantville condominium unit. The defendant also asked Christos for an eavesdropping device that she knew he owned in order to assist Melissa in planting the device in Jack's office so they could listen in on his conversations. Early one morning, the defendant telephoned Christos to inform him that she and Melissa were outside Anna Lisa's apartment and asked Christos if Melissa should confront Anna Lisa. Christos told the defendant that Anna Lisa had a 'right to know her boyfriend is cheating on her . . . .' In time, Christos became 'sick' of the stories of the love triangle and '. . . got angry' with the defendant.

"The defendant also related the story of the love triangle to Emilio Mei and Tammy Mei, friends of the defendant and Christos, to Christos' parents and to 'one or two other friends as well.' The defendant told Tammy

[3] Sessler's testimony confirmed that this interaction had occurred, in reality, with the defendant on his return flight from a bachelor party in Las Vegas. See *State* v. *Davalloo*, supra, 153 Conn. App. 423 n.2.

Mei about Melissa '[a]lmost every time [they] spoke' and would ask her questions such as whether she thought Jack would break up with Anna Lisa and date Melissa. The defendant told Tammy Mei that Melissa had access to Jack's voice mail and would listen to it on a daily basis to see if he was still seeing Anna Lisa or any other woman. She also told Tammy Mei that Jack 'tried to set Melissa up with one of his friends,' but that it did not go well because 'Melissa just wanted to be with Jack.'[4] The defendant 'quite a few times' asked Tammy Mei if Melissa should confront Anna Lisa to 'let her know that she [Melissa] was also seeing Jack.' Tammy Mei advised against this confrontation, but sensed that the defendant wanted her to say that Melissa should confront Anna Lisa.

"A few minutes after noon on November 8, 2002, the Stamford Police Department received a 911 call in which the caller reported that a man was assaulting someone at 123 Harborview, apartment 105; the caller claimed to be a neighbor [but was later identified at trial as the defendant]. The dispatcher knew that Harborview was a commercial area without apartments and knew the given address had to be incorrect. After the caller ended the call, the dispatcher called back the number and discovered that the call had come from a pay phone at a Dutchess restaurant on Shippan Avenue in Stamford. The dispatcher telephoned the Dutchess restaurant and spoke to a manager, who had not noticed anyone at the pay phone. The dispatcher sent officers to 123 Harbor Drive, apartment 105, which she knew was a residential facility near the Dutchess restaurant.

"An officer knocked on the door of apartment 105 and received no answer. He pushed the door open and saw the deceased victim, Raymundo, on the floor of

[4] In reality, Sessler did attempt to set up a date between a friend and the defendant. See *State* v. *Davalloo*, supra, 153 Conn. App. 424 n.3.

the front foyer. The officers saw no signs of forced entry, burglary, or ransacking. [Raymundo] had died from multiple stab wounds and her injuries indicated a violent struggle.

"In the course of [the] investigation, officers found details whose relevance later became apparent. At 11:57 a.m. [on the day of the murder, Raymundo's] home telephone had been used to place a call to Sessler's office; Sessler had not answered the call and no voice message had been left. Officers discovered a bloodstain on the handle of a bathroom sink, which suggested that the assailant had tried to clean up after the crime. The bloodstain much later was determined to contain 'all of the different genetic elements that [were] present' in the DNA profiles of both the defendant and [Raymundo]. The state's expert testified that due to the fact that [Raymundo] cleaned her apartment regularly, as testified to by Sessler and [Raymundo's] parents, and the fact that the sink handle was nonporous, it was 'extremely, extraordinarily unlikely' that any DNA left by the defendant on the sink handle prior to November 8, 2002, would have lasted or remained 'very long . . . .' " (Footnotes altered.) Id., 423–25. Additionally, Christos noticed one day in late November, 2002, that the defendant came home from work with a " 'nasty cut' " on her thumb. Id., 426. She explained to Christos that she had cut her thumb opening a can of dog food for their two dogs. Id.

"When Sessler returned after work to [Raymundo's] apartment, where he frequently stayed, police officers questioned him. Sessler gave officers the names of two other women he dated who suffered from mental illnesses. He did not at that time tell police officers about his overlapping sexual relationships with [Raymundo] and the defendant. After several hours of questioning, the police released Sessler. The police were unaware,

at this point, of any connection between the defendant and the crime.

"After [Raymundo's] death, the defendant pursued Sessler. She sent him a care package, consoled him, and was one of the few people willing to talk to Sessler about Raymundo at a time when most people '. . . shunned him.' In January, 2003, the defendant invited Sessler to go on a group ski trip. The 'group' turned out to be only Sessler and the defendant. Sessler again entered into a sexual relationship with the defendant. The defendant would invite Sessler to her residence, but, again, only after having first told Christos that her mentally ill brother was visiting." Id., 425–26.

"As part of his work, on November 13, 2002, Christos had a meeting with representatives from Pharmacia, where Anna Lisa had worked. The representatives mentioned that a colleague of theirs had been recently murdered. Although a name was not mentioned, Christos began to wonder if Melissa did something to Anna Lisa. Christos mentioned to the defendant that an employee at Pharmacia had been killed and asked whether Melissa was involved and if Anna Lisa was 'okay. . . .' The defendant did not seem shocked or surprised and responded, without elaboration, that Anna Lisa was 'fine.' Christos testified at trial that he believed that, at that point, the defendant thought that he had made that connection. In late 2002, the defendant reported to Christos that Jack and Anna Lisa had 'broken up' and that Melissa and Jack were together exclusively. But also in late 2002, the defendant asked Christos for information about fingerprints and DNA.

"On December 8, 2002, during dinner, the defendant also asked Emilio Mei and Tammy Mei about DNA and fingerprints, and questioned whether 'they have everybody's DNA on file.' In early 2003, Tammy Mei noticed that, although the defendant continued to talk about

Jack and Melissa, she had not spoken about Anna Lisa in a while. Tammy Mei asked the defendant about Anna Lisa, and the defendant responded that Jack and Melissa were a happy couple; Anna Lisa had moved to New Jersey because she had obtained a job there.

"In 2003, the frequency of trysts at the Pleasantville condominium—under the guise, so far as the defendant told Christos, of her mentally ill brother's visiting—increased. Christos was [frustrated with] . . . leaving when the defendant's 'brother' visited and told the defendant that her brother 'ha[d] to be told that [they were] married.'

"On March 22, 2003, the defendant described a guessing game to Christos. The game involved one person's being handcuffed and blindfolded while the other placed objects against the bound person's skin; the bound person was to guess the identity of the object. The following day, the defendant asked Christos if he wanted to play the guessing game. The defendant was the first to be bound and blindfolded. She guessed various household items.

"Then it was Christos' turn. He lay on the floor, blindfolded and handcuffed to a chair. Christos guessed various common household items. The defendant then went to the kitchen to retrieve 'one last item . . . to guess.' She sat on Christos' midsection and touched the item to his face; Christos guessed the item was a candle. The item was a knife. The defendant thrust the knife into Christos' chest, paused and then again thrust the knife into Christos' chest. The defendant said, 'Oh, my God, I think I hurt you. You're bleeding.' Still blindfolded and handcuffed, Christos asked the defendant what had happened. She explained that 'something fell on you. I think the candle hurt you.' Christos asked the defendant to remove the blindfold, and she did. But when he asked her to remove the handcuffs, she stated that she could

not find the key. At Christos' request, the defendant helped him break the chair to which the handcuffs were attached.

"Christos asked the defendant to call 911. He heard the defendant seem to make a 911 call, but, after a significant amount of time had passed, no ambulance arrived. Christos asked the defendant to call 911 again and he asked to talk to the operator. The defendant told Christos that the operator did not want to talk to him, but rather wanted him to lie on the floor. The defendant at this point instead telephoned Sessler and invited him over to the condominium for dinner.

"Eventually, Christos, still conscious, asked the defendant to take him to a nearby hospital, and the defendant obliged. She drove slowly, according to Christos, and parked in the rear of the Behavioral Health Center of Westchester Medical Center in Valhalla, New York. The defendant got out of the car and opened the rear driver's side door. Christos thought the defendant was going to help him out of the car until he saw an angry expression on her face and saw her lunge at him with the knife. Christos managed to get out of the car and attempted to wrestle the knife out of the defendant's hands. The melee moved to a grassy spot in the parking lot, while Christos visibly was bleeding through his shirt. The defendant begged Christos to 'stay with me, talk to me . . . .' Christos broke free, ran about 200 feet, and yelled to a medical resident and another person, who were near the entrance to the Behavioral Health Center. The resident called 911. The defendant asked the resident to let her take Christos to the emergency room. The resident refused. The defendant was arrested, in New York, for attempted murder in connection with this incident.

"When Sessler arrived at the defendant's condominium for dinner, he found police officers searching the

residence. Police officers informed him that there had been a domestic dispute and that Christos was in a hospital. Later, after reading an article in a newspaper about the stabbing, Sessler contacted the Stamford police and informed them that they should consider the defendant to be a suspect in the death of Raymundo. Eventually, Sessler told officers about his concurrent affairs with the defendant and Raymundo. Days after Christos' stabbing, the Stamford police contacted Christos about the death of Raymundo. Christos gave the officers several written statements and the defendant's phone records." Id., 426–29.

Christos survived his injuries and testified in the Connecticut jury trial of the defendant for the murder of Raymundo. Id., 429. Prior to trial, however, the defendant filed a motion in limine seeking to prevent Christos' testimony on the basis of the marital communications privilege. Id. The state also filed a motion in limine, requesting a determination that certain statements between the former spouses were admissible. Id. The testimony at issue dealt with the defendant's statements and actions during the course of the marriage pertaining to the relevant events.[5]

On June 3, 2011, the court heard arguments relating to the motions in limine and ruled that " 'these statements . . . were not made in furtherance or induced by affection, confidence, loyalty, and integrity of the relationship; quite the contrary. It is just the opposite. The statements made to the run-up of the murder of [Raymundo], the description of a faux triangle, again, for lack of a better word, it would be bizarre to classify those as in furtherance of the sanctity of the marital relationship. The plan here was to do in a potential third party suitor of [Sessler] . . . and, ultimately,

[5] The defendant and Christos were divorced in 2004. *State* v. *Davalloo*, supra, 153 Conn. App. 421 n.1.

[Christos], have him removed from the scene either by way of divorce and/or physically remove him from the scene. And, in fact, this defendant was convicted of the attempted murder of her husband in those [New York] proceedings. So, those statements leading up to the run-up in this triangle and whatnot for various reasons don't fall within the purview of the marital privilege. To rule that way would be . . . bizarre. Statements after the death of Raymundo to accommodate the relationship with Sessler fall in the same category, as well as the statements leading up to and relative to the attack and attempted murder of [Christos].' " Id., 430. The trial court further stated that, "[t]o argue that these [statements] were in furtherance of the marital relationship defies common sense, are in fact bizarre, and could only be applicable to some parallel universe . . . with which I am not acquainted." The court then granted the state's motion and denied the defendant's motion.

After a jury trial, the defendant was convicted of murder in violation of § 53a-54a. She was sentenced to fifty years imprisonment to be served consecutively to a sentence she received in New York for her conviction based on the attempted murder of Christos.

On appeal to the Appellate Court, the defendant argued that her statements to Christos were improperly admitted by the trial court in violation of the marital communications privilege[6] because the trial court had

[6] Specifically, the defendant argued that admission of testimony regarding the following topics was improper: "(1) stories about Melissa, Jack and Anna Lisa, (2) fictional visits from the defendant's brother, (3) the defendant's informing Christos that she bought a lock pick set to get into [Raymundo's] house to look for photographs, and her attempts to use the lock pick set on the front doors of their [own] condominium, (4) conversations about an eavesdropping device that the defendant wanted to place in Jack's office to listen to his conversations, (5) the defendant's questioning of Christos in late 2002 about DNA and fingerprints, (6) stories about Melissa's becoming upset when Jack rebuffed her sexual advances and Melissa's arranging to run into Jack at an airport and fly back home in the seat next to him, (7) in November, 2002, Christos' asking the defendant about Anna Lisa, and the defendant's reporting that Jack had ended his relationship with Anna Lisa

inquired into the quality of the marriage, contrary to this court's holding in *State* v. *Christian*, 267 Conn. 710, 841 A.2d 1158 (2004), and because the communications at issue, which pertained to personal matters, fell within the statutory parameters of the privilege. *State* v. *Davalloo*, supra, 153 Conn. App. 433–34. The Appellate Court disagreed, concluding that the trial court properly had focused on the nature of the communications, and not the quality of the marriage. Id., 434. According to the Appellate Court, "[t]he [defendant's] statements quite clearly were meant to deceive Christos, so that he would leave the marital home and her affair with Sessler would be enabled, would give advice and assistance to her so that she could further her affair with Sessler, [and] would assist in his own demise by submitting to being restrained and by accepting the defendant's false assurances that she was trying to secure medical assistance." Id., 435–36. Thus, the Appellate Court concluded that the defendant's statements were not "induced by the affection" of the marital relationship. Id., 435. This appeal followed.[7]

The defendant claims that the Appellate Court, in holding that the marital communications privilege was inapplicable, misconstrued § 54-84b to require that the privileged statement must strengthen a marital relationship, thereby necessitating an improper examination of the state of that relationship. The defendant argues that the language in § 54-84b (a), which requires that the communication must be "induced by the affection, con-

and was dating Melissa exclusively, (8) in late November, 2002, the defendant's explaining that she had cut her thumb on a can of dog food, and (9) the events of the stabbing on March 23, 2003." *State* v. *Davalloo*, supra, 153 Conn. App. 430–31.

[7] This court granted the petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly construe . . . § 54-84b in concluding that the statements made by the defendant were not subject to the marital communication privilege?" *State* v. *Davalloo*, 314 Conn. 949, 103 A.3d 977 (2014).

fidence, loyalty and integrity of the marital relationship," simply reflects the common-law requirement that the confidential statements must relate to the marital relationship and not to everyday conversations incidental to marriage. According to the defendant, the statements at issue were thinly veiled confessions of adultery and, therefore, fell squarely within the privilege. The state argues that the legislature, by including the language at issue, plainly and unambiguously intended to add an additional element, and thereby narrow, the common-law privilege as articulated in *Christian*, and that the Appellate Court, like the trial court, correctly concluded that the defendant's statements fell far short of satisfying that element. We agree with the state that the language does plainly and unambiguously add an element to the marital privilege.[8]

As a preliminary matter, we address the proper standard of review. "The scope of an evidentiary privilege is a question of law, which we review de novo. . . . The application of the privilege presents a mixed question of law and fact." (Citation omitted.) *State* v. *Mark R.*, 300 Conn. 590, 597, 17 A.3d 1 (2011). Thus, "[t]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, 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." (Internal quotation marks omitted.) *State* v. *Christian*, supra, 267 Conn. 732–33. "[B]ecause testimonial privileges prevent full disclosure

[8] Because we decide the issue on the basis of our interpretation of the marital communication privilege, we need not address the state's arguments regarding disclosure and waiver, which it has presented as alternative grounds for affirming the Appellate Court's judgment.

of the truth, they are to be strictly construed." *State* v. *Mark R.*, supra, 598.

To the extent that our review requires us to interpret § 54-84b, the statute codifying the marital communications privilege, our review is plenary. See *State* v. *Adams*, 308 Conn. 263, 269–70, 63 A.3d 934 (2013). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *State* v. *Fernando A.*, 294 Conn. 1, 13–14, 981 A.2d 427 (2009).

On appeal, the parties do not dispute the underlying facts regarding what the defendant told Christos, but only the question of whether, given those facts, the marital communications privilege should have applied. Because our review concerns the scope of the privilege based on an interpretation of § 54-84b and its application to undisputed facts, our review is plenary.

We begin our analysis with a review of the development of the marital communications privilege under Connecticut law. In *State* v. *Christian*, supra, 267 Conn. 730, this court recognized, for the first time, the existence of the marital communications privilege as part of Connecticut's common law.[9] In that case, the defendant

[9] The other related testimonial privilege, the adverse spousal testimony privilege, had already been previously codified in General Statutes § 54-84a. *State* v. *Christian*, supra, 267 Conn. 725. "Under that privilege, the husband or wife of a criminal defendant has a privilege not to testify against his or her spouse in a criminal proceeding, provided that the couple is married at the time of trial." Id. In contrast, the marital communications privilege survives divorce. Id., 733.

was involved in a fatal automobile accident that killed an occupant of a car in which the defendant was riding. Thereafter, while in the hospital, the defendant quietly confided in his wife, when no others were present, that he, rather than the deceased individual, had been the driver of the car. Id., 722. At trial, the defendant sought to prevent his wife from testifying about this communication. During voir dire, the defendant's wife conveyed that she and the defendant were separated and in the process of divorcing, that the marriage " 'was very rocky' " at the time of the accident, and that, because the marriage was "over," preserving the confidentiality of the defendant's statement would not repair it. Id. Relying on this testimony, the trial court ruled that the privilege, to the extent it existed, did not apply, even though the communications were private and occurred during a valid marriage, because that "marriage irretrievably had broken down." Id., 723.

On appeal, this court confirmed that the marital communications privilege, which we previously had alluded to, was in fact "a fixture of our common law." Id., 730. We determined that a marital communication is privileged if (1) the communication was made to a spouse during a valid marriage and (2) the communication was confidential. Id., 731–32. We ultimately concluded that the trial court improperly had refused application of the privilege on the basis of the acrimonious state of the parties' marriage because that marriage, at the time of the communications, nevertheless was intact. Id., 735. Accordingly the first requirement was satisfied.

In formally adopting the privilege, we explained the well recognized principles underlying it: "The basis of the immunity given to communications between [spouses] is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to

the administration of justice which the privilege entails." (Internal quotation marks omitted.) Id., 728. "The marital communications privilege protects information privately disclosed between [spouses] in the confidence of the marital relationship—once described . . . as the best solace of human existence. . . . [T]he primary purpose of the confidential marital communication privilege is to foster marital relationships by encouraging confidential communication between spouses . . . . The privilege permit[s] [spouses] to communicate freely with one another without fear that their communications will be used against them at some future date. . . . We encourage married people to confide in each other by protecting their statements from later scrutiny in court." (Citations omitted; internal quotation marks omitted.) Id., 728–29. The marital communications privilege "exists to [e]nsure that spouses . . . feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law." (Internal quotation marks omitted.) Id., 729.

After *Christian* was decided, the legislature codified the privilege by enacting § 54-84b. That provision defines "confidential communications" as "any oral or written communication made between spouses during a marriage that is intended to be confidential and is induced by the affection, confidence, loyalty and integrity of the marital relationship." General Statutes § 54-84b (a). Accordingly, we agree with the state that the legislature adopted the elements stated in *Christian*, but also added a third element, effectively narrowing the scope of the privilege.

"We ordinarily do not read statutes so as to render parts of them superfluous or meaningless." (Internal quotation marks omitted.) *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 37, 848 A.2d 418 (2004); see *State* v. *Drupals*, 306 Conn. 149, 159, 49 A.3d 962 (2012) ("[s]tatutes must be construed,

if possible, such that no clause, sentence or word shall be superfluous, void or insignificant" [internal quotation marks omitted]). Section 54-84b (a) provides the common-law elements that the communication must be made between spouses during a marriage and be intended to be confidential;[10] see *State* v. *Christian*, supra, 267 Conn. 710; but then adds the "induced by the affection" language, which is not found in the Connecticut common law, in the conjunctive. See *State* v. *Davalloo*, supra, 153 Conn. App. 433. Thus, the plain language of the statute compels us to view the "induced by the affection" requirement as a separate element that limits the privilege to those confidential communications made between spouses in a valid marriage that are "induced by the affection, confidence, loyalty and integrity of the marital relationship."[11] General Statutes

[10] As the Appellate Court stated, the codified marital communications privilege does not entirely displace the common-law privilege. See *State* v. *Davalloo*, supra, 153 Conn. App. 433 n.5; Conn. Code Evid. § 5-1 ("[e]xcept as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book, privileges shall be governed by the principles of the common law").

[11] Although the "induced by" language does not appear in any other state's codification of the marital communications privilege, some courts have invoked it in determining whether particular statements constitute a "confidential communication," subject to that privilege. See, e.g., *People* v. *Fediuk*, 66 N.Y.2d 881, 883, 489 N.E.2d 732, 498 N.Y.S.2d 763 (1985) ("[n]ot protective of all communications, the privilege attaches only to those statements made in confidence and that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship" [internal quotation marks omitted]). Frequently, the "induced by" language is used to refine what kind of communications between married spouses are confidential. See, e.g., *People* v. *Melski*, 10 N.Y.2d 78, 80, 176 N.E.2d 81, 217 N.Y.S.2d 65 (1961) (finding that New York's marital privilege was "designed to protect not all the daily and ordinary exchanges between the spouses, but merely those which would not have been made but for the absolute confidence in, and induced by, the marital relationship"); *State* v. *Freeman*, 302 N.C. 591, 597–98, 276 S.E.2d 450 (1981) (in determining "[w]hether a particular segment of testimony includes a 'confidential communication' . . . the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship"); *State* v. *Richards*, 182 W. Va. 664, 668, 391 S.E.2d 354 (1990) ("[t]he test of whether

§ 54-84b (a). Consequently, in order for a communication to be privileged under § 54-84b, the communication must be: (1) made to a spouse during a marriage; (2) confidential; *and* (3) induced by the affection, confidence, loyalty and integrity of the marital relationship.

To aid in our analysis we look to the language of the statute. The word "induce" means "to bring on or bring about" or, alternatively, to "cause . . . ." Webster's Third New International Dictionary (2002). Accordingly, the statements must be "brought about" or "caused" by the affection, confidence, loyalty and integrity of the marital relationship. It therefore follows that if the statements are instead influenced by precisely the opposite, they would not qualify. The language of the statute, read as a whole, clearly contemplates one spouse confiding personal information truthfully in the other due to the special trust existing between the two, and not to the active concealment of a secret, nefarious undertaking designed to destroy the marriage.

In the present case, there are three categories of statements the trial court identified: (1) " 'statements made to the run-up of the murder of [Raymundo],' " including the " 'description of a faux triangle' "; (2) " '[s]tatements after the death of Raymundo to accommodate the relationship with Sessler' "; and (3) " 'statements leading up to and relative to the attack and

the acts of the spouse come within the privilege against disclosure of confidential marital communications is whether the act or conduct was induced by or done in reliance on the confidence of the marital relation, i.e., whether there was an expectation of confidentiality" [internal quotation marks omitted]). Nevertheless, our legislature chose to add the language as a distinct element and thus, while related, the language must mean something more than communications made during a marriage that are confidential. See *State* v. *Davalloo*, supra, 153 Conn. App. 434 ("[i]f, as the defendant contends, the 'induced by affection' language merely describes the nature of marital relationships in general and is intended to protect 'personal feelings,' the language adds nothing to the 'during marriage' and confidentiality requirements").

attempted murder of [Christos].' "[12] *State* v. *Davalloo*, supra, 153 Conn. App. 430. As for the statements made during the period immediately preceding the murder of Raymundo, all of them were meant to deceive the defendant's spouse by being dishonest about her "brother's visits," the real actors in the faux love triangle, and the reasons she requested items from Christos. The statements after the death of Raymundo were meant not only to deceive and further her obsessive relationship with Sessler, but also to conceal her involvement in Raymundo's death. Finally, with regard to the statements leading up to the defendant's attempted murder of Christos, it is self-evident that her violence against her spouse vitiates any reasonable argument that these statements were "induced by . . . affection"[13] as required by § 54-84b (a).

Because the defendant's purpose in making the statements at issue was to further her extramarital affair with Sessler and to ultimately eliminate, by murdering, both Raymundo and Christos, whom she perceived as obstacles to that affair,[14] we agree with the determination by the trial court and the Appellate Court that the statements at issue here do not fall within the language of § 54-84b (a) because we simply cannot conceive of

[12] See also footnote 6 of this opinion.

[13] The legislature has indicated its disapproval of spousal violence. It expressly excluded from the privilege's protection the testimony of a spouse regarding a confidential communication in a criminal proceeding against the other spouse for "bodily injury, sexual assault or other violence attempted, committed or threatened upon the spouse . . . ." General Statutes § 54-84b (c) (2); see also *People* v. *Trzeciak*, 5 N.E.3d 141, 152–53 (Ill. 2013) (holding that defendant's spousal abuse and statements made during that abuse could not have been "made in reliance on the confidences of his marriage" and citing cases in accord from multiple jurisdictions).

[14] We reject the defendant's characterization of her statements, on appeal, as thinly veiled confessions of adultery. The trial court did not so find, and nothing about their content or the overall circumstances remotely suggests that they were confessional in nature.

any scenario whereby the statements could have been "induced by the affection, confidence, loyalty and integrity" of the defendant's marital relationship as required under that statute.[15] In short, the defendant made statements to Christos that were indisputably not induced by affection or loyalty and, in the end, engaged in the ultimate betrayal of the spousal relationship, attempting to murder her husband. We, therefore, agree with the trial court that application of the marital communications privilege, in the particular facts and circumstances of this case, would be nothing short of bizarre.

The defendant argues that the trial court and the Appellate Court wrongfully looked at the state of the defendant's marriage, contrary to our holding in *Christian*.[16] We make short work of this argument because the Appellate Court explicitly stated that the nature of

[15] Because the applicability of the marital communications privilege necessarily depends on the facts and circumstances of a particular matter, we do not endeavor to articulate an all-encompassing explanation of what types of statements are "induced by the affection, confidence, loyalty and integrity of the marital relationship." General Statutes § 54-84b (a); see *People* v. *Fediuk*, 66 N.Y.2d 881, 883, 489 N.E.2d 732, 498 N.Y.S.2d 763 (1985) (under particular circumstances of case, presumption that communication between spouses was made under "mantle of confidentiality" not rebutted by fact that parties were not living together at time of communication or that marriage had deteriorated); *People* v. *Melski*, 10 N.Y.2d 78, 80, 176 N.E.2d 81, 217 N.Y.S.2d 65 (1961) ("since each case contains peculiar circumstances it is, as a practical matter, impossible to formulate an all-embracing definition or an infallible guide" [internal quotation marks omitted]).

[16] Additionally, the defendant seems to argue that the Appellate Court's interpretation only protects statements that further a harmonious marital relationship. The defendant mischaracterizes the Appellate Court's interpretation. The Appellate Court found, as do we, that the statements made simply cannot be said to be "induced by . . . affection," not that, in order for any statement to be protected by the privilege, it must further a harmonious marriage. The state concedes that it is not necessary that the information communicated has to be positive vis-à-vis the likely effect on the marriage for the communication to be protected. For example, in *State* v. *Christian*, supra, 267 Conn. 722, the admission of drunk driving may not have been positive for the marriage but could have been induced by the perceived loyalty in the marriage.

the marriage was not the focus of its analysis. *State* v. *Davalloo*, supra, 153 Conn. App. 434. Consistent with *Christian*, the Appellate Court agreed with the defendant that the nature of the marriage, whether acrimonious or harmonious, is not a factor in determining whether the privilege applies.[17] Id. Similarly, the trial court did not attempt to evaluate the quality of the defendant's marriage at the time she made the statements at issue, but rather, focused on the characteristics of the statements themselves. Indeed, the only fair reading of the trial court's and the Appellate Court's decisions is that they focused on the nature of the communication. Id. On the basis of the undisputed facts presented in this case, we conclude that the defendant's communications fall well outside the marital communications privilege.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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[17] As we explained in *State* v. *Christian*, supra, 267 Conn. 734–35, "the reasons justifying the marital communications privilege . . . apply with equal force to married couples who, despite the appearance to outsiders of an irretrievably broken marriage, may still share hopes of reconciliation. . . . Although the defendant's marriage may have been acrimonious at the time that he had made the communications to his wife, the marital communications privilege nonetheless was valid." (Citation omitted; internal quotation marks omitted.) Despite the statutory addition of the "induced by" element in § 54-84b (a), we reaffirm this principle today. See, e.g., *People* v. *Fediuk*, 66 N.Y.2d 881, 883, 489 N.E.2d 732, 498 N.Y.S.2d 763 (1985) ("Communication between spouses is presumed to have been conducted under the mantle of confidentiality . . . . This presumption is not rebutted by the fact . . . that [the parties'] marriage has deteriorated, *for even in a stormy separation disclosures to a spouse may be induced by absolute confidence in the marital relationship* . . . ." [Citations omitted; emphasis added; internal quotation marks omitted.]).

CELIA W. WHEELER ET AL. *v.* BEACHCROFT, LLC, ET AL.
(SC 19355)
(SC 19356)
(SC 19357)

Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The plaintiffs, the owners of certain interior lots in a residential housing development adjacent to Long Island Sound, brought the present action seeking to quiet title to a parcel of real property owned by the defendants, the owners of certain waterfront lots. The defendants filed a motion for summary judgment, claiming that the counts of the plaintiffs' complaint alleging the creation of a public right of way and a prescriptive easement were barred, under the doctrine of res judicata, by certain previous actions pertaining to the same property involving other interior lot owners. In four previous actions, certain waterfront lot owners asserted claims of trespass and adverse possession against certain interior lot owners. The interior lot owners in those cases filed counterclaims alleging the creation of implied and prescriptive easements over the property. Some of the interior lot owners then filed a fifth action against certain waterfront lot owners seeking, inter alia, declaratory relief in connection with the same facts. After these five previous actions were consolidated, the trial court rendered a judgment establishing, inter alia, implied and prescriptive easements over the property in favor of the interior lot owners. On appeal from that judgment, this court concluded that, although the interior lot owners had not acquired prescriptive easements, they had acquired implied easements over the property. This court then remanded the case to the trial court with direction to conduct further proceedings regarding the scope of the implied easement and to provide all lot owners with notice and a chance to intervene. Thereafter, certain interior lot owners filed another action seeking, inter alia, an injunction preventing interference with the implied easement and mailed notice of the complaint to all lot owners. On remand in the fifth action, the trial court concluded that the implied easement included the right to pass over the property during certain hours, but not the right to recreate on the property. After a posttrial hearing, the trial court determined that its judgment was binding on all lot owners. Subsequently, the plaintiffs here, who were not parties to any of the six previous actions, filed the present action. Thereafter, the remaining claims in the fifth and sixth actions were either withdrawn or struck by the trial court. In a second appeal, this court affirmed nearly all aspects of the trial court's judgment regarding the scope of the interior lot owners' implied

easement over the property. In their motion for summary judgment in the present case, the defendants claimed that the doctrine of res judicata barred litigation of several of the plaintiffs' claims because the plaintiffs were in privity with the interior lot owners in the six previous actions and were given repeated notices and opportunities to intervene therein. The trial court denied the defendants' motion with respect to the prescriptive easement and public way claims, concluding, inter alia, that those claims were not barred because they were beyond the scope of the previous remand, the plaintiffs were not in privity with the parties to the previous actions because the prescriptive easement claims in the present case were fact specific and based on the plaintiffs' individual uses of the property, and that the public right of way claim was not at issue in the previous actions. On the defendants' subsequent appeal, *held*:

1. The trial court properly concluded that the plaintiffs' public way claim was not barred by res judicata, this court having concluded that that claim could not be considered the same as the easement claims made in the previous actions; because of the distinct nature of the plaintiffs' public way claim and the evidence required to prove it, the plaintiffs were not required to join in the prior actions to prove their claim, and although there was some overlap between the evidence required to prove the plaintiffs' public way claim and the evidence in the previous actions, there was not a significant overlap that would render those claims the same for the purpose of res judicata.
2. The defendants could not prevail on their claim that the plaintiffs' prescriptive easement claim was barred by res judicata: although some prescriptive easement claims were raised in the previous actions, the defendants failed to meet the burden of demonstrating that the plaintiffs here were in privity with respect to those claims because the plaintiffs' claims were factually distinct and depended on their own individual uses of the property; furthermore, even if notice and opportunity to intervene in a prior action could serve as a substitute for privity, the notices provided to the plaintiffs did not sufficiently inform them that they should, let alone were required to, join in the previous actions and raise their claims or risk them being barred by res judicata, and, given the absence of the other elements of res judicata, the mailing of copies of the trial court's previous decision regarding the scope of the implied easement could not serve as the basis for barring the plaintiffs' claims.

Argued September 11, 2015—officially released January 12, 2016

Procedural History

Action seeking, inter alia, judgment declaring that certain real property is a public way, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Hartford, Complex Litigation Docket, where the court,

Bright, *J.*, granted the motions by James R. McBurney et al. to intervene as party defendants; thereafter, the court, *Shapiro*, *J.*, granted the motion of Peter Paquin et al. to intervene as party plaintiffs and to file an intervening complaint; subsequently, count one of the plaintiffs' and the intervening plaintiffs' complaints were tried to the court, *Bright*, *J.*; judgment for the named defendant on count one of the plaintiffs' and intervening plaintiffs' amended complaints; thereafter, the court, *Bright*, *J.*, granted in part the motions for summary judgment filed by the named defendant and the intervening defendants on the remaining counts of the plaintiffs' amended complaint and rendered partial judgment thereon, from which the named defendant and the intervening defendants filed separate appeals. *Affirmed.*

Gerald L. Garlick, with whom were *Daniel J. Klau* and *William H. Clendenen, Jr.*, for the appellants (named defendant et al.).

Linda Pesce Laske, with whom, on the brief, was *Joel Z. Green*, for the appellees (named plaintiff et al.).

Opinion

ROBINSON, J. These consolidated appeals arise from a nearly century old dispute among neighbors in a housing development along the Long Island Sound (sound) over access to the shore. This dispute has given rise to numerous actions, two of which have reached this court over the past ten years. See *McBurney* v. *Cirillo*, 276 Conn. 782, 889 A.2d 759 (2006) (*McBurney I*), overruled in part by *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 914 A.2d 996 (2007); *McBurney* v. *Paquin*, 302 Conn. 359, 28 A.3d 272 (2011) (*McBurney II*). The present appeals require us to determine whether certain prior actions bar, via the doctrine of

res judicata, two claims in the plaintiffs'[1] consolidated quiet title actions, namely: (1) that they have prescriptive easements over certain property adjacent to the sound; and (2) that the same property constitutes a public way. The defendants[2] appeal from the judgment of the trial court denying in part their motions for summary judgment as to those claims pursuant to the doctrine of res judicata.[3] On appeal, the defendants claim that the trial court improperly denied their motions for summary judgment because: (1) the plaintiffs' claims are sufficiently similar to those asserted in the prior actions, such that they should have been brought in the same action; and (2) the plaintiffs are in privity with the lot owners party to the prior actions and, even if they are not in privity, the notices and opportunities to intervene provided to the plaintiffs in the prior actions

[1] The original plaintiffs in the present case are: Lori P. Callahan, Charles L. Dimmler III, Dean Leone, Tina Mannarino, Angela Rossetti, Harold D. Sessa, Sheryl Lee Sessa, and Celia W. Wheeler. The following parties subsequently intervened as plaintiffs: James Baldwin, Joann Baldwin, Leslie Carothers, Frank Cirillo, Susan Cirillo, Ann Harrison, Peter Paquin, Suzanne Paquin, and Antoinette Verderame. We note that, while the present appeals were pending, Callahan withdrew her claims. For the sake of simplicity, we refer to all of the plaintiffs individually by name. Because the claims raised by the intervening plaintiffs are not at issue in the present appeals, references to the plaintiffs hereinafter collectively include Dimmler, Leone, Mannarino, Rossetti, Harold D. Sessa, Sheryl Lee Sessa, and Wheeler.

[2] The defendant in SC 19355 is Beachcroft, LLC. The defendants in SC 19356 are Erin E. McBurney and James R. McBurney. The defendants in SC 19357 are Kay A. Haedicke and Roger A. Lowlicht. Although the town of Branford and the Pine Orchard Association, Inc., were also named as defendants in the underlying action, they are not parties to the present appeals. For the sake of simplicity, we refer to all of the defendants individually by name. References to the defendants in this opinion collectively include Beachcroft, LLC, Erin McBurney, James McBurney, Haedicke, and Lowlicht.

[3] We transferred the appeal in SC 19356 to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. We transferred the appeals in SC 19355 and SC 19357 to this court pursuant to § 51-199 (c) and Practice Book § 65-2. A denial of a motion for summary judgment constitutes a final judgment for the purposes of appeal if the motion was based on a claim of res judicata. See, e.g., *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 344, 63 A.3d 940 (2013).

served the purpose of the privity requirement and, therefore, privity should not be required for the application of res judicata. We disagree and affirm the judgment of the trial court.

The record, including our previous opinions, reveals the following facts and procedural history. The plaintiffs and the defendants own lots in a housing development (development) that is located adjacent to the sound on Crescent Bluff Avenue (avenue) in the town of Branford. See *McBurney I*, supra, 276 Conn. 787. The development consists of thirty-five lots in a long and narrow five acre tract of land. The narrow end of the development borders the sound to the south, with the avenue running north to south through the development and perpendicular to the sound. Thirty-one lots line the avenue in the interior of the development. The avenue runs between the four waterfront lots, with two lots on each side. The avenue ends at a small strip of land (lawn) directly abutting the sound, which is the subject of the dispute in the present case. The plaintiffs own interior lots in the development. The defendants own waterfront lots and portions of the lawn. Beachcroft, LLC (Beachcroft), owns the avenue. The plaintiffs allege that, over the years, they and other interior lot owners have crossed the lawn to go down to the sound.

In 2009, the plaintiffs filed a quiet title action pursuant to General Statutes § 47-31, asserting that they and other interior lot owners, as well as members of the public, have acquired various rights to use the avenue and lawn. The complaint alleges that the plaintiffs have acquired an express easement, implied easement, prescriptive easement, covenant appurtenant, and easement by necessity over the lawn, and that the lawn constitutes a public way as an extension of the avenue, which they also claim is a public way. The defendants moved for

summary judgment only on the counts pertaining to the lawn, arguing that they are barred by res judicata.

In order to place the defendants' argument and the trial court's decision in full context, we briefly recount the relevant portions of the prior litigation surrounding the lawn. We note at the outset of this discussion that the plaintiffs were not a party to any of these prior actions.

Between 1998 and 2001, James R. McBurney and Erin E. McBurney, who own a waterfront lot and part of the lawn, brought four quiet title actions (McBurney actions) for trespass and adverse possession against several interior lot owners seeking declaratory and injunctive relief.[4] Id., 786. The defendants in the McBurney actions, who owned interior lots, counterclaimed that they had acquired prescriptive easements over the lawn. Id. In 2001, several interior lot owners, including Salvatore Verderame and Antoinette Verderame, filed a separate action (first Verderame action) against several waterfront lot owners seeking declaratory and injunctive relief and damages in connection with the same facts.[5] Id., 795 and n.17. All lot owners in the development were notified of the pendency of the first Verderame action, but not of the McBurney actions. Id., 795. The McBurney actions and the first Verderame action were subsequently consolidated for trial. Id. The court decided to try the nonjury claims in the McBurney

[4] "The[se] four . . . actions . . . were *McBurney* v. *Cirillo*, Superior Court, judicial district of New Haven, Docket No. CV980414820; *McBurney* v. *Verderame*, Superior Court, judicial district of New Haven, Docket No. CV990422102; *McBurney* v. *Baldwin*, Superior Court, judicial district of New Haven, Docket No. CV990422100; and *McBurney* v. *Paquin*, Superior Court, judicial district of New Haven, Docket No. CV010455411." *McBurney I*, supra, 276 Conn. 786 n.3.

[5] In *McBurney I*, supra, 276 Conn. 795, we noted that this "companion case . . . *Verderame* v. *McBurney*, Superior Court, judicial district of New Haven, Docket No. CV010453999 [involved] many of the same parties [in the McBurney actions]." See also id., 795 n.17.

actions first and discharged the jury in the first Verderame action. Id. After a bench trial, the trial court, *Arnold*, *J.*, found against James McBurney and Erin McBurney on their adverse possession claims and most of their trespass claims.[6] Id., 786. With regard to the counterclaims in the McBurney actions, the court held that the interior lot owners had both implied and prescriptive easements over the lawn. Id., 786–87. Both interior and waterfront lot owners appealed. Id., 785.

On appeal, we reversed the trial court's judgment in part, concluding that although the interior lot owners had an implied easement over the lawn, they had not acquired a prescriptive easement because the trial court had improperly aggregated all of the lot owners' collective uses of the lawn to satisfy the fifteen year statutory period. Id., 813–14. We upheld the existence of the implied easement and remanded the case for further proceedings to determine the scope of that easement. Id., 823. We also ordered that notice of the remand action be provided to all lot owners and that they be given an opportunity to join as parties. Id. It is undisputed that notice of the proceeding on remand was given to all lot owners in March, 2006.[7]

Three months later, several interior lot owners filed another action, *Verderame* v. *Saggese*, Superior Court, judicial district of New Haven, Docket No. CV-06-4027737-S (second Verderame action). That action sought, inter alia, a declaratory judgment that those interior lot owners "enjoy[ed] an easement . . . for all purposes as might reasonably serve [their] convenience," an injunction preventing interference with the

[6] The trial court found in favor of James McBurney and Erin McBurney on the trespass counts only with respect to the defendants Frank Cirillo, Susan Cirillo, James Baldwin, and Joann Baldwin. *McBurney I*, supra, 276 Conn. 786.

[7] The first Verderame action was not part of the appeal and remained pending. See *McBurney I*, supra, 276 Conn. 786 n.4.

implied easement declared in *McBurney I*, damages, and certification of a class action.[8] Notice of the complaint in the second Verderame action was sent to all lot owners.

In March, 2008, in accordance with our *McBurney I* remand order, the trial court, *Shortall*, *J.*, held an evidentiary hearing to determine the scope of the interior lot owners' implied easement over the lawn. *McBurney II*, supra, 302 Conn. 365. Beachcroft, two waterfront lot owners, and one interior lot owner intervened.[9] Id., 362 n.1 and 363 n.3. The trial court determined that the implied easement included the right to pass and repass over the lawn to access the beach during certain hours, but not the right to socialize and recreate on the lawn. Id., 365.

The trial court in *McBurney II* withheld final judgment and ordered a posttrial hearing to address several questions, including, in relevant part, which lot owners should be bound by the judgment. Id., 366. After that hearing, the trial court held that its orders were binding on all lot owners. *McBurney* v. *Paquin*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X09-CV-01-4027736-S (September 17, 2008). Copies of the trial court's decision on the scope of the implied easement and its binding effect were sent to all lot owners. The interior lot owners appealed and the waterfront lot owners cross appealed. *McBurney II*, supra, 302 Conn. 362–63.

On November 26, 2008, while the appeal in *McBurney II* was pending, the trial court, *Shortall*, *J.*, rendered

[8] The plaintiffs in that case were Salvatore Verderame, Antoinette Verderame, Wayne Cooper, Julia Cooper, and Leslie Carothers. The defendants were Barbara Saggese and Beachcroft.

[9] The sole interior lot owner to intervene in *McBurney I* on remand was Leslie Carothers. *McBurney II*, supra, 302 Conn. 362 n.1. The waterfront lot owners who intervened in those actions were Kay A. Haedicke and Roger A. Lowlicht. Id., 363 n.3.

partial summary judgment in the second Verderame action in favor of the defendants.[10] Approximately one year later, in September, 2009, the plaintiffs filed the action giving rise to the present appeals. Shortly thereafter, the plaintiffs in the first Verderame action withdrew all counts of their complaint except for a single claim under the Connecticut Unfair Trade Practices Act. The defendants in that case moved to strike this claim. The trial court, *Shapiro*, *J.*, granted the motion to strike and rendered judgment for those defendants in 2010. On April 19, 2011, the plaintiffs in the second Verderame action withdrew the remainder of their claims. On October 4, 2011, we affirmed nearly all aspects of the trial court's 2008 judgment regarding the scope of the interior lot owners' implied easement over the lawn.[11] *McBurney II*, supra, 302 Conn. 384. On December 14, 2011, the defendants in the present case filed motions for summary judgment on the ground of res judicata.

In seeking summary judgment in the present case, the defendants argued that a number of the plaintiffs' claims are barred by res judicata because the plaintiffs are in privity with the lot owners involved in the prior cases and were given repeated notices and opportunities to intervene in those cases. The trial court, *Bright*, *J.*, agreed with the defendants with respect to most of the plaintiffs' claims, but not with respect to the prescriptive easement and public way claims. The court reasoned that those claims were not barred because they were beyond the scope of the *McBurney I* remand hearing and the plaintiffs were not in privity with the other lot owners with respect to those claims. The court

[10] The court granted summary judgment on the issue of Beachcroft's ownership of the avenue and lawn, holding that it been conclusively established.

[11] We did not affirm the portion of the trial court's judgment permitting access to areas other than the shoreline. *McBurney II*, supra, 302 Conn. 383–84.

stated that the plaintiffs' prescriptive easement claims are fact specific and based on their individual uses of the lawn. The court also noted that the avenue was never at issue in the *McBurney I* or *McBurney II* litigation and, thus, the plaintiffs' claim that the lawn constitutes a public way as an extension of the avenue should not be barred. Accordingly, the trial court granted the defendants' motions for summary judgment in part. This appeal followed. See footnote 3 of this opinion.

On appeal, the defendants contend that the trial court improperly held that the plaintiffs' prescriptive easement and public way claims are not barred by res judicata because they constitute the " 'same claim' " as the easement claims raised in the prior actions and, thus, should have been raised in those actions. The defendants also assert that the plaintiffs are in privity with the other lot owners with regards to those claims. Alternatively, the defendants argue that even if the lot owners are not in privity, the purpose of the privity requirement is met by the repeated notices and opportunities to intervene provided to the plaintiffs in the prior actions.

In response, the plaintiffs argue that their prescriptive easement and public way claims are not barred because they are factually and legally distinct from those previously asserted, and the plaintiffs are not in privity with the other lot owners with respect to those claims. Additionally, the plaintiffs contend that the notices informing them of the prior litigation are insufficient to overcome the privity requirement because those notices did not inform them that they had to raise their claims in those actions, rendering it inequitable to bar them now. After examining the facts and weighing the applicable policy concerns, we agree with the plaintiffs that

their public way and prescriptive easement claims are not barred by res judicata.[12]

The applicability of the doctrine of res judicata presents a question of law that we review de novo. *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 57–58, 808 A.2d 1107 (2002). Res judicata, or claim preclusion, "express[es] no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest." (Internal quotation marks omitted.) *Carol Management Corp.* v. *Board of Tax Review*, 228 Conn. 23, 32, 633 A.2d 1368 (1993). Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate

[12] The defendants alternatively contend that, even if the plaintiffs' public way and prescriptive easement claims are not barred by res judicata, they fail as a matter of law based on principles of stare decisis. See, e.g., *Batte-Holmgren* v. *Commissioner of Public Health*, supra, 281 Conn. 291. The character of the lawn as a public way and the lot owners' rights to use the lawn as members of the public, however, were never raised in the prior actions. Additionally, our conclusion in *McBurney I* that the lot owners have an implied easement over the lawn, and the trial court's determination that the easement does not include the right to socialize and recreate on the lawn, do not cause the lot owners' prescriptive easement claims to fail on the merits because of the absence of an adverse use. See General Statutes § 47-37. The plaintiffs' socialization and recreation on the lawn may still constitute an adverse use of the lawn, and the plaintiffs could conceivably obtain the right to socialize and recreate on the lawn by prescription. The plaintiffs' prescriptive rights depend on their uses of the lawn over a fifteen year period. See General Statutes § 47-37. In contrast, the plaintiffs' implied rights depend on which uses of the lawn are considered "reasonably necessary for the use and normal enjoyment of the [lots]" and the grantor's intent. (Emphasis omitted; internal quotation marks omitted.) *McBurney I*, supra, 276 Conn. 800. Thus, the plaintiffs could acquire the right to socialize and recreate on the lawn if they have adversely used the lawn in this way for fifteen years, even if such use is not "reasonably necessary" for the enjoyment of the lots and contrary to the grantor's intent. Accordingly, our previous decisions with respect to the plaintiffs' implied easement have no bearing on the plaintiffs' prescriptive easement claims.

opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue. See, e.g., *Tirozzi* v. *Shelby Ins. Co.*, 50 Conn. App. 680, 686–87, 719 A.2d 62, cert. denied, 247 Conn. 945, 723 A.2d 323 (1998).

Res judicata bars the relitigation of claims actually made in the prior action as well as any claims that might have been made there.[13] *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 607–608, 922 A.2d 1073 (2007). Public policy supports the principle that "a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate." (Internal quotation marks omitted.) *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 363–64, 511 A.2d 333 (1986). Thus, res judicata prevents reassertion of the same claim "regardless of what additional or different evidence or legal theories might be advanced in support

[13] Res judicata, rather than collateral estoppel, governs the present case because the issues underlying the plaintiffs' claims, namely, whether the plaintiffs have acquired prescriptive easements through their uses of the lawn and whether the lawn has been dedicated to and accepted for public use, were not previously litigated. The "closely related" doctrine of collateral estoppel only bars issues that were actually litigated. *Cumberland Farms, Inc.* v. *Groton*, supra, 262 Conn. 57–58; see also *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 600–601, 922 A.2d 1073 (2007) ("[Collateral estoppel] prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim. . . . An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined." [Citations omitted; internal quotation marks omitted.]). Even if the issues underlying the plaintiffs' claims are similar to those examined in the prior actions, "[i]n order for collateral estoppel to apply . . . there must be an identity of issues, that is, the prior litigation must have resolved the same legal or factual issue that is present in the second litigation." *Upjohn Co.* v. *Planning & Zoning Commission*, 244 Conn. 82, 93–94, 616 A.2d 786 (1992), citing *P. X. Restaurant, Inc.* v. *Windsor*, 189 Conn. 153, 161, 454 A.2d 1258 (1983); see also *Trinity United Methodist Church of Springfield, Massachusetts* v. *Levesque*, 88 Conn. App. 661, 671, 870 A.2d 1116 (collateral estoppel unavailable in action because "the issues litigated in [the] action are not identical to those actually litigated in the prior action"), cert. denied, 274 Conn. 907, 908, 876 A.2d 1200 (2005). The parties primarily briefed the res judicata issue, and we decide this appeal accordingly.

of it." *Delahunty* v. *Massachusetts Mutual Life Ins. Co.*, 236 Conn. 582, 589, 647 A.2d 1290 (1996).

We recognize, however, that application of the doctrine can yield harsh results, especially in the context of claims that were not actually litigated and parties that were not actually involved in the prior action. See *Weiss* v. *Weiss*, 297 Conn. 446, 465–66, 998 A.2d 766 (2010). The decision of whether res judicata should bar such claims should be based upon "a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim." (Citation omitted.) *Delahunty* v. *Massachusetts Mutual Life Ins. Co.*, supra, 236 Conn. 591; see also 1 Restatement (Second), Judgments § 24 (1982). The doctrine should be flexible and "must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Internal quotation marks omitted.) *Isaac* v. *Truck Service, Inc.*, 253 Conn. 416, 423, 752 A.2d 509 (2000).

In the present case, we conclude that policy considerations do not support the application of res judicata to the plaintiffs' claims for three reasons. First, the character of the lawn as a public way was never raised in the prior actions, and it is not similar enough to the interior lot owners' easement claims to say that they had to be raised in the same action. Second, with respect to the plaintiffs' prescriptive easement claims, the plaintiffs are not in privity with the other lot owners because their rights stem from their own distinct uses of the lawn. Third, the notices and opportunities to intervene provided to the plaintiffs in the prior actions cannot overcome the lack of privity because the notices did not sufficiently inform the plaintiffs that they could—

let alone *should* or *must*—bring their prescriptive easement claims or risk them being barred by res judicata.

I

First, the plaintiffs' public way claim is not barred because it does not constitute the same claim as the easement claims made in prior actions, such that the plaintiffs were required to join in those actions and assert the claim therein.[14] Although res judicata bars claims that were not actually litigated in a prior action, the previous and subsequent claims must be considered the same for res judicata to apply. See *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 607–608. "[T]he critical question is how broad a definition to give to the term 'same claim' or 'cause of action.' The broader the definition, the broader the scope of preclusion." F. James & G. Hazard, Civil Procedure (2d Ed. 1965) § 11.7, p. 540; see also *State* v. *Ellis*, 197 Conn. 436, 464, 497 A.2d 974 (1985).

To determine whether claims are the "same" for res judicata purposes, this court has adopted the transactional test. *Weiss* v. *Weiss*, supra, 297 Conn. 461. Under the transactional test, res judicata extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." (Internal quotation marks omitted.) *Duhaime* v. *American Reserve Life Ins. Co.*, supra, 200 Conn. 364, quoting 1 Restatement (Second), supra, § 24 (1). "What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considera-

[14] We note that the plaintiffs did not raise the declaratory judgment exception to the doctrine of res judicata, which provides that "a declaratory judgment action does not have a claim preclusive effect beyond what actually was decided in that action." *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 347, 15 A.3d 601 (2011).

tions as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." (Internal quotation marks omitted.) *Orselet* v. *DeMatteo*, 206 Conn. 542, 545–46, 539 A.2d 95 (1988). "[E]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 349, 15 A.3d 601 (2011). "In applying the transactional test, we compare the complaint in the [present] action with the pleadings and the judgment in the earlier action." *Commissioner of Environmental Protection* v. *Connecticut Building Wrecking Co.*, 227 Conn. 175, 190, 629 A.2d 1116 (1993).

In the context of private easement and public way claims, we find instructive one recent case from another state that has adopted the transactional test. In *Gillmor* v. *Family Link, LLC*, 284 P.3d 622, 626–27 (Utah 2012), the Supreme Court of Utah held that a property owner's public way claims[15] were not barred by res judicata, despite the fact that the same property owner had previously asserted private easement claims over the same roads owned by her neighbors. Although her public way claims were "factually available" at the time of the prior action and involved the same roads, the court held that the claims were not barred because they did not originate from the same facts. Id., 630. The court explained that the easement claims arose from the property owner's use of the roads, a property agreement,

[15] Specifically, the plaintiff in *Gillmor* alleged that certain property was "subject to condemnation for a public access easement" and "had been continuously used as public thoroughfares for a period of ten years, and were thus dedicated to public use as a 'highway by use' . . . ." *Gillmor* v. *Family Link, LLC*, supra, 284 P.3d 625.

and the landlocked nature of the property. In contrast, the public way claims arose from the public's use of the roads dating back to the 1800s. Id., 628–29. Because "there [was] no significant overlap in the facts, witnesses, or evidence necessary to establish [the claims]," the public way claims were "legally and factually distinct . . . ." Id., 629. The court concluded that, although the property owner could have brought her public way claims in the prior action, she was not *required* to assert them therein.[16] Id., 626–27. Additionally, the court observed that the motivations underlying the claims were distinct; the motive for the easement claim was "a desire for private, exclusive access to a private road" and, in contrast, the motive for the public way claims was "a public right-of-way that is accessible to all members of the public with no right of exclusion." Id., 629. Therefore, the property owner's neighbors "could not have reasonably expected that they would be immune from all public claims regarding these roads" and, similarly, "could not have reasonably believed that all members of the general public, including the [property owner], would be precluded from making a public claim to these roads."[17] Id.

[16] Additionally, the court observed that the motivations underlying the claims were distinct; the motive for the easement claim was "a desire for private, exclusive access to a private road" and, in contrast, the motive for the public way claims was "a public right-of-way that is accessible to all members of the public with no right of exclusion." *Gillmor* v. *Family Link, LLC*, supra, 284 P.3d 629.

[17] But cf. *Hatton* v. *Grigar*, 258 Fed. Appx. 706, 707 (5th Cir. 2007) (prior public way and private easement claims barred subsequent trespass action to try title to strip because "[a]t their core," both suits involved same issue of whether road was public or private); *Currier* v. *Cyr*, 570 A.2d 1205, 1209 (Me. 1990) (predecessors' claims to public way and private easement in prior action, and subsequent dispute over rights to disputed strip of land, both relied upon facts "that are sufficiently related in time, space [and] origin that their treatment as a unit conforms to the parties' expectations," thus barring subsequent claim [internal quotation marks omitted]); *Carlson* v. *Clark*, 185 Vt. 324, 328–29, 970 A.2d 1269 (2009) (property owner's easement by necessity claim barred by prior action determining that property owner had acquired prescriptive easement over shoreline; in prior action,

In the present case, as in *Gillmor*, the distinct nature of the plaintiffs' public way claim, and the evidence required to prove it, leads us to the conclusion that the plaintiffs were not *required* to join in the prior actions in order to assert their claim. To determine whether an implied easement exists, courts consider: (1) the intention of the parties; and (2) whether the easement is "reasonably necessary for the use and normal enjoyment of the dominant estate." (Emphasis omitted; internal quotation marks omitted.) *McBurney I*, supra, 276 Conn. 800. To establish a prescriptive easement claim, a plaintiff must prove an open, visible, continuous, and uninterrupted use of the property for fifteen years under a claim of right. General Statutes § 47-37. In *McBurney I*, the trial court, in reaching its conclusions as to the interior lot owners' implied easement and prescriptive easement claims reviewed "numerous title investigation records, deed copies, photographs, maps and witness testimony, including the testimony of [a land surveyor and historian]" as well as *Fisk* v. *Ley*, 76 Conn. 295, 56 A. 559 (1903), a 1903 decision by this court interpreting the lot owners' rights to the lawn. *McBurney* v. *Cirillo*, Superior Court, judicial district of New Haven, Docket Nos. CV-98-0414820-S, CV-99-0422102-S, CV-99-0422100-S, CV-01-0455411-S (September 17, 2003). In contrast, to prove that the lawn is a public way as an extension of the avenue in the present case, the plaintiffs must demonstrate that the grantor impliedly dedicated the avenue to the public and that the public has accepted the avenue for that purpose. See *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 9, 48 A.3d 107 (2012); see also *DiCioccio* v. *Wethersfield*, 146 Conn. 474, 479, 152 A.2d 308 (1959). The plaintiffs would rely on evidence of the grantor's intent to dedicate the lawn and avenue to the public and the public's use and main-

property owner alleged easement by necessity claim in complaint and trial court referenced easement by necessity claim in judgment).

tenance of the lawn since the development's inception. See *DiCioccio* v. *Wethersfield*, supra, 479; *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 9. Such evidence might well include some evidence offered in the prior actions, such as the lot owners' deeds, photographs, and the testimony of a historian, especially with regard to the grantor's intent.[18] That evidence, however, would necessarily also include documents and testimony from the public about its acceptance and maintenance of the lawn and avenue, as well as the public's use of the lawn since the establishment of the development in the early 1900s.[19] Although there is some overlap in this evidence, there is not a *significant* overlap rendering the public way, implied easement, and prescriptive easement claims the "same" for res judicata purposes and justi-

[18] Although both the implied easement and public way claims require consideration of the grantor's intent—in either giving an implied easement to the lot owners or dedicating the lawn to public use—the different intents render the claims factually and legally dissimilar enough to preclude their presentation to a jury in a logically succinct way. See *Orselet* v. *DeMatteo*, supra, 206 Conn. 545–46. In separating the McBurney actions from the first Verderame action in 2002, the trial court noted that "the posture of the case made it nearly impossible to submit the issues in an orderly fashion to a jury." *McBurney* v. *Cirillo*, supra, Superior Court, Docket Nos. CV-98-0414820-S, CV-99-0422102-S, CV-99-0422100-S, CV-01-0455411-S. Those cases involved trespass, adverse possession, and easement claims between neighbors, and not any public way claims. Id.

[19] We note that the trial went forward on count one of the plaintiffs' complaint in the present case, which alleges that the *avenue* is a public way. At the trial, the court heard testimony from: (1) several interior lot owners regarding the public's use of the avenue; (2) employees from the town of Branford, including a town engineer, assessor, former director of public works, and the first selectman who worked as a private contractor for the Pine Orchard Association, Inc.; (3) a town historian; (4) an employee of the South Central Regional Water Authority; and (5) a member of the Pine Orchard Association, Inc. The court also reviewed the deeds conveying lots in the development, the development plan, and historical documents showing how the avenue has been used and maintained over the years and by whom. The trial court ultimately concluded that the avenue is not a public way. The plaintiffs' claim that the *avenue* is a public way is contained in a separate count and, therefore, distinct from their claim that the *lawn* is a public way as an extension of the avenue.

fying a complete bar of the plaintiffs' claim, especially since the plaintiffs were not a party to the prior actions. See *Weiss* v. *Weiss*, supra, 297 Conn. 463 (dissolution action determining equitable distribution of marital assets barred "more specific" claim that plaintiff was entitled to proceeds from defendant's workers' compensation cases); *Commissioner of Environmental Protection* v. *Connecticut Building Wrecking Co.*, supra, 227 Conn. 189–92 (claim alleging that company committed solid waste violations, water pollution violations, and unreasonable pollution identical to claim alleging that company's officers illegally operated solid waste facility and polluted natural resources); cf. *Bruno* v. *Geller*, 136 Conn. App. 707, 729–30, 46 A.3d 974 (barring plaintiff's third attempt to prove previously rejected fraud claims to "get around" New York judgment; plaintiff could not "simply cite in a new defendant and put new labels on her causes of action"), cert. denied, 306 Conn. 905, 52 A.3d 732 (2012).

Moreover, the plaintiffs' claim that the lawn is a public way as an extension of the avenue necessarily requires a determination that the avenue itself constitutes a public way, and the avenue was never examined in the prior actions. "[T]he scope of [the] matters precluded necessarily depends on what has occurred in the former adjudication." *State* v. *Ellis*, supra, 197 Conn. 467; see also *Twenty-Four Merrill Street Condominium Assn., Inc.* v. *Murray*, 96 Conn. App. 616, 620, 902 A.2d 24 (2006) (condominium association not required to assert statutory lien claims pertaining to tenant's failure to pay common charges and failure to pay fines and repair charges in same action; failure to pay fines and repair charges due to faulty plumbing "was not a subject of the prior action"). As the trial court observed, "[a]ll of the litigation [since 1903] . . . has focused primarily on disputes over property rights to the lawn." (Citation omitted.) Although we noted in *McBurney I*

that "the most reasonable way to view the two, the avenue and the lawn, is as part and parcel of one common area," that observation was in reference to our holding that the lawn and avenue were both intended for shared use among the lot owners, such that the implied easement extended to the avenue for access to the highway. *McBurney I*, supra, 276 Conn. 805. We did not suggest that the previous litigation concerning the lawn fully encompassed the lot owners' rights with regard to the avenue. The avenue was neither part of our remand order in *McBurney I* nor part of the trial court's subsequent determination on the scope of the implied easement over the lawn. See id., 823–24. Most significantly, the lot owners' rights to use the lawn *or* avenue *as members of the public* were never raised in the prior actions. Accordingly, we conclude that the plaintiffs' public way claim is not barred by res judicata.

II

We next consider whether the plaintiffs' prescriptive easement claims are barred by res judicata. Although some prescriptive easement claims *were* raised in the prior actions, we conclude that these plaintiffs' individual claims are not barred because the plaintiffs are not in privity with the other lot owners with respect to those claims.[20] The lot owners involved in the prior

[20] We could also hold that the plaintiffs' prescriptive easement claims are not barred because they do not constitute the "same claims" as those of the other lot owners. The plaintiffs, in proving their claims, would offer evidence of their specific uses of the lawn over a fifteen year period, which would involve facts distinct from those underlying the other lot owners' claims. The plaintiffs simply *could not* rely on evidence of the other lot owners' uses, as we stated expressly in *McBurney I*. *McBurney I*, supra, 276 Conn. 813–14. Although we elect to address the parties' privity argument and hold that the plaintiffs' prescriptive easement claims are not barred on that basis, our inquiry is essentially the same; whether the plaintiffs' prescriptive rights were adequately protected in the prior actions. Additionally, in this context, the elements are linked, insofar as the distinct nature of each lot owner's prescriptive easement claim necessarily *means* that they do not share the same rights and, hence, are not in privity. See *Smigelski* v. *Kosiorek*, 138 Conn. App. 728, 735–36, 54 A.3d 584 (2012) ("The claims

actions could not know the details of, and adequately litigate, the plaintiffs' claims, which depend on their individual uses of the lawn over a fifteen year period under § 47-37. Thus, the lot owners do not share the same prescriptive rights, and we cannot say that the plaintiffs' rights were adequately protected by the parties in the prior actions such that privity may be found. Moreover, we disagree with the defendants' contention that privity is not required because the notices and opportunities to intervene in the prior actions sufficiently informed the plaintiffs that they had to raise their claims in those prior actions or risk subsequent preclusion.

A

When res judicata is asserted against a nonparty to a prior action, privity must be established to ensure that the nonparty's rights were sufficiently protected in the action. The privity requirement exists "to ensure that the interests of the party against whom [res judicata] is being asserted have been adequately represented . . . ." (Internal quotation marks omitted.) *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 304, 596 A.2d 414 (1991). "In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather, it is, in essence, a shorthand statement for the principle that [res judicata] should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclu-

being raised in this action are essentially the same claims that were raised and adjudicated in the prior action. Furthermore, privity exists between the parties as to the claims and issues being raised so that the doctrine of res judicata bars this action." [Internal quotation marks omitted.]), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013).

sion." *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 814, 695 A.2d 1010 (1997). "[T]he crowning consideration . . . [is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable." (Internal quotation marks omitted.) Id., 818. Thus, "[a] key consideration . . . is the sharing of the same legal right . . . ." (Internal quotation marks omitted.) *Aetna Casualty & Surety Co.* v. *Jones*, supra, 304.

Because parties may share some legal rights and not others, parties may be in privity with respect to some claims, but not others, for res judicata purposes. See *Martinez* v. *Texaco Trading & Transportation, Inc.*, 353 F.3d 758, 763 (9th Cir. 2003) (although plaintiff's "public" claims were barred, plaintiff was not in privity with party to prior action "with regards to the easement claim"); *JPMorgan Chase Bank, N.A.* v. *KB Home*, 740 F. Supp. 2d 1192, 1206 (D. Nev. 2010) ("privity may exist for some claims or issues and not others"); *Smigelski* v. *Kosiorek*, 138 Conn. App. 728, 736, 54 A.3d 584 (2012) (noting that "privity exists between the parties *as to the claims and issues being raised*" such that res judicata barred action [emphasis added; internal quotation marks omitted]), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013). As the Supreme Court of South Carolina has observed, " '[p]rivity' as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Richburg* v. *Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164 (1986). The trial court in the present case held as much, concluding that the plaintiffs are in privity with the other lot owners with regard to their implied easement, express easement, and covenant appurtenant claims but not their prescriptive easement and public way claims. Thus, a conclusion that the

plaintiffs are in privity with regard to their implied easement, express easement, and covenant appurtenant claims, but not their prescriptive easement claims, could be logically sound if supported by the record.[21]

Accordingly, we conclude that the plaintiffs are not in privity with the other lot owners with regard to their prescriptive easement claims, even if they are with regard to their other claims, because each lot owner's claim is factually distinct and based on their individual uses of the lawn. Because some lot owners may be able to satisfy the elements of a prescriptive easement claim and others may not, depending on each lot owner's use of the lawn over a fifteen year period, all of the lot owners in the subdivision cannot be said to share the same prescriptive rights. Although the lot owners in the previous cases could litigate their *own* prescriptive easement claims, they could not be expected to know the details of and adequately litigate the plaintiffs' claims, such that the application of res judicata to them would not be unfair.[22] As one court noted, "[e]ven if [the parties] share interests in some respect, if they are not in privity in *all respects* necessary to satisfy the court of the fairness of applying the estoppel doctrine, the court will not give res judicata effect . . . ." (Emphasis added.) *Kreisberg* v. *Scheyer*, 11 Misc. 3d 818, 823, 808 N.Y.S.2d 889 (2006); see also id., 819–24 (property owners' variance claim not barred by previous denial of previous owners' variance claim; owners not in privity because facts not identical and subsequent claim presented significant changes in plans and new

[21] The defendants cite no authority to support their contentions otherwise.

[22] Cf. *Henderson* v. *Scott*, 418 So. 2d 840, 842 (Ala. 1982) (property owner barred from relitigating easement claim established in prior action brought by predecessor in interest); *McClaran* v. *Traw*, 382 S.W.3d 705, 710 (Ark. App. 2011) (property owners barred from reasserting prescriptive easement claims after action establishing extent of prescriptive easements held by same property owners and public; two property owners were party to original action and one was successor in interest).

evidence); *Cianciola* v. *Johnson's Island Property Owners' Assn.*, 981 N.E.2d 311, 315 (Ohio App. 2012) (lot owners in subdivision not in privity with other lot owners involved in prior cases against homeowner's association; lots had different characteristics and chains of title and lot owners had no relationship with one another other than owning property in same subdivision); cf. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 322 F.3d 1064, 1082–83 (9th Cir. 2003) (property owners' membership in and close relationship with property owners' association rendered them in privity, given that individual owners "clearly hitched their fortunes" to association's leadership and alleged similar wrongs arising from same set of facts).

Our holding in *McBurney I* that the lot owners are not in privity for "tacking" purposes in establishing their prescriptive easement claims supports this conclusion. *McBurney I*, supra, 276 Conn. 813–14; accord *Kornbluth* v. *Kalur*, 577 A.2d 1194, 1195–96 (Me. 1990) (property owners cannot combine uses of land to establish prescriptive easement claims). Because we have already held that the lot owners do not have a sufficiently close relationship to be in privity for tacking purposes, it easily follows that they are not in privity for res judicata purposes, especially when the latter conclusion would bar the plaintiffs' claims altogether.

The defendants ask us to draw a distinction between privity in the context of tacking and res judicata, arguing that, because privity of estate is required for the former and not the latter, privity for res judicata purposes may still be found. It is true that strict privity of estate, or "mutual or successive relationships to the same rights of property," is not required for res judicata. *Mazziotti* v. *Allstate Ins. Co.*, supra, 240 Conn. 813 n.12. Rather, we have recognized that "[t]here is no prevailing definition of privity to be followed automatically in every

case. . . . It is not a matter of form or rigid labels; rather it is a matter of substance." Id., 813–14. At the very least, however, privity "signifies a relationship between one who is a party of record and another who is a nonparty, but is sufficiently close to mandate the application of res judicata . . . ." Id., 813 n.12.

We do not agree with the defendants that this case presents the requisite closeness. The lot owners not only do not share "mutual or successive" prescriptive easement rights, but they do not share the same rights at all because their rights depend on their differing uses of the lawn. Furthermore, when the result is not that the plaintiffs have failed to establish a prescriptive easement claim, but that they are barred from raising the claim at all, the privity showing must be particularly strong. We conclude that the defendants have not met their burden in this case.

B

The defendants alternatively contend that the repeated notices and opportunities to intervene provided to the plaintiffs in the prior actions satisfy the concerns of the privity requirement and, thus, privity should not be required for the application of res judicata. The defendants cite no authority in support of this argument. The defendants suggest that because the plaintiffs declined the opportunity to protect their interests in the prior actions, the purpose of the privity requirement—to ensure that a party's interests were adequately protected in the previous action—is inapplicable. Even if we were to agree with the defendants' view of the law, we disagree that the notices provided to the plaintiffs adequately informed them of the preclusive effect of their failure to join and assert their claims in the prior actions, and ultimately cannot bar their claims.

Generally, notice alone has been insufficient to bind nonparties to a prior action and compel the harsh results of res judicata.[23] See, e.g., *Richards* v. *Jefferson County*, 517 U.S. 793, 800–801, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996) (noting that, while adequate representation might cure lack of notice, prior action would at least have to be "so devised and applied as to [e]nsure that those present are of the same class as those absent and that the litigation is so conducted as to [e]nsure the full and fair consideration of the common issue"); *Headwaters, Inc.* v. *United States Forest Service*, 399 F.3d 1047, 1055 n.7 (9th Cir. 2005) ("[w]e do not suggest that notice alone would be sufficient to demonstrate adequate representation"). Courts more commonly hold that notice of and an opportunity to intervene in the prior action *support* their privity findings, but do not replace the requirement that the parties share the same legal rights. See, e.g., *Regions Bank* v. *J.R. Oil Co., LLC*, 387 F.3d 721, 731 (8th Cir. 2004) (claims not barred "even though [the subsequent party] clearly had notice of the [prior litigation], and failed to intervene, because a party is not . . . required to intervene voluntarily in a separate pending suit merely because it is permissible to do so" [internal quotation marks omitted]); *Loveridge* v. *Fred Meyer, Inc.*, 72 Wn. App. 720,

[23] A notable exception is in the context of uninsured motorist litigation. See, e.g., *Lenzi* v. *Redland Ins. Co.*, 140 Wn. 2d 267, 269, 996 P.2d 603 (2000) (insurer bound by prior judgment "where it had timely notice . . . and ample opportunity to intervene in the lawsuit to protect its interests, but declined to do so"); see also *Zirger* v. *General Accident Ins. Co.*, 144 N.J. 327, 342, 676 A.2d 1065 (1996) ("[w]e recognize that our holding on this point subverts the requirement of privity normally present with an application of the doctrines of res judicata" [internal quotation marks omitted]); *Allstate Ins. Co.* v. *Pietrosh*, 85 Nev. 310, 316–17, 454 P.2d 106 (1969) (same). Other courts have appeared to condone notice as a substitute for privity in the context of suretyships. See, e.g., *Swayne* v. *Capitol Indemnity Corp.*, Docket No. C2-09-CV-0341, 2010 WL 2663209, *3 (S.D. Ohio July 1, 2010) ("[The surety] made no effort to involve itself in the [prior] suit, despite notice . . . . Therefore, privity does apply in this case and [the surety] is bound by res judicata.").

731, 864 P.2d 417 (1993) ("we do not agree that the privity inquiry turns on notice . . . instead, our focus is on the relationship between the [party to the prior action] and the nonparty"), aff'd, 125 Wn. 2d 759, 887 P.2d 898 (1995); see also *Windsor Locks Associates* v. *Planning & Zoning Commission*, 90 Conn. App. 242, 253, 876 A.2d 614 (2005) (addressing argument that property owner had notice of and opportunity to intervene in prior proceeding and noting that "an unexercised right to participate does not result in preclusion"); *Young* v. *Metropolitan Property & Casualty Ins. Co.*, 60 Conn. App. 107, 115, 758 A.2d 452 (insurer's declination to participate in prior proceedings did not overcome finding that "there can be no privity because the same legal rights are not involved"), cert. denied, 255 Conn. 906, 762 A.2d 912 (2000).

Regardless, even if we were to assume without deciding that notice may serve as a substitute for privity, the notices provided to the plaintiffs did not sufficiently inform the plaintiffs that they *should*, let alone *must*, raise their claims or risk them being barred by res judicata. The defendants point to: (1) notice of the first Verderame action; (2) the 2006 notice of the *McBurney I* remand hearing to determine the scope of the implied easement; (3) notice of the second Verderame action; and (4) notice of the trial court's decision in 2008 regarding the scope of the implied easement and its binding effect on all lot owners. We address each notice in turn.

First, the complaint in the first Verderame action, which was mailed and delivered to the lot owners in 2001,[24] made no reference to any opportunity or obliga-

[24] The complaint states that that "[a]ll lot owners . . . have been given notice of the pendency of this case by delivery of a copy of this complaint, with exhibits, and orders, on each of them by first class mail . . . and by abode service at their respective addresses . . . ." It is unclear from the record which exhibits, orders, or other information were provided to the plaintiffs along with the complaint. Because the action sought a declaratory judgment, the notice was presumably provided to comply with Practice Book § 17-56 (b), which mandates in relevant part that "[a]ll persons who

tion on the part of the lot owners to join and assert their claims.[25] There is no language in that complaint suggesting that the plaintiffs must raise their *own* claims. Additionally, four of the six plaintiffs had not yet acquired their interests in their lots and may not have received this notice.[26]

Second, the notice given to all lot owners pursuant to our *McBurney I* remand order did not indicate that the plaintiffs could bring additional and different claims to the court's attention at the remand hearing on the implied easement. Instead, that notice, sent in March, 2006, reiterates our order that the case be remanded "for further proceedings *to determine the scope of the implied easement* . . . ." (Emphasis added.) *McBurney I*, supra, 276 Conn. 823. This sentence specifically defines the purpose of the remand hearing to determining the extent of the implied easement already established by the interior lot owners.[27] Although the notice included a copy of our *McBurney I* decision, it is not at all clear from our decision that the plaintiffs could

have an interest in the subject matter of the requested declaratory judgment . . . be made parties to the action or . . . be given reasonable notice thereof. . . ."

[25] The complaint simply alleges that the lot owners have "a private right or easement appurtenant" for "all purposes as might reasonably serve the convenience of the lot owners . . . ." The interior lot owners eventually asserted by counterclaim that they had acquired prescriptive easements, but these counterclaims are not evident on the face of the complaint.

[26] Celia W. Wheeler, Harold D. Sessa, and Sheryl Lee Sessa acquired their interests in 1966 and 2000, respectively. These plaintiffs presumably received the notice sent in 2001. Dean Leone and Tina Mannarino, however, did not acquire their interests until 2002, and Charles L. Dimmler III and Angela Rossetti did not acquire their interests until 2004. We cannot assume that these plaintiffs' predecessors in interest passed on notice of the pending case and impute such notice to them.

[27] Even if the plaintiffs technically could have brought their claims at the remand hearing; see *Higgins* v. *Karp*, 243 Conn. 495, 502–503, 706 A.2d 1 (1998) (remand hearing not limited to record and evidence presented at original hearing); we cannot impute such legal knowledge to the plaintiffs without more information.

try to establish their *own* prescriptive easement claims at the remand hearing.[28]

Third, the notice given in the second Verderame action specifically referenced the implied easement declared in *McBurney I* and, again, did not suggest that the plaintiffs join and assert their claims. Only a copy of the complaint was sent to the plaintiffs, which essentially asks the court to ensure that the defendants did not interfere with the implied easement declared in *McBurney I* while the trial court's determination on the scope of that easement was pending.

Lastly, the mailing of copies of the trial court's 2008 decision regarding the scope of the implied easement cannot serve as the basis for barring the plaintiffs' claims, given the absence of the other elements of res judicata. We cannot say that the burden was on the plaintiffs to appeal from these decisions, or that the decisions should have prompted the plaintiffs to raise their prescriptive easement and public way claims sooner. Moreover, although the defendants continuously blame the plaintiffs for failing to intervene in the prior actions, we note that in none of those actions did the defendants serve the plaintiffs with process and summon them to appear pursuant to § 47-31.

The trial court's holding that its decision on the scope of the implied easement is binding on all lot owners because they were provided notice and an opportunity to intervene does not undermine this result. The court's notion holds true *with respect to the scope of the implied easement*, but not necessarily any other claims

[28] It is arguable that one sentence in the notice—"[i]n the event there are no intervenors, the court will proceed in accordance with the Supreme Court's remand orders"—gives some indication that the lot owners could bring their own distinct claims, and if no one did, the court would simply determine the scope of the implied easement as directed. Without any other information about the case, however, we cannot impute this understanding to the lot owners, especially when doing so would preclude their day in court.

that the plaintiffs had. The trial court aptly indicated as such by stating that it was not "unfair for the court to bind them *to its determination of the scope of the easement* . . . ." (Emphasis added.)

We acknowledge that the competing concerns of judicial efficiency and repose for the defendants weigh heavily in this case. At first glance, the procedural history of the case seems to favor the application of res judicata. It is evident from a closer examination of the case, however, that barring the plaintiffs' public way and prescriptive easement claims would not actually save considerable judicial resources. Judicial resources have already been conserved by the proper application of res judicata to the plaintiffs' express easement, implied easement, and covenant appurtenant claims. Furthermore, the plaintiffs' remaining claims with respect to the avenue will move forward regardless of our decision in this appeal. See footnote 19 of this opinion. Thus, our efficiency concerns do not outweigh the unfairness of barring the plaintiffs' distinct claims.

As tempting as it is to put an end to at least part of this litigation, we cannot condone a result that would be "manifestly unfair . . . ." *Weiss* v. *Weiss*, supra, 297 Conn. 473 (*Palmer*, *J.*, dissenting); see also *Gladysz* v. *Planning & Zoning Commission*, 256 Conn. 249, 261, 773 A.2d 300 (2001) (courts must "be careful that the effect of the doctrine does not work an injustice"). Our analysis of res judicata claims must be informed by the "deep-rooted fundamental doctrine of the law that a party to be affected by a personal judgment must have a day in court and an opportunity to be heard on the matter." 47 Am. Jur. 2d 42, Judgments § 641 (1995); see also *Windsor Locks Associates* v. *Planning & Zoning Commission*, supra, 90 Conn. App. 254. We must be fully comfortable with depriving the plaintiffs of their day in court on these claims, and for the reasons dis-

cussed in this opinion, we cannot say as such in this case.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ANTHONY DYOUS
(SC 19410)

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

Argued December 10, 2015—officially released January 12, 2016

Procedural History

Petition for an order extending the defendant's commitment to the Psychiatric Security Review Board, brought to the Superior Court in the judicial district of Windham and tried to the court, *Boland, J.*; judgment granting the petition, from which the defendant appealed to the Appellate Court, *Lavine*, *Prescott* and *West*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

Robert E. Byron, assigned counsel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Patricia M. Froehlich*, state's attorney, and *Roger Caridad*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Anthony Dyous, appealed to the Appellate Court from the judgment of the trial court granting the state's second petition for an order of continued commitment filed pursuant to General Statutes § 17a-593 (c). In his appeal to the Appellate Court, the defendant claimed that: "(1) the

order of continued commitment to the Psychiatric Security Review Board (board) violate[d] his right to equal protection as against mentally disordered prison inmates, and (2) his April 8, 2011 criminal conviction constitute[d] a finding by the trial court that he is sane and, therefore, 'the state no longer has a rationale for his commitment.' " (Footnote omitted.) *State* v. *Dyous*, 153 Conn. App. 266, 267–68, 100 A.3d 1004 (2014). The Appellate Court affirmed the judgment of the trial court. Id., 268. We then, after modification, granted the defendant's petition for certification to appeal limited to the following issues: (1) "Did the Appellate Court properly determine that the [defendant's] claim that his continued commitment violated his right to equal protection failed the first prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), because there was an inadequate record for appellate review?"; and (2) "If the answer to the first question is no, did the Appellate Court properly determine that the trial court correctly found that the [defendant] failed to present any evidence in support of his equal protection claim?" (Internal quotation marks omitted.) *State* v. *Dyous*, 315 Conn. 909, 105 A.3d 901 (2014); see also *State* v. *Dyous*, 314 Conn. 945, 102 A.3d 1116 (2014).

After examining the entire record on appeal, including the detailed and well reasoned opinion of the Appellate Court, and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

SHARON DENUNZIO *v.* PETER DENUNZIO ET AL. (SC 19388)

Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the Probate Court appointing her former husband, the defendant P, conservator of the person and estate of their adult son, D. After P filed an application in the Probate Court seeking to be appointed D's conservator, the plaintiff filed an objection to that application and filed an application seeking her own appointment. The Probate Court thereafter appointed an attorney, T, and a guardian ad litem, M, for D. Because all of the parties stipulated that a conservator should be appointed for D, the evidentiary hearing in the Probate Court focused principally on the question of who the conservator should be. Various medical and treatment providers testified at the hearing, including O, one of D's longtime medical providers, who opined that P should be appointed conservator. M also filed a report with the Probate Court in which he opined that P should be appointed conservator, but the report was not admitted into evidence. The Probate Court issued its decision finding by clear and convincing evidence that D needed a conservator of the estate and person, and appointing P as conservator. In her appeal to the trial court, the plaintiff claimed that the Probate Court had failed to apply the statutory (§ 45a-650 [h]) factors for selecting a conservator and had improperly considered M's report. The trial court affirmed the Probate Court's decision and the plaintiff appealed to the Appellate Court, claiming, inter alia, that the Probate Court's decision improperly had been based on the best interests of the conserved person standard, which no longer applied following amendment of § 45a-650 (h) and other provisions of the conservatorship scheme in 2007. The Appellate Court determined that the decision of the Probate Court had been rendered in conformity with the conservatorship scheme as modified, and that that court could consider the best interests of D as a guide in examining the factors in § 45a-650 (h). The Appellate Court further concluded that, although the rules of evidence applied to the evidentiary hearing and M's report had not been admitted into evidence, M could give his opinion on the ultimate issue of fact—who should be appointed conservator—and that M could rely on hearsay statements in reaching that opinion. The Appellate Court noted that there was no indication that the Probate Court had relied on any hearsay in M's report for substantive purposes in deciding to appoint P. The Appellate Court affirmed the trial court's judgment, and, on the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court properly concluded that the plaintiff's substantial rights were not prejudiced by the Probate Court's appointment of P as

conservator; although the factors set forth in § 45a-450 (h) supplanted any consideration by the Probate Court of the best interests of the conserved person, and such interests should not be used as a factor or a guide in selecting a conservator, to the extent that the Probate Court considered the best interests of D, that impropriety was not harmful, the record here clearly having demonstrated that the Probate Court predicated its decision on the statutory factors and the clear weight of the admissible evidence supported the Probate Court's selection of P as conservator.

2. The plaintiff could not prevail on her claim that her substantial rights were prejudiced by the Probate Court's consideration of M's report: to the extent that that court may have considered the report, this court could not conclude that M's opinion, which was consistent with the opinion of O and the clear weight of the remaining evidence, likely affected the outcome; although consideration of the report as substantive evidence would have been improper because the report had never been admitted into evidence, it was not clear that the Probate Court relied on the report for substantive purposes or relied on any hearsay in the report, but rather the Probate Court acknowledged that it had accepted the report because M was required to submit it under then existing probate court rules.

Argued September 11, 2015—officially released January 12, 2016

Procedural History

Appeal from the decision of the Probate Court for the district of Greenwich appointing the named defendant conservator of the person and estate of the defendant Douglas DeNunzio, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. David R. Tobin*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment affirming the decision of the Probate Court, from which the plaintiff appealed to the Appellate Court, *Bear*, *Sheldon* and *Lavery*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Michael P. Kaelin, with whom was *William N. Wright*, for the appellant (plaintiff).

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

Louise T. Truax, with whom, on the brief, was *Leslie I. Jennings-Lax*, for the appellee (defendant Douglas DeNunzio).

Opinion

McDONALD, J. In 2007, the legislature adopted a paradigmatic shift in its approach to conservatorship appointments, including significant modifications to the circumstances and manner in which they may be made. This certified appeal requires us to consider how the substantive and procedural amendments to the conservatorship scheme set forth in No. 07-116 of the 2007 Public Acts (P.A. 07-116) affected the Probate Court's selection of a conservator in this case.

The plaintiff, Sharon DeNunzio, appeals from the judgment of the Appellate Court affirming the trial court's judgment which, in turn, affirmed the Probate Court's decision to appoint the defendant, the plaintiff's former husband, Peter DeNunzio, conservator of their adult son, Douglas DeNunzio.[1] On appeal, the plaintiff claims that the Appellate Court improperly concluded that her substantial rights were not prejudiced because: (1) the Probate Court properly could use Douglas' "best interests" as a consideration in the appointment of a conservator, in addition to the statutory factors adopted in P.A. 07-116; see General Statutes § 45a-650 (h);[2] or as a guiding principle in applying those factors; and (2)

[1] In her complaint appealing from the Probate Court's decision, the plaintiff named Peter DeNunzio and Douglas DeNunzio as defendants. For convenience, we refer to Peter DeNunzio as the defendant and to Douglas DeNunzio by his first name.

[2] Although § 45a-650 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2014, No. 14-103, § 6; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

a guardian ad litem's report supporting the defendant's appointment was properly considered by the Probate Court for its opinion as to the ultimate issue of fact and was not considered insofar as it contained inadmissible hearsay. We agree with the plaintiff that, after the enactment of P.A. 07-116, probate courts may no longer consider the amorphous "best interests" of a respondent in conservatorship proceedings. We further agree that probate courts may only consider evidence that has been properly admitted pursuant to the rules of evidence. We nevertheless conclude that, to the extent that the Probate Court may have engaged in such improper considerations, the plaintiff's substantial rights were not prejudiced in light of the clear weight of the admissible evidence supporting the defendant's appointment under the proper standard. We therefore affirm the judgment of the Appellate Court.

The record reveals the following undisputed facts and procedural history. For many years, Douglas has manifested symptoms of mental distress, including paranoia, extreme anxiety, and a tendency to perseverate, meaning to obsess over a particular topic, most notably, his health. The plaintiff and the defendant, whose marriage was dissolved in 2003 when Douglas was still a minor, have been involved in a protracted dispute over whether Douglas' symptoms were caused by chronic Lyme disease and/or psychological and/or developmental disorders. During the early stages of this dispute, the trial court in the dissolution action modified its custody orders to confer on the defendant sole decision-making authority over medical decisions concerning Douglas. The trial court in the dissolution action subsequently held the plaintiff in contempt of that order after she took Douglas to a pediatrician without the defendant's consent, finding that the plaintiff's "preoccupation with Douglas' health" was unhealthy for Douglas.

Douglas' numerous treating physicians have determined that his symptoms were caused by schizophrenia and an Asperger spectrum disorder. The defendant accepted these physicians' opinions and agreed with their advice to place Douglas on a regimen of antipsychotic medications, which appeared to them to stabilize Douglas' condition. With the plaintiff's consent, the defendant placed Douglas in a residential education and treatment facility (school) that holds itself out as specializing in the treatment of young males with developmental, psychological and learning disorders. The school's staff has concluded that Douglas was making good progress under this course of treatment.

Although the plaintiff agrees that Douglas is on the autism spectrum, she disagrees with the defendant with respect to the cause of that condition and Douglas' symptoms of mental distress. Specifically, the plaintiff is convinced that these conditions have resulted from chronic Lyme disease that had persisted despite repeated courses of antibiotic treatment, negative test results, and Douglas' ability to engage in vigorous athletic activities such as skiing. She therefore advocated substantially reducing Douglas' antipsychotic medication and treating him with antibiotics.

In 2011, shortly after Douglas' twenty-first birthday, the defendant filed an application in the Probate Court seeking to be appointed as Douglas' conservator. The plaintiff filed an objection to that application, and filed an application seeking her own appointment. The Probate Court thereafter appointed an attorney and a guardian ad litem for Douglas, Louise T. Truax and Richard J. Margenot, respectively.

Because Douglas' representatives and parents all stipulated that Douglas' condition was such that he needed a conservator, the evidentiary hearing on the applications focused principally on the question of who the

conservator should be. Truax informed the court that Douglas had refused to express a preference regarding which one of his parents should be appointed. Both the plaintiff and the defendant testified at length regarding Douglas' medical and educational history, and voiced their respective views about the underlying cause of his symptoms. The defendant also testified that he had taken Douglas to hundreds of medical appointments over the years, that he had discussed Douglas' wishes regarding his medical treatment with Douglas as recently as the previous week, and that he was willing to commit his time and financial resources to ensure that Douglas received appropriate medical care. The plaintiff testified that Douglas wanted to be taken off of his current medication and treated for Lyme disease, that she would replace Douglas' medical team if appointed, and that she believed that the defendant was not committed to following Douglas' interests or promoting his independence.

In support of his application, the defendant offered testimony from Douglas' current treatment providers. These providers contrasted their observations of the defendant's commitment to a course of treatment that had helped Douglas and Douglas' calm state when under the defendant's care with their contrary observations of the plaintiff. Nancy O'Hara, a physician who specializes in autism and neurological development issues and who had treated Douglas for many years, testified that, although Douglas previously had Lyme disease, it had been effectively treated. O'Hara testified that the plaintiff repeatedly had violated instructions not to discuss medical treatment with Douglas because it caused him severe anxiety. O'Hara also testified that she did not believe the plaintiff would adhere to her advice that Douglas should continue his antipsychotic medications. O'Hara further testified, over the plaintiff's objection, that it was her opinion that the defendant, who had

adhered to O'Hara's instructions, should be appointed Douglas' conservator. O'Hara's concerns about the plaintiff's conduct as it adversely effected Douglas' state of mind was echoed in testimony from Shahrzad Yamini, a psychiatrist at Douglas' school, and Joanne Boelke, a clinical therapist and social worker at the school.

In support of the plaintiff's application, the court heard testimony from two psychiatrists who had examined Douglas eighteen months and three years prior to the hearing, respectively. In addition to their observations based on those examinations, these experts offered opinions based on information that had been provided to them by the plaintiff. Carl Mueller testified that Douglas had an abnormality on the surface of his brain that could have been caused by chronic Lyme disease, and suggested the possibility that Douglas may be on too high a dosage of antipsychotic medication, but conceded that Douglas should continue the medication as prescribed if the defendant accurately had represented Douglas' condition. Robert Bransfield opined that Lyme disease may be a contributory factor to Douglas' symptoms and therefore recommended that a Lyme disease specialist be added to Douglas' treatment team and that the team consider adding antibiotics to Douglas' current medications.

On the last day of the evidentiary hearings, Margenot filed a guardian ad litem report over the plaintiff's objection. The report indicated that Margenot had interviewed various medical and educational professionals, Douglas' family members, and Douglas himself, and had reviewed various documents, including deposition testimony. The report stated that, based on this information and the evidence adduced during the preceding evidentiary hearings, Margenot's opinion was that it was "in [Douglas'] best interests to appoint [the defendant] as [Douglas'] [c]onservator of the [p]erson and [e]state . . . ." The plaintiff claimed that the report

was inadmissible because it contained hearsay and an opinion on the ultimate issue in the case. The Probate Court indicated that it believed that it was proper for a guardian ad litem to offer such an opinion, but withheld a definitive ruling on the admissibility of the report pending a review of the rules of evidence. Although Margenot did take the stand so that the plaintiff could question him regarding the report, it was never admitted into evidence.

The Probate Court subsequently issued a decision finding by clear and convincing evidence that Douglas needed a conservator of both the person and estate and appointed the defendant as conservator. The Probate Court's decision cited testimony related to Douglas' psychological and developmental conditions and symptoms, the harmful effect that his parents' conflict had on him, and concerns about the plaintiff's interference with Douglas' current course of medical treatment. The decision noted the filing of Margenot's report and the conclusion therein that the defendant should be appointed conservator. The Probate Court concluded its decision by stating: "This court further finds that there is no doubt that both parents care and love their son deeply; that they cannot agree on the proper treatment for [Douglas] as they disagree with each other on [Douglas'] current diagnosis; that the [plaintiff's] constant second-guessing of the professionals in charge of [Douglas'] care, causes inconsistent care, duress, anxiety and perseveration to [Douglas]; *and that medical professionals involved with* [*Douglas'*] *current care and supervision have testified that it is in the best interest of* [*Douglas*] *to have the* [*defendant*] *appointed as conservator*. This court therefore appoints [the defendant] as the conservator of the person and estate of [Douglas] to serve without bond." (Emphasis added.) The decision then set forth the conservator's powers, followed by two statements simply noting, without elab-

oration, that the court had considered the factors set forth in § 45a-650 (h) in deciding whom to appoint as conservator.

The plaintiff appealed from the Probate Court's decision to the trial court pursuant to General Statutes § 45a-186. The plaintiff claimed, inter alia, that the Probate Court had failed to apply the statutory factors for selecting a conservator set forth in § 45a-650 (h) and had improperly considered Margenot's report. The trial court rejected these claims and affirmed the Probate Court's decision. The trial court ultimately concluded that there was competent and compelling evidence that the appointment of the defendant rather than the plaintiff was in Douglas' best interests and that the plaintiff had not proved that her substantial rights were prejudiced.

The plaintiff appealed to the Appellate Court, reiterating her claim that consideration of Margenot's report was improper. In connection with that claim, the plaintiff also asserted that the Probate Court's decision improperly had been based on a standard that no longer existed following the enactment of P.A. 07-116. Specifically, she contended that instead of applying the factors prescribed in § 45a-650 (h), the court improperly had applied the pre-2007 best interests of the conserved person standard.

The Appellate Court affirmed the trial court's judgment, concluding that the Probate Court's decision had been rendered in conformity with the conservatorship scheme as modified by P.A. 07-116. *DeNunzio* v. *DeNunzio*, 151 Conn. App. 403, 95 A.3d 557 (2014). With respect to Margenot's report, the Appellate Court determined that, although the rules of evidence applied and Margenot's report had not been admitted into evidence, the Probate Court had considered the report. Id., 412. Nonetheless, it concluded that Margenot could

give his opinion on the ultimate issue of fact—who should be appointed as conservator—because having been appointed specifically to investigate the circumstances of the parties, the specialized knowledge he had gained pursuant to his investigation qualified him to make recommendations to the court as to what appointment would be in Douglas' best interests.[3] Id. The Appellate Court further concluded that Margenot properly could rely on hearsay statements in reaching his opinion, and that there was no indication in the record that the Probate Court had relied on any hearsay in the report for substantive purposes in deciding to appoint the defendant. Id., 414.

In connection with its conclusion that the Probate Court could use the specialized knowledge acquired by Margenot to assist it with its determination as to what appointment would be in Douglas' best interests, the Appellate Court stated: "To the extent that the plaintiff suggests that the court is confined to the factors set forth in § 45a-650 (h) in determining whom to appoint as conservator, and the best interests of the conservatee are not a consideration, we disagree. The statutory factors cannot be considered in a vacuum. Consistent with the overall policy and purpose of a conservatorship, the best interests of a conservatee must always be a consideration and a guide in examining the statutory factors. In other words, because a conservator is appointed to serve the best interests of the conservatee, the statutory factors enumerated in § 45a-650 (h) must be considered with the overarching purpose of serving those interests." Id., 409 n.3.

[3] The Appellate Court's opinion principally focused on a statement made in the Probate Court by Margenot at oral argument on the admissibility of his report regarding his opinion as to who should serve as conservator; *DeNunzio* v. *DeNunzio*, supra, 151 Conn. App. 410–11; but the Appellate Court noted that the same reasoning applies to his opinion in the report. Id., 412 n.6.

We subsequently granted the plaintiff's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly conclude that the [Probate Court properly could use] the 'best interest[s] of the conservatee' standard as [a consideration and a guide in examining the statutory factors]?"; and (2) "Did the Appellate Court properly determine that . . . the plaintiff's substanti[al] rights were not prejudiced by the Probate Court's consideration of . . . Margenot's report, which was not admitted into evidence?"[4] *DeNunzio* v. *DeNunzio*, 314 Conn. 926, 101 A.3d 271 (2014). We conclude that the statutory factors adopted by the legislature in § 16 of P.A. 07-116 and codified as § 45a-650 (h) wholly supplant any "best interests" consideration, but, to the extent that the Probate Court considered that matter, the record demonstrates that the statutory factors were considered and supported the Probate Court's selection of the defendant as conservator. We further conclude that, although there appears to be clear tension between a guardian ad litem's report being considered for substantive purposes without being admitted into evidence and the strict procedural changes mandated under P.A. 07-116, we are not persuaded that any improper reliance on Margenot's report would have affected the outcome. Accordingly, the plaintiff's substantial rights were not prejudiced.

Before turning to the merits of the plaintiff's claim, it is useful to set forth a brief overview of the relevant 2007 amendments to the conservatorship process, and the legal context in which those changes were adopted.

[4] The first question, as certified, stated: "Did the Appellate Court properly conclude that the trial court correctly used the 'best interest of the conservatee' standard as the basis for its decision?" *DeNunzio* v. *DeNunzio*, 314 Conn. 926, 101 A.3d 271 (2014). In accordance with established practice, we have reframed the question to more accurately reflect the issue presented to the Appellate Court. See *State* v. *Ouellette*, 295 Conn. 173, 184, 989 A.2d 1048 (2010).

See P.A. 07-116. Prior to 2007, this court generally adhered to the principle that "the legal disability of an incompetent is analogous to that of a minor." *Cottrell* v. *Connecticut Bank & Trust Co.*, 175 Conn. 257, 264, 398 A.2d 307 (1978); accord *Lesnewski* v. *Redvers*, 276 Conn. 526, 537, 886 A.2d 1207 (2005), overruled by *Gross* v. *Rell*, 304 Conn. 234, 270–71, 40 A.3d 240 (2012).[5] This court thus reasoned that "there is no difference in the court's duty to safeguard the interests of a minor and the interests of a conserved person. . . . This is reflected in the statutory scheme governing conservatorships, which requires the Probate Court to be guided by the conserved person's best interests in establishing the conservatorship and selecting the conservator; General Statutes [Rev. to 2005] § 45a-650 (e); limiting the conservator's powers and duties; General Statutes [Rev. to 2005] § 45a-650 (h); resolving conflicts between conservators; General Statutes [Rev. to 2005] § 45a-657; approving a conservator's petition to sell or mortgage the conserved person's real property; General Statutes [Rev. to 2005] § 45a-164 (a); and determining whether to remove a conservator. General Statutes [Rev. to 2005] §§ 45a-242 (a) and 45a-199 . . . ."[6] (Citations omitted.) *Lesnewski* v. *Redvers*, supra, 540–41.

[5] In *Gross* v. *Rell*, supra, 304 Conn. 269, this court recognized that, even under the pre-2007 scheme, the legal status of incapable adults was not equivalent to minors for all purposes. In that case, this court concluded that "the governing standard for the representation of impaired adult clients is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences. This is true even if the Probate Court has appointed a conservator for the client." Id.; see id., 264, 270–71 (citing 2005 revision to General Statutes as applicable to case before court and overruling *Lesnewski* v. *Redvers*, supra, 276 Conn. 526, insofar as it held that conserved person may appeal in his or her own name from Probate Court decision only if conserved person's attorney demonstrates to trial court that appeal is in conserved person's best interests).

[6] Recently, in *Kortner* v. *Martise*, 312 Conn. 1, 52–53, 91 A.3d 412 (2014), this court quoted this best interests framework from *Lesnewski* v. *Redvers*, supra, 276 Conn. 540–41, under circumstances that did not require us to consider whether the "best interests" standard continued to apply to the selection of the conservator following the enactment of P.A. 07-116. Because

Public Act 07-116 evidenced a fundamental shift in policy regarding the capacity of conserved persons and their concomitant rights. As our courts previously have recognized, the legislature made comprehensive substantive and procedural changes to the conservatorship scheme designed to require probate courts to respect individuals' preferences, impose the least restrictive means of intervention, and provide more transparency and accountability in the conservatorship process. See *Kortner* v. *Martise*, 312 Conn. 1, 53–56, 91 A.3d 412 (2014) (discussing legislative history of P.A. 07-116); *Falvey* v. *Zurolo*, 130 Conn. App. 243, 250–53, 22 A.3d 682 (2011) (same). These changes included enumerating factors that must be considered in determining whether a conservator is necessary and, if one is necessary, who should be appointed as conservator. P.A. 07-116, § 16 (codified as § 45a-650 [g] and [h]).

Public Act 07-116, § 16, also required the Probate Court to follow more formal procedures, under which the rules of evidence for civil proceedings apply and testimony is taken under oath. Proceedings relating to the selection of a conservator are required to be conducted on the record; General Statutes § 45a-650 (b); eliminating the usual practice prior to 2007, under which appeals from decisions rendered by the Probate Court were trials de novo. General Statutes (Rev. to 2007) § 45a-186 (a); see P.A. 07-116, § 2 (amending § 45a-186 [a]); *Lesnewski* v. *Redvers*, supra, 276 Conn. 543. Because of the formalities required in such proceedings, they are subject to a new standard of review, under which "[t]he Superior Court shall affirm the decision of the Court of Probate unless the Superior Court finds that substantial rights of the person appealing have

Kortner was decided well after the Probate Court's decision in the present case, it could not have influenced that court's view of the proper legal standard. Nonetheless, it may have influenced the Appellate Court's view of the law, which we now clarify.

been prejudiced because the findings, inferences, conclusions or decisions are: (1) In violation of the federal or state constitution or the general statutes, (2) in excess of the statutory authority of the Court of Probate, (3) made on unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." General Statutes § 45a-186b; see also *Falvey* v. *Zurolo*, supra, 130 Conn. App. 256–57 (explaining that this standard also applies to appellate courts).

I

With that background in mind, we turn to the plaintiff's claim that the Appellate Court improperly concluded that the Probate Court could consider the "best interests" of the respondent in selecting a conservator, either as an independent consideration or an overarching guiding principle. The plaintiff contends that, because the "best interests" standard was excised from the relevant statute and replaced with five mandatory factors to be considered, it would be inconsistent with the statutory text and the purpose of P.A. 07-116 in limiting the probate courts' discretion to allow the Probate Court to use the respondent's "best interests" in selecting a conservator. The plaintiff further contends that the decision evidences that the Probate Court made its decision on the basis of which appointment would be in Douglas' best interests by reciting opinion testimony to that effect and by failing to make any findings relating to the statutory factors. In response, the defendant contends that the decision indicates that the Probate Court's decision was predicated on the statutory factors, but, even if the court did consider Douglas' best interests, P.A. 07-116 did not intend to preclude such

a consideration.[7] The defendant notes that other sections of the conservatorship statutes expressly retain the "best interests" standard. See, e.g., General Statutes §§ 45a-132 (d) and 45a-657. We conclude that the respondent's "best interests" are neither a factor nor an overarching guide in selecting a conservator. We further conclude, however, that to the extent that the Probate Court considered Douglas' best interests, that consideration was not harmful given the Probate Court's consideration of the statutory factors and the clear weight of the admissible evidence supporting its decision under those factors.[8]

A

The question of whether the "best interests" standard is a proper consideration or guide to selecting a conservator is a matter of law, subject to plenary review and our well established principles of statutory construction. See General Statutes § 1-2z (setting forth plain meaning rule); *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 742, 865 A.2d 428 (2005) ("[w]hen a statute is not plain and unambiguous, we also seek interpretive guidance from the legislative history of the statute and the circumstances surrounding its enactment, the legislative policy it was designed to implement, the statute's relationship to existing legislation and common-law principles governing the same general subject matter").

As previously noted, § 16 of P.A. 07-116 amended § 45a-650, which prescribes the procedures a Probate

[7] Truax filed a brief in this court on behalf of Douglas arguing against the position advanced by the plaintiff in this certified appeal. The plaintiff contends that we should not consider Truax' brief because the fact that Douglas did not want to take a position before the Probate Court on which one of his parents should serve as his conservator makes it unethical for Truax to advocate for one parent over the other on appeal. Because Truax' brief does not raise any arguments that substantively differ from the defendant's, however, we need not consider the plaintiff's contention.

[8] We do not rely on Margenot's report in reaching that conclusion. See part II of this opinion.

Court must follow in determining whether to appoint a conservator on an application for involuntary representation and, if so, who should be appointed to serve that role. Prior to the passage of P.A. 07-116, the statute provided that "the court shall be guided by the best interests of the respondent" in making both determinations. General Statutes (Rev. to 2007) § 45a-650 (e). Indeed, even when the respondent had requested that a particular person serve as conservator, the Probate Court could disregard that choice if it found that the respondent lacked "sufficient capacity to form an intelligent preference" or if that appointment was "not in the best interests of the respondent." General Statutes (Rev. to 2007) § 45a-650 (e). Public Act 07-116, § 16, deleted the intelligent preference requirement and every reference to "best interests" in § 45a-650. Instead, it directed the Probate Court to comply with the respondent's choice unless the nominee was unwilling, unable, or disqualified by substantial evidence. P.A. 07-116, § 16. In the absence of an expressed choice, P.A. 07-116 prescribed as follows: "In considering who to appoint . . . the court shall consider (1) the extent to which a proposed conservator has knowledge of the respondent's or conserved person's preferences regarding the care of his or her person or the management of his or her affairs, (2) the ability of the proposed conservator to carry out the duties, responsibilities and powers of a conservator, (3) the cost of the proposed conservatorship to the estate of the respondent or conserved person, (4) the proposed conservator's commitment to promoting the respondent's or conserved person's welfare and independence, and (5) any existing or potential conflicts of interest of the proposed conservator." P.A. 07-116, § 16, codified as § 45a-650 (h).

In light of this background, we can readily dispense with the Appellate Court's determination that the respondent's best interests may be considered as a fac-

tor in conjunction with the statutory factors. Under the doctrine of expressio unius est exclusio alterius—the expression of one thing is the exclusion of another—we presume that when the legislature expresses items as part of a group or series, an item that was not included was deliberately excluded. *State* v. *Bell*, 303 Conn. 246, 265, 33 A.3d 167 (2011). Indeed, because the legislature affirmatively deleted every reference to best interests in § 45a-650, we presume that the legislature intended to remove that matter from consideration. This presumption is reinforced by the fact that the legislature undoubtedly knows how to enumerate a nonexclusive list of factors when it wants to. See, e.g., General Statutes § 19a-528 ("the commissioner may consider all factors that the commissioner deems relevant, including, but not limited to, the following"); General Statutes § 51-219b (a) ("the following factors, as well as any other factors which may be relevant, shall be considered"). Using best interests as a factor could thwart the legislature's clear intent because nothing would preclude the Probate Court from giving that factor dispositive weight after considering the statutory factors.

We similarly are not persuaded that the respondent's "best interests" remain an overarching guide through which the statutory factors should be analyzed. That contention is at odds with the text and purposes of P.A. 07-116. The legislature readily could have retained the language directing that the Probate Court "shall be guided by the best interests of the respondent"; General Statutes (Rev. to 2007) § 45a-650 (e); in selecting a conservator and simply elaborated that the statutory factors were relevant to that assessment. Instead, the legislature unambiguously chose to excise the phrase "shall be guided by the best interests of the respondent" from § 45a-650. Indeed, the fact that the legislature retained the "best interests" standard in a few other sections of the conservatorship scheme demonstrates

that it retained that standard where it intended for that standard to apply. It is noteworthy that the provisions in which the "best interests" standard was retained all involve issues that arise after a conservator has been appointed and been provided with those limited powers that cannot be retained by the conservatee. See, e.g., General Statutes § 45a-164 (a) (sale or mortgage of real property); General Statutes § 45a-655 (e) (distribution of gifts from estate); General Statutes § 45a-657 (conflicts between conservators); General Statutes § 45a-679 (conflicts between guardians and conservators). The text of P.A. 07-116 therefore indicates that the legislature retained the "best interests" standard in the specific circumstances in which it was appropriate and abandoned it in those for which it was not.

Although we acknowledge that faithful application of the enumerated factors should yield a result that is in a respondent's best interests, as that term is *commonly* understood, the legislature evidently recognized that the "best interests" standard has historically been imbued with a particular meaning in Probate Court proceedings—one that effectively equates adults who are respondents in conservation proceedings with minors. Public Act 07-116 unambiguously manifests that such a paternalistic view no longer is consistent with a contemporary understanding of the broad range of capacities of persons who are in need of a conservator and the necessity of preserving the rights of such persons to the greatest extent possible. See, e.g., P.A. 07-116, § 1 (allowing respondent or conserved person to refuse court-ordered examination by physician, psychiatrist or psychologist); P.A. 07-116, § 16 (requiring conservators, in carrying out their duties, to employ least restrictive means necessary to meet needs of conserved person and reserving to conserved person all rights and authority not expressly assigned to conservator). Indeed, because there is no statute or rule that expressly

directs the Probate Court to make findings on the record in support of the enumerated factors; cf. Practice Book § 6-1 (requiring trial court to state basis for conclusion as to each claim of law and factual basis therefor in rulings that constitute final judgment for purposes of appeal); sanctioning the Probate Court's use of the respondent's best interests as a "guide" in considering those factors runs the risk of the Probate Court effectively continuing to follow past practice. Doing so obviously would be at odds with the goal of P.A. 07-116 to ensure greater accountability in the conservatorship process. We therefore conclude that the "best interests" of the respondent are neither a factor nor a guide in the selection of a conservator.

B

Having concluded that the "best interests" of the respondent are no longer a proper consideration in making such an appointment, we must determine whether the Probate Court improperly engaged in such a consideration, and, if so, whether the plaintiff's substantial rights were prejudiced by any such impropriety. Although it appears that the Probate Court considered Douglas' best interests, we conclude that this impropriety was not harmful because the record reflects that the Probate Court ultimately, but imperfectly, predicated its decision on the statutory factors.

We note at the outset that the Probate Court's decision is not a model of clarity. The Probate Court unambiguously stated twice in its decision that it had considered the factors set forth in § 45a-650 (h) in selecting the defendant.[9] The decision does not, how-

[9] The fact that one statement in the decision refers to the "conservator(s) named above," rather than the "conservator" raises a question as to whether this statement was preprinted on the Probate Court form. Nonetheless, the plaintiff has neither advanced such a contention, nor provided this court with a copy of the Probate Court form then in effect.

ever, reference any of the specific statutory factors or state factual findings that are directly connected to any one of those factors. In what appears to be a brief summary of the evidence preceding the decision to appoint the defendant, much of the evidence recited is more directly related to why the plaintiff is not qualified or the better qualified person to be the conservator rather than why the defendant is qualified or the better qualified person. In the court's statements immediately preceding its statement appointing the defendant, the court noted "that medical professionals involved with [Douglas'] current care and supervision have testified that it is the best interest[s] of [Douglas] to have the [defendant] appointed as [c]onservator."

When examining an ambiguous decision, however, "we presume that the trial court applied the correct standard . . . ." *Singhaviroj* v. *Board of Education*, 301 Conn. 1, 17 n.12, 17 A.3d 1013 (2011). We also "read the record to support, rather than to undermine, the judgment." (Internal quotation marks omitted.) *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1, 9, 826 A.2d 1088 (2003).

The record lends strong support to the statements in the decision that the Probate Court considered, and in fact relied on, the statutory factors. It is clear that the parties litigated the case under the expectation that the statutory factors would govern the court's decision. The defendant's attorney asked various witnesses questions relating to those factors. The attorney asked Yamini, for example, whether, in her opinion, the defendant had "any personal conflicts" with any of Douglas' physicians, whether he had "the ability to carry out the duties and responsibilities" of a conservator, and whether he had knowledge of Douglas' preferences. Although O'Hara used the term "best interest" on a few occasions during her testimony, including when expressing her belief that both parents had Douglas'

"best interest" at heart, none of the questions posed to her sought to elicit an opinion in terms of Douglas' best interests. Indeed, the plaintiff did not object to the relevancy of those questions posed or the responses given thereto. The plaintiff and the defendant also focused on the statutory factors in their closing arguments. The defendant's attorney, for example, stated "[l]et's discuss the statutory factors Your Honor needs to consider," and then went through the factors one by one. The plaintiff's attorney responded, arguing why the factors weighed in favor of appointing the plaintiff. Given this posture, we are not persuaded that the Probate Court either ignored this evidence and argument while stating in its decision that these factors were considered, or decided, without notice to the parties, that a factor other than the statutory factors would be given conclusive weight.

We acknowledge, however, that on the last day of the evidentiary hearings, the Probate Court stated that it had "to determine . . . what [was] in the best interest of" Douglas. In light of the Probate Court's decision and the litigation posture of the parties, however, it appears most likely that the Probate Court unwisely used the phrase "best interest" as shorthand for the collective effect of the statutory factors. Indeed, in its decision, the court stated that Douglas' current treatment providers had testified that it would be in Douglas' best interest to have the defendant appointed as conservator. Only O'Hara, however, had made a statement to that effect; the other providers directed their testimony to the statutory factors. Therefore, we conclude that, even assuming Douglas' "best interests" were considered, the plaintiff has failed to demonstrate that her substantial rights were prejudiced.

We underscore, however, that, had the record not been so clear that this case was litigated under the statutory factors, we would have been compelled to

request an articulation or reverse the judgment. See, e.g., *Falvey* v. *Zurolo*, supra, 130 Conn. App. 255 (concluding that appointment of defendant as conservator was arbitrary and constituted abuse of discretion when Probate Court indicated that it had considered § 45a-650 [h] factors in appointing defendant but "the record [was] bereft of any evidence regarding the defendant or his qualifications to be conservator"). Moreover, although we recognize that there is no rule of practice or statute expressly requiring the Probate Court to make specific findings relating to the court's consideration of each of the statutory factors, it clearly would be the better practice to do so.

II

We now turn to the plaintiff's claim that her substantial rights were prejudiced by the Probate Court's consideration of Margenot's report. Although Margenot's report was never offered or admitted as evidence, the plaintiff claims that the Probate Court improperly relied on it as though it had been, when the report could not have been properly received into evidence because: (1) it contained a conclusion on the ultimate issue insofar as it recommended that the defendant be appointed; and (2) it was replete with hearsay. With respect to the first reason, the plaintiff argues that no one can be an expert qualified to testify on the ultimate issue of who should be appointed as a conservator because the § 45a-650 (h) factors "present questions of fact [that] do not require any special scientific or technical knowledge to decide."[10] Thus, according to the plaintiff, a recommendation on who should be appointed as conservator is not necessary to assist the court, and is therefore

[10] It is unclear from the plaintiff's argument whether she recognizes that an expert may not only have scientific or technical knowledge, but also may have "other specialized knowledge" for which he or she is qualified as an expert by skill, experience, training, or education. See Conn. Code Evid. § 7-2.

inadmissible under the rules of evidence. In the alternative, the plaintiff argues that, even if an expert's recommendation could help the court, a guardian ad litem may be an expert on the law, if also an attorney, but is not an expert on disabled adults. With respect to her second reason, the plaintiff claims that the hearsay throughout the report was harmful, pointing specifically to a statement attributed to O'Hara that the plaintiff's appointment as conservator would " 'kill' " Douglas. The defendant responds that there is no evidence that the Probate Court relied on the report, and, even if the court did rely on it, the report was cumulative of other admissible evidence and therefore harmless. We conclude that consideration of the report would have been improper under the circumstances. Nonetheless, we are not persuaded that the report, to the extent that it may have been considered, had a substantial impact on the Probate Court's decision.

One of the fundamental reasons that, prior to 2007, appeals from conservatorship proceedings were subject to trials de novo in the trial court was because Probate Court proceedings were relatively informal. See *Thomas* v. *Arafeh*, 174 Conn. 464, 470, 391 A.2d 133 (1978) (noting, inter alia, that strict rules of evidence were rarely followed). The trial court in the present case, however, was bound to follow the rules of evidence. See Conn. Code Evid. § 1-1 (b). Following the enactment of P.A. 07-116, in conservatorship proceedings under § 45a-650, the Probate Court is required to adhere to the more formalized procedures to which the trial court previously was bound. See General Statutes § 45a-650 (b). Thus, statements in a report by a guardian ad litem cannot be relied on as substantive evidence unless the report has been properly admitted into evidence.

A guardian ad litem's report is, by its nature, hearsay if offered for its truth, and it typically contains hearsay

within hearsay insofar as it contains the out-of-court statements of others. See Conn. Code Evid. § 8-1 (defining hearsay). Use of such statements for substantive purposes (i.e., their truth) is barred unless they satisfy an exception provided by a statute or rule. See Conn. Code Evid. §§ 8-2 and 8-7. Such statements may be used, however, for nonsubstantive purposes under certain conditions. See, e.g., Conn. Code Evid. § 7-4 (b) ("The facts in the particular case upon which an expert bases an opinion . . . need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence."). An opinion on an ultimate issue of fact may likewise be inadmissible unless certain predicates are satisfied. See Conn. Code Evid. §§ 7-2, 7-3 and 7-4. In addition to these evidentiary constraints, relying on such a report for substantive purposes without requiring its author to be subject to cross-examination may raise due process concerns. See *Toms* v. *Toms*, 98 S.W.3d 140, 144–45 (Tenn. 2003).

During the proceedings in the present case, however, a Probate Court rule was in effect *requiring* a guardian ad litem to submit a written report to the court. Probate Court Rules (2012) § 4.3. Although that rule since has been repealed; see Probate Court Rules § 13.6 (effective July 1, 2013); a recent amendment to the conservatorship scheme appears to sanction or at least acknowledge the practice of guardians ad litem submitting reports to the court. See Public Acts 2012, No. 12-25, § 1, codified as General Statutes § 45a-132 (a) (3) ("[a]ny appointment of a guardian ad litem under this subdivision shall terminate upon the guardian ad litem's report to the judge or magistrate . . . or earlier upon the order of the judge or magistrate").[11] Nonetheless, the

[11] We recognize that there is an inherent tension between the guardian ad litem's traditional role as an advocate for the respondent's "best interests"

legislature has not set forth an exception to the evidentiary requirements for guardian ad litem reports. Cf. General Statutes § 54-46a (b) (in probable cause hearings, "[t]he court shall be confined to the rules of evidence, except that written reports of expert witnesses shall be admissible in evidence and matters involving chain of custody shall be exempt from such rules"). It may be, however, that these reporting practices can be reconciled with the mandate that the rules of evidence apply to conservatorship proceedings.

Some courts have also drawn a distinction between reliance on such reports for substantive purposes and review for nonsubstantive purposes. See, e.g., *Toms* v. *Toms*, supra, 98 S.W.3d 144 ("[a]lthough a guardian ad litem's report is not admissible evidence, we hold that such a report may be reviewed by a trial court"); *Joyce S.* v. *Frank S.*, 6 Neb. App. 23, 33, 571 N.W.2d 801 (1997)

and his or her role in proceedings determining whether a conservator is necessary and who should be appointed in light of the fact that the "best interests" standard no longer is applicable to such proceedings. The 2012 amendment to the conservatorship statutes, however, limited the circumstances under which a guardian ad litem may be appointed in conservatorship proceedings and required the order making such an appointment to specifically delineate the scope of the guardian ad litem's mandate. See General Statutes § 45a-132 (a) (3) ("No judge or magistrate may appoint a guardian ad litem for a conserved person in a proceeding under section 17a-543 or 17a-543a or sections 45a-644 to 45a-663, inclusive, unless [A] the judge or magistrate makes a specific finding of a need to appoint a guardian ad litem for a specific purpose or to answer specific questions to assist the judge or magistrate in making a determination, or [B] the conserved person's attorney is unable to ascertain the preferences of the person, including preferences previously expressed by the person. Prior to appointing a guardian ad litem for a person under subparagraph [B] of this subdivision, the judge or magistrate may question the person to determine the person's preferences or inability to express such preferences. If the judge or magistrate appoints a guardian ad litem under this subdivision, the judge's or magistrate's order shall [i] limit the appointment in scope and duration, and [ii] direct the guardian ad litem to take only the specific action required or to answer specific questions posed by the judge or magistrate . . . ."). Thus, the guardian ad litem's role may be limited, particularly when the issue to be decided is one in which the "best interests" standard no longer applies.

(distinguishing between reviewing report to determine whether guardian ad litem has performed adequate investigation and relying on it for truth of statements therein). Indeed, the Tennessee Supreme Court noted that holding otherwise and precluding the submission of reports "would effectively undermine the important role played by a guardian ad litem" and that a guardian ad litem's report "may assist the parties by: [1] alerting the parties to the identity of potential witnesses who may be interviewed; [2] highlighting the testimony, both favorable and unfavorable, that may be presented at trial; and [3] providing a third party's view of the facts of the case." *Toms* v. *Toms*, supra, 144.

In the present case, it is not clear to this court that the Probate Court relied on the report for substantive purposes rather than simply acknowledged that it had reviewed the report because it was required under then existing court rules to accept it. We first observe that every paragraph in the Probate Court's decision, except the one relating to the report, commenced with the phrase "This court finds" or "This court further finds . . . ." In contrast, the decision states: "Margenot, guardian ad litem, has filed his report . . . ." This appears to be a purposeful distinction. We further observe that the court never resolved on the record the plaintiff's specific evidentiary objections to the report or otherwise suggested why it had concluded that it could rely on the report in light of the statutory requirement of compliance with the rules of evidence that had been brought to the court's attention. With respect to any hearsay on which Margenot relied in reaching his recommendations, we agree with the trial court and the Appellate Court that there is no indication in the record that the Probate Court relied on any such hearsay for substantive purposes. With respect to Margenot's opinion as to the ultimate issue of fact, even if we assume that this opinion was substantively

considered, we are not persuaded that any such impropriety prejudiced the plaintiff's substantial rights.

"When a court commits an evidentiary impropriety, we will reverse the trial court's judgment only if we conclude that the trial court's improper ruling harmed [a party]. . . . In a civil case, a party proves harm by showing that the improper evidentiary ruling likely affected the outcome of the proceeding." (Citation omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 417, 97 A.3d 920 (2014). "It is well established that if erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not constitute reversible error." *Swenson* v. *Sawoska*, 215 Conn. 148, 155, 575 A.2d 206 (1990). "In determining whether evidence is merely cumulative, we consider the nature of the evidence and whether any other evidence was admitted that was probative of the same issue as the evidence in controversy." *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 23, 60 A.3d 222 (2013).

The critical dispute before the Probate Court was which parent was committed to a course of treatment that would promote Douglas' welfare and independence. The defendant marshaled testimony from all of Douglas' current treatment providers in support of his application. Most significantly, O'Hara, who had treated Douglas for many years, had undertaken extensive testing and examinations of him, and who specialized in the very conditions at issue, opined that the defendant was pursuing the proper and effective course of treatment. The plaintiff's own experts offered some support for the course of treatment undertaken by the defendant and only supported the possibility that Douglas could still have Lyme disease and that such a condition could be a contributing factor in his condition. Therefore, we cannot conclude that Margenot's opinion, which was consistent with the view of Douglas' longtime treating

physician and the clear weight of the remaining evidence, likely affected the outcome.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

DAIRYLAND INSURANCE COMPANY *v.* MAUREEN K. MITCHELL, EXECUTRIX (ESTATE OF JOHN MOONEY, JR.), ET AL.
(SC 19482)

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

Syllabus

The plaintiff insurer sought a declaratory judgment to determine the scope of coverage provided under an insurance policy it had issued to the named defendant's decedent, and, more specifically, its duty to defend. The named defendant, M, had filed a wrongful death action against A, who was permissively operating the decedent's vehicle, in which the decedent was a passenger, when it struck a parked tractor trailer. The plaintiff sought a declaratory ruling that its insurance policy did not provide coverage for M's claims against A, and that it had no duty to defend A in the wrongful death action because although A was a covered driver under the policy, there was an exclusion in the policy that precluded coverage for claims of bodily injury to the named insured, who was the decedent. The plaintiff thus filed a motion for summary judgment on the basis of that exclusion. M objected to that motion, claiming that the exclusion was void because it did not comply with the statutory ([Rev. to 2009] § 38a-335 [d]) requirement that exclusions be set forth separately in an endorsement to the policy that specifically names the individual excluded from coverage. Because the exclusion in the policy here was located within the body of the policy, M claimed that the exclusion was void and unenforceable, and that the plaintiff had a duty to defend A and to indemnify him if he were ultimately found liable for the decedent's death. The trial court concluded that the exclusion did not violate § 38-335 (d) and, further, that the exclusion unambiguously barred M's claims against A. Accordingly, the trial court rendered summary judgment in favor of the plaintiff and M appealed, claiming that the exclusion was invalid because it failed to comply with the plain and unambiguous strictures of § 38a-335 (d) that the exclusion be both sufficiently specific and set forth in a separate endorsement to the policy. *Held* that the trial court improperly held that the exclusion was

valid, the exclusion not having been set forth in a separate endorsement as required by § 38a-335 (d), but, rather, having been listed among other exclusions in the body of the policy itself; this court previously has determined that § 38a-335 (d) did not create an absolute prohibition on such policy exclusions, but merely required notice and acceptance by the insured of an endorsement that specifically excludes the named insured, and an endorsement has been defined as a writing added or attached to an insurance policy that, like here, expands or restricts its benefits or excludes certain conditions from coverage, and, contrary to the plaintiff's contention, the exclusion's clarity did not excuse it from the statutory requirement that it be set forth in an endorsement.

Argued October 7, 2015—officially released January 19, 2016

Procedural History

Action for a declaratory judgment to determine whether the plaintiff was obligated to defend and indemnify the defendant Robert Atherton under an automobile insurance policy issued by the plaintiff to the named defendant's deceased, brought to the Superior Court in the judicial district of Litchfield, where the court, *Danaher*, *J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the named defendant appealed. *Reversed; further proceedings.*

William M. O'Donnell III, with whom, on the brief, were *Lauren J. Taylor* and *S. Sherry Xia*, for the appellant (named defendant).

Cristin E. Sheehan, with whom was *Cara D. Joyce*, for the appellee (plaintiff).

Opinion

ROGERS, C. J. This appeal presents the question of whether General Statutes (Rev. to 2009) § 38a-335 (d)[1] bars automobile liability insurers from excluding coverage for personal injuries caused to a named insured unless the exclusion is set forth in a separate endorse-

[1] Hereinafter, all references to § 38a-335 are to the 2009 revision, unless otherwise noted.

ment to the policy. The named defendant, Maureen K. Mitchell, in her capacity as executrix of the estate of John Mooney, Jr. (decedent), appeals from the trial court's summary judgment rendered in favor of the plaintiff, Dairyland Insurance Company, in this declaratory judgment action brought to determine the scope of coverage provided by an automobile insurance policy and the associated duty to defend. She argues that the trial court's ruling was improper because the exclusion at issue was void and unenforceable due to its failure to comply with the clear and unambiguous requirements of § 38a-335 (d). We agree and reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to the appeal. The decedent died in an automobile accident on April 24, 2010, while riding in his own motor vehicle as a passenger. The vehicle was being driven, with the decedent's permission, by the decedent's friend, Robert Atherton,[2] when it struck a parked tractor trailer. At the time, the vehicle was insured by the plaintiff under a personal automobile policy (policy). Atherton was a covered permissive driver under the policy.

On or about April 12, 2012, the defendant filed a wrongful death action against Atherton, seeking various damages on behalf of the decedent's estate. On June 25, 2012, the plaintiff filed a one count declaratory judgment action[3] against the defendant and Atherton, seeking a ruling that the policy did not provide coverage for the defendant's claims against Atherton and that

[2] Atherton also was named as a defendant in this action. He did not appear in the trial court proceedings, however, and he has not participated in this appeal. We refer, hereinafter, to Mitchell as the defendant and to Atherton by name.

[3] General Statutes § 52-29 (a) provides in relevant part that "[t]he Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration . . . ."

the plaintiff had no duty to defend Atherton. Specifically, the plaintiff claimed that, although Atherton generally was covered as a driver, exclusion 11 of the policy precluded coverage for claims of bodily injury to the named insured, i.e., the decedent.[4]

Thereafter, the plaintiff filed a motion for summary judgment on the basis of that exclusion, arguing that it unambiguously barred coverage for the defendant's claims and, therefore, that the plaintiff had no duty to defend or indemnify Atherton. The defendant objected to the plaintiff's motion, arguing that exclusion 11 violated § 38a-335 (d) and, therefore, was void. Specifically, the defendant contended, § 38a-335 (d) required that an exclusion, such as exclusion 11, be set forth separately in an endorsement to the policy that specifically names the individual excluded from coverage. Exclusion 11, to the contrary, is located within the body of the policy. The defendant argued further that, because exclusion 11 failed to comply with the statute, it was void and unenforceable as against public policy. Consequently, according to the defendant, the plaintiff had a duty to defend Atherton and, potentially, to indemnify him if he ultimately were to be held liable for the decedent's death. In response, the plaintiff contended, inter alia, that exclusion 11 was valid, consistent with

[4] The portion of the policy pertaining to liability coverage provides in relevant part: "*We* will pay damages for which any *insured person* is legally liable because of *bodily injury* . . . caused by a *car accident* arising out of the ownership, maintenance or use of a *car* . . . . *We* have no duty to defend any suit or settle any claim for *bodily injury* . . . not covered under this policy." (Emphasis in original.) The policy otherwise defines "[b]odily injury" to include death, and "[i]nsured person" to include both the named insured, here, the decedent, and permissive users such as Atherton.

The body of the policy also contains a number of exclusions within the liability coverage portion, among them exclusion 11. That exclusion provides in relevant part: "This coverage and our duty to defend does not apply to . . . [*b*]*odily injury to you*." (Emphasis in original.) "You" is defined in the policy as the named insured, who in turn is identified as the decedent.

Connecticut's public policy and specific enough to satisfy the parameters of § 38a-335 (d).

After surveying the various appellate and Superior Court case law applying § 38a-335 (d), the trial court concluded that exclusion 11 did not violate that statute and, further, unambiguously barred the defendant's claims against Atherton.[5] Accordingly, the court rendered summary judgment in favor of the plaintiff. The defendant's appeal followed.[6]

The defendant claims that the trial court improperly granted the plaintiff's motion for summary judgment because exclusion 11, although permitted by § 38a-335 (d), nevertheless is invalid because it fails to comply with the plain and unambiguous strictures of that statute, namely, the requirements that the exclusion be both sufficiently specific and set forth in a separate endorsement to the policy. According to the defendant, these requirements must be met in order to create a valid exception from coverage, because such an exception would not be expected by the ordinary consumer and, therefore, must be set forth in a manner that is more likely to be noticed.[7] The plaintiff contends, in response, that the exclusion's location in the body of the policy, rather than in an endorsement, "unquestionably" complies with § 38a-335 (d), and that the exclusion

[5] The trial court's opinion specifically acknowledges the defendant's argument that exclusion 11, to be valid, needed to be both: (1) specific; and (2) set forth in an endorsement to the policy. The court's analysis, however, addresses only the specificity and clarity of that exclusion, and not the question of whether it properly was located within the policy itself.

[6] The defendant appealed from the trial court's judgment to the Appellate Court, and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[7] The defendant also contends, in the alternative, that exclusion 11 is invalid and unenforceable because it is contrary to separate statutory provisions governing minimum coverage for bodily injury liability, or because it is unconscionable and violates Connecticut public policy. Because we agree with the defendant's first claim, we need not address these alternative bases for her appeal.

clearly and unambiguously disallowed liability coverage for the decedent. According to the plaintiff, it would be "illogical" to conclude that the exclusion, which specifically is authorized by § 38a-335 (d), is invalid simply because it was part of the original terms of the policy rather than set forth in an amendatory endorsement. We agree with the defendant that exclusion 11 is invalid because it was not set forth in a separate endorsement to the policy.[8]

We begin with the standard of review. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . 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." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 37, 84 A.3d 1167 (2014).

The parties do not dispute that exclusion 11, by its terms, precludes recovery under the policy. See footnote 4 of this opinion. They contest only whether that exclusion, as it appears in the body of the policy, is authorized by § 38a-335 (d) and, therefore, is valid. Because the trial court's conclusion in this regard required it to determine the meaning and applicability of a statute, our review is plenary. *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 311 Conn. 37; see also *Joseph General Contracting, Inc.* v. *Couto*,

[8] Because the failure to set forth exclusion 11 in a separate endorsement is fatal to its validity, we do not address the defendant's additional contention that the exclusion is not sufficiently specific.

317 Conn. 565, 586, 119 A.3d 570 (2015) (statutory interpretation presents question of law). In reviewing the trial court's construction of § 38a-335 (d), we adhere to the strictures of General Statutes § 1-2z.[9]

Section 38a-335 governs the general requirements for automobile liability insurance policies in Connecticut. At the time of the accident when the insurance policy at issue was in effect, subsection (d) provided: "With respect to the insured motor vehicle, the coverage afforded under the bodily injury liability and property damage liability provisions in any [automobile liability insurance] policy shall apply to the named insured and relatives residing in his household unless any such person is specifically excluded by endorsement."[10] General Statutes (Rev. to 2009) § 38a-335 (d). This court had occasion to construe this subsection in *American States Ins. Co.* v. *Allstate Ins. Co.*, 282 Conn. 454, 922

[9] "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 586.

[10] In the following year, § 38a-335 (d) was amended by No. 11-19, § 4, of the 2011 Public Acts. That subsection presently provides: "With respect to the insured motor vehicle, the coverage afforded under the bodily injury liability and property damage liability provisions in any [automobile liability insurance] policy shall apply to the named insured and relatives residing *in such insured's* household unless any such *relative* is specifically excluded by endorsement." (Emphasis added.) General Statutes § 38a-335 (d). The change suggests that, at present, an automobile liability insurer may not exclude a named insured from bodily injury liability or property damage liability coverage under any circumstances. In this opinion, however, we analyze the validity of the exclusion at issue with reference to the statute as it existed in 2010, when the policy at issue was in effect.

A.2d 1043 (2007), a conflict of laws case in which an insurer sought to exclude liability coverage for injuries caused to a named insured under a policy provision similar to exclusion 11.[11] As part of a multifactor test used to determine whether Connecticut or Florida law should govern the dispute, we weighed the public policy interests of the conflicting forums. We concluded that § 38a-335 (d) did not create "an absolute prohibition on such exclusions, but merely require[d] *notice and acceptance by the insured of an endorsement* that specifically exclude[s] the [named insured and] relatives residing in the household of the named insured." (Emphasis added; internal quotation marks omitted.) Id., 475. Stated otherwise, the statute "prescribes a process by which such exclusions must be executed [in order] to be valid." Id.

In the insurance context, "endorsement" is a term of art. It is defined as "a writing *added or attached to a policy or certificate of insurance* which expands or restricts its benefits or excludes certain conditions from coverage. . . . When properly incorporated into the policy, the policy and the . . . endorsement together constitute the contract of insurance, and are to be read together to determine the contract actually intended by the parties." (Emphasis added; internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 806, 967 A.2d 1 (2009); see also id. (endorsement is "[a] written or printed form *attached to the policy* which alters provisions of the

[11] The exclusion at issue, which was set forth in an endorsement, barred "automobile liability insurance coverage for bodily injury to [the policyholder] or any resident of [the policyholder's] household related to [the policyholder] by blood, marriage or adoption." (Internal quotation marks omitted.) *American States Ins. Co.* v. *Allstate Ins. Co.*, supra, 282 Conn. 458. One of two policyholders sought to recover under the policy for injuries she had sustained as a passenger while the other policyholder was driving the insured vehicle. Id., 457.

contract" [emphasis added; internal quotation marks omitted]).

When an insurer seeks to limit its liability based on a statute, "it should only be permitted to do so to the extent that the statute expressly authorizes." *Chmielewski* v. *Aetna Casualty & Surety Co.*, 218 Conn. 646, 674, 591 A.2d 101 (1991). "In order for a policy exclusion to be expressly authorized by [a] statute [or regulation], there must be substantial congruence between the statutory [or regulatory] provision and the policy provision." (Internal quotation marks omitted.) *Piersa* v. *Phoenix Ins. Co.*, 273 Conn. 519, 529, 871 A.2d 992 (2005); see also *Lowrey* v. *Valley Forge Ins. Co.*, 224 Conn. 152, 156, 617 A.2d 454 (1992). This requirement pertains to matters of both substance and form. See 2 G. Couch, Insurance (3d Ed. 2010) § 22:33, p. 22-147 ("[e]xceptions are without effect and may be ignored where there is a violation of statute in respect of the size of type in which they are printed and the want of prominence given them in the format of the policy"); 43 Am. Jur. 2d 238, Insurance § 180 (2013) ("[i]f an insurance policy provision violates a statute requiring exceptions to be printed with prominence, an exception that is not printed in compliance with the statute will be rendered meaningless, and the contract will be read as if the exception were not there").

On the basis of the foregoing law, we conclude that the trial court improperly held that exclusion 11 was valid, as that exclusion was not set forth in an endorsement as clearly and unambiguously required by § 38a-335 (d), but rather, was listed among other exclusions in the body of the policy itself. We disagree with the plaintiff that the exclusion's clarity excuses it from the statutory requirement that it be set forth in an endorsement, or that it is "illogical" to enforce such a requirement. Presumably, the legislature considered exclusions such as exclusion 11 to be counterintuitive to the

lay consumer of insurance and, therefore, required them to be set forth in a conspicuous fashion.

The plaintiff directs our attention to the distinction between liability coverage for the named insured when he or she is *a tortfeasor* who negligently injures third parties, and liability coverage for the named insured when he or she is *a victim* of the negligence of another insured party under the policy, such as Atherton. It argues, as an alternative ground for affirmance of the trial court's judgment, that § 38a-335 (d) is directed at the first situation, but not at the second. Consequently, according to the plaintiff, the statute is simply inapplicable and, therefore, no endorsement was necessary.

It is difficult to see how this argument benefits the plaintiff because it has not identified any other statutory or regulatory authority for disallowing coverage for certain classes of injured parties if § 38a-335 (d) is inapplicable.[12] In any event, we agree with the defendant that there is no basis for the distinction identified by the plaintiff in the wording of the statute, which, in the years since its enactment, has been applied by Connecticut's courts under both fact patterns. See, e.g., *American States Ins. Co.* v. *Allstate Ins. Co.*, supra, 282 Conn. 458 (named insured as injured party); *Progressive Northwestern Ins. Co.* v. *Rivera*, Superior Court, judicial district of Hartford, Docket No. CV-00-0802973-S (September 25, 2001) (30 Conn. L. Rptr. 469) (relative of named insured as liable party); *Colonial Penn Ins. Co.* v. *Patriot General Ins. Co.*, Superior Court, judicial district of New Haven, Docket No. CV-95-0377876-S (June 19, 1998) (22 Conn. L. Rptr. 355) (named insured as liable party). Subsequent to these decisions, the legislature has amended the statute; see footnote 10 of this

[12] See Regs., Conn. State Agencies § 38a-334-5 (c) and (d) (listing permissible exclusions for automobile liability insurance policies, and requiring liability coverage for permissive users, with certain inapplicable exceptions, respectively).

opinion; but has not rewritten it in a fashion that would make clear an intent to limit its application to the named parties as tortfeasors only. "[T]he legislature is presumed to be aware of the [courts'] interpretation of a statute and . . . its subsequent nonaction may be understood as a validation of that interpretation," particularly when it "affirmatively amended the statute subsequent to [such] interpretation, but chose not to amend the specific provision of the statute at issue." (Internal quotation marks omitted.) *Berkley* v. *Gavin*, 253 Conn. 761, 776 n.11, 756 A.2d 248 (2000); see also *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 404, 999 A.2d 682 (2010).

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

ISABELLA D. ET AL. *v.* DEPARTMENT OF CHILDREN AND FAMILIES ET AL.*
(SC 19451)

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

Syllabus

The plaintiff D, a minor child acting through her mother as next friend, appealed to the trial court from the decision of the defendant Department of Children and Families concluding that A, the alleged perpetrator of sexual abuse and emotional neglect against D, was not responsible for the allegations and ordering the removal of his name from the central child abuse and neglect registry. A's name had been placed on the central registry after an investigation conducted by the department initially substantiated certain allegations that he was responsible for the sexual abuse and emotional neglect of D. An internal review upheld the investigations' findings, and A requested an administrative hearing. A depart-

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

ment hearing officer found that there was insufficient evidence to support a finding of substantiation and, accordingly, reversed the department's finding and removed A's name from the central registry. Thereafter, D requested reconsideration of the hearing officer's decision, claiming that she was deprived of the opportunity to participate in the hearing. The hearing officer denied D's request on the ground that D lacked standing to seek reconsideration because she was not a party to the substantiation hearing. D appealed from that decision to the trial court, and the department moved to dismiss on the ground that the plaintiff lacked standing to appeal. The trial court granted the department's motion and rendered judgment dismissing D's administrative appeal. On D's subsequent appeal, *held* that the trial court properly determined that D lacked standing to appeal from the department's decision, D having failed to establish that she had a specific, personal and legally protected interest in the substantiation process greater than any other member of the general public: although D was required to participate in the department's investigation and testified, thus revealing personal information, the department's decision did not implicate D's reputational and privacy interests, as the central registry is generally confidential and there was no evidence to indicate that the department improperly disclosed any information from the investigative process, nor did A's subsequent use of the department's decision in a collateral family preceding create a specific, personal and legal interest in the substantiation process for the purpose of classical aggrievement; furthermore, the statutory scheme governing the substantiation appeal process, to which alleged victims, like D, are not a party, was designed to protect the community and, therefore, D could not demonstrate that she had a specific, personal and legal interest in the substantiation process for the purpose of statutory aggrievement.

Argued October 13, 2015—officially released January 19, 2016

Procedural History

Administrative appeal from the decision of the named defendant determining that the plaintiffs did not have standing to seek reconsideration of an order removing a name from the child abuse and neglect registry, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Abrams, J.*; judgment dismissing the appeal, from which the plaintiffs appealed. *Affirmed.*

Alan Giacomi, with whom were *Robert S. Kolesnik, Sr.*, and, on the brief, *Stephanie E. Cummings*, for the appellants (plaintiffs).

John E. Tucker, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellees (defendants).

Opinion

EVELEIGH, J. The sole issue in this administrative appeal is whether the trial court properly concluded that the plaintiff Isabella D.[1] lacks standing to appeal from the final decision of the defendant Department of Children and Families (department)[2] finding that the alleged perpetrator was not responsible for allegations of sexual abuse and emotional neglect against the plaintiff and removing his name from the central child abuse and neglect registry (central registry).[3] On appeal to this

[1] We note that, although Isabella D. is the named plaintiff, the only claim in the present case was brought on Isabella D.'s behalf by her mother as next friend. We also note that, although Isabella D.'s mother is also named as a plaintiff in the present case, she has not asserted any claim in her individual capacity. For the sake of simplicity, we refer to Isabella D., acting through her mother as next friend, as the plaintiff.

[2] We note that the Commissioner of Children and Families (commissioner) was also named as a defendant in the underlying action and is a party to the present appeal. Because the commissioner acts on behalf of the department, references in this opinion to the department include the commissioner. References to the commissioner contained within quotations have been retained for the sake of simplicity.

[3] Section 17a-101k-1 (14) of the Regulations of Connecticut State Agencies defines " '[c]entral registry' " as "the confidential data file maintained as part of the department's computerized database, of persons who have been substantiated as individuals responsible for an act or acts of child abuse or neglect and for whom the commissioner has made a determination, based upon a standard of reasonable cause, that the individual poses a risk to the health, safety or well-being of children . . . ."

Before the trial court, the plaintiff framed the issue as "whether the [plaintiff] has standing to seek reconsideration of the finding that insufficient evidence existed to support a finding of substantiation of abuse." The department contended before the trial court that the dispositive issue was "whether the [plaintiff] has standing to appeal the actual decision that insufficient evidence existed to support a finding of substantiation of abuse." The trial court addressed this discrepancy and noted that, "[w]hile the plaintiff may be technically correct, it does not appear to make a difference because, if a minor child lacks standing to challenge the underlying determination, the

court, the plaintiff claims that the trial court improperly concluded that she lacks standing to bring this action. Specifically, the plaintiff claims that she has a specific, personal and legal interest in the department's decision because her constitutionally protected interests in her reputation, privacy, safety, and family integrity were implicated as a result of the department's substantiation process, and that these interests were harmed by the department's decision. The plaintiff further claims that these interests were harmed by the alleged perpetrator's use of the department's decision in a collateral family court proceeding. In response, the department contends that the plaintiff was not classically aggrieved by its decision because the plaintiff cannot establish a specific, personal and legal interest in the substantiation process that is distinguishable from that of the general public. The department further claims that the plaintiff was not statutorily aggrieved because she is not within the zone of interests intended to be protected by the statutory scheme. We agree with the department and conclude that the trial court properly determined that the plaintiff lacks standing to bring this action.[4]

The record reveals the following undisputed facts and procedural history. As a result of a mandated reporter's anonymous referral, the department instituted an inves-

court does not see how she can have standing to challenge a refusal to reconsider that determination." We agree with the trial court and find it necessary to address only whether the plaintiff has standing to appeal from the decision of the department determining that there was insufficient evidence to support a finding of substantiation of abuse and neglect.

[4] We note that the department also offered two alternative grounds for affirmance of the trial court's judgment: (1) the plaintiff's petition for reconsideration did not comply with General Statutes § 4-181a because the plaintiff was not a party to the substantiation hearing; and (2) the department's denial of the plaintiff's petition for reconsideration was not a " '[f]inal decision' " pursuant to General Statutes § 4-166 (5) and, therefore, was not appealable to the trial court pursuant to General Statutes § 4-183 (a). We do not reach either of the department's alternative grounds for affirmance, however, because we conclude that the plaintiff lacks standing to bring this action.

tigation into possible sexual abuse of the plaintiff pursuant to General Statutes § 17a-101g.[5] Following the

[5] General Statutes § 17a-101g provides in relevant part: "(a) Upon receiving a report of child abuse or neglect, as provided in sections 17a-101a to 17a-101c, inclusive, or section 17a-103, in which the alleged perpetrator is (1) a person responsible for such child's health, welfare or care, (2) a person given access to such child by such responsible person, or (3) a person entrusted with the care of a child, the Commissioner of Children and Families, or the commissioner's designee, shall cause the report to be classified and evaluated immediately. If the report contains sufficient information to warrant an investigation, the commissioner shall make the commissioner's best efforts to commence an investigation of a report concerning an imminent risk of physical harm to a child or other emergency within two hours of receipt of the report and shall commence an investigation of all other reports within seventy-two hours of receipt of the report. A report classified by the commissioner, or the commissioner's designee, as lower risk may be referred for family assessment and services pursuant to subsection (g) of this section. Any such report may thereafter be referred for standard child protective services if safety concerns for the child become evident. A report referred for standard child protective services may be referred for family assessment and services at any time if the department determines there is a lower risk to the child. If the alleged perpetrator is a school employee, as defined in section 53a-65, or is employed by an institution or facility licensed or approved by the state to provide care for children, the department shall notify the Department of Education or the state agency that has issued such license or approval to the institution or facility of the report and the commencement of an investigation by the Commissioner of Children and Families. The department shall complete any such investigation not later than forty-five calendar days after the date of receipt of the report. If the report is a report of child abuse or neglect in which the alleged perpetrator is not a person specified in subdivision (1), (2) or (3) of this subsection, the Commissioner of Children and Families shall refer the report to the appropriate local law enforcement authority for the town in which the child resides or in which the alleged abuse or neglect occurred.

"(b) The investigation shall include a home visit at which the child and any siblings are observed, if appropriate, a determination of the nature, extent and cause or causes of the reported abuse or neglect, a determination of the person or persons suspected to be responsible for such abuse or neglect, the name, age and condition of other children residing in the same household and an evaluation of the parents and the home. The report of such investigation shall be in writing. The investigation shall also include, but not be limited to, a review of criminal conviction information concerning the person or persons alleged to be responsible for such abuse or neglect and previous allegations of abuse or neglect relating to the child or other children residing in the household or relating to family violence. After an investigation into a report of abuse or neglect has been completed, the commissioner shall determine, based upon a standard of reasonable cause, whether a child has been abused or neglected, as defined in section 46b-120. If the commissioner determines that abuse or neglect has occurred,

investigation, the department's investigator found the alleged perpetrator responsible for sexual abuse and emotional neglect of the plaintiff and placed the alleged perpetrator's name on the central registry. As a result of the alleged perpetrator's request for an appeal pursuant to § 17a-101k-4 (a) of the Regulations of Connecticut State Agencies,[6] the department conducted an internal review and notified the alleged perpetrator of the decision to uphold the substantiation of sexual abuse and emotional neglect and the decision to place the alleged perpetrator's name on the central registry. Thereafter, the alleged perpetrator sought an administrative hearing. After a hearing, the hearing officer found that there

the commissioner shall also determine whether: (1) There is an identifiable person responsible for such abuse or neglect; and (2) such identifiable person poses a risk to the health, safety or well-being of children and should be recommended by the commissioner for placement on the child abuse and neglect registry established pursuant to section 17a-101k. If the commissioner has made the determinations in subdivisions (1) and (2) of this subsection, the commissioner shall issue notice of a recommended finding to the person suspected to be responsible for such abuse or neglect in accordance with section 17a-101k. . . .

"(d) If the child abuse or neglect resulted in or involves (1) the death of a child; (2) the risk of serious physical injury or emotional harm of a child; (3) the serious physical harm of a child; (4) the arrest of a person due to abuse or neglect of a child; (5) a petition filed by the commissioner pursuant to section 17a-112 or 46b-129; or (6) sexual abuse of a child, entry of the recommended finding may be made on the child abuse or neglect registry and information concerning the finding may be disclosed by the commissioner pursuant to a check of the child abuse or neglect registry or request for information by a public or private entity for employment, licensure, or reimbursement for child care purposes pursuant to programs administered by the Department of Social Services or pursuant to any other general statute that requires a check of the child abuse or neglect registry, prior to the exhaustion or waiver of all administrative appeals available to the person suspected to be responsible for the abuse or neglect as provided in section 17a-101k. . . ."

[6] Section 17a-101k-4 (a) of the Regulations of Connecticut State Agencies provides: "Any person: (1) who has been substantiated as an individual responsible for child abuse or neglect; (2) against whom a determination is made that the individual's name should be entered on the central registry; or (3) who is the parent or guardian of a child who has been substantiated as an individual responsible for child abuse or neglect, and who disagrees with such substantiation or registry finding may request an internal review of the substantiation or registry finding."

was insufficient evidence to support a finding of substantiation of sexual abuse and emotional neglect by the alleged perpetrator. The hearing officer, therefore, reversed the department's finding of substantiation and removed the alleged perpetrator's name from the central registry.

Subsequently, the plaintiff sent a letter to the department requesting that the hearing officer reconsider the decision reversing the substantiation finding. As grounds for reconsideration, the plaintiff asserted that, "without the opportunity to be notified of (let alone participate in), the hearings process, [the plaintiff] was deprived of the opportunity to present evidence in her own defense or to pursue challenges to the credibility, authenticity, reliability or admissibility of any of the evidence introduced by [the alleged perpetrator]." The hearing officer denied the plaintiff's request on the basis that the plaintiff lacked standing to seek reconsideration. As grounds for the decision, the hearing officer explained that, because General Statutes § 4-181a[7] solely permits a *party* to a contested hearing to file a petition for reconsideration and, because the plaintiff was not a party to the substantiation hearing, the plaintiff did not have standing to appeal the department's decision.

From that decision, the plaintiff filed an administrative appeal pursuant to General Statutes § 4-183 (a) of the Uniform Administrative Procedure Act.[8] At the trial

[7] Section 17a-101k-11 (a) of the Regulations of Connecticut State Agencies provides that "[a]ny request for reconsideration of a final decision [of the department's hearing officer] is governed by section 4-181a of the Connecticut General Statutes." General Statutes § 4-181a (a) (1) provides in relevant part: "Unless otherwise provided by law, a party in a contested case may, within fifteen days after the personal delivery or mailing of the final decision, file with the agency a petition for reconsideration of the decision . . . ."

[8] In her complaint, the plaintiff alleged, inter alia, that: (1) she was "aggrieved" within the meaning of § 4-183 because "[t]he conduct of the substantiation hearing was arbitrary, capricious, characterized by abuses of discretion and clearly unwarranted exercises of discretion—including, but not limited to, the consideration of inflammatory, unsupported and uncorroborated hearsay evidence"; (2) General Statutes § 17a-101k is uncon-

court, the department moved to dismiss the plaintiff's claims for lack of subject matter jurisdiction on the ground that the plaintiff lacked standing to bring the administrative appeal. Following oral argument on the issue of standing, the trial court granted the department's motion to dismiss. This appeal followed.[9]

By way of background, we briefly summarize the substantiation process and the central registry scheme as set forth in General Statutes §§ 17a-101g[10] and 17a-101k.[11] As this court has previously explained, "§ 17a-

stitutional, as applied to the facts of this case; and (3) the department "failed to properly, completely or fully present all relevant and reasonably available evidence at the substantiation hearing . . . ."

[9] The plaintiff appealed from the judgment of the trial 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.

[10] See footnote 5 of this opinion.

[11] General Statutes § 17a-101k provides in relevant part: "(a) The Commissioner of Children and Families shall maintain a registry of the commissioner's findings of abuse or neglect of children pursuant to section 17a-101g that conforms to the requirements of this section. The regulations . . . shall provide for the use of the registry on a twenty-four-hour daily basis to prevent or discover abuse of children and the establishment of a hearing process for any appeal by a person of the commissioner's determination that such person is responsible for the abuse or neglect of a child pursuant to subsection (b) of section 17a-101g. The information contained in the registry and any other information relative to child abuse, wherever located, shall be confidential, subject to such statutes and regulations governing their use and access as shall conform to the requirements of federal law or regulations. Any violation of this section or the regulations adopted by the commissioner under this section shall be punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year.

"(b) Upon the issuance of a recommended finding that an individual is responsible for abuse or neglect of a child pursuant to subsection (b) of section 17a-101g, the commissioner shall provide notice of the finding, by first class mail, not later than five business days after the issuance of such finding, to the individual who is alleged to be responsible for the abuse or neglect. . . .

"(c) (1) Following a request for appeal, the commissioner or the commissioner's designee shall conduct an internal review of the recommended finding to be completed no later than thirty days after the request for appeal is received by the department. The commissioner or the commissioner's designee shall review all relevant information relating to the recommended finding, to determine whether the recommended finding is factually or legally

101g sets forth the [department's] responsibilities upon receiving a report of abuse or neglect of a child: classification; evaluation; investigation; and determination of whether abuse or neglect has occurred." (Internal quotation marks omitted.) *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 418, 94 A.3d 588 (2014). If, after an investigation into the report, the department has reasonable cause to believe that the child has been " 'neglected' " or " 'abused' " as defined by statute; General Statutes § 46b-120 (6) and (7); the allegations of

deficient and ought to be reversed. Prior to the review, the commissioner shall provide the individual access to all relevant documents in the possession of the commissioner regarding the finding of responsibility for abuse or neglect of a child, as provided in section 17a-28.

"(2) The individual or the individual's representative may submit any documentation that is relevant to a determination of the issue and may, at the discretion of the commissioner or the commissioner's designee, participate in a telephone conference or face-to-face meeting to be conducted for the purpose of gathering additional information that may be relevant to determining whether the recommended finding is factually or legally deficient.

"(3) If the commissioner or the commissioner's designee, as a result of the prehearing review, determines that the recommended finding of abuse or neglect is factually or legally deficient, the commissioner or the commissioner's designee shall so indicate, in writing, and shall reverse the recommended finding. The commissioner shall send notice to the individual by certified mail of the commissioner's decision to reverse or maintain the finding not later than five business days after the decision is made. If the finding is upheld, the notice shall be made in accordance with section 4-177 and shall notify the individual of the right to request a hearing. The individual may request a hearing not later than thirty days after receipt of the notice. The hearing shall be scheduled not later than thirty days after receipt by the commissioner of the request for a hearing, except for good cause shown by either party.

"(d) . . . (2) At the hearing, the individual may be represented by legal counsel. The burden of proof shall be on the commissioner to prove that the finding is supported by a fair preponderance of the evidence submitted at the hearing.

"(3) Not later than thirty days after the conclusion of the hearing, the hearing officer shall issue a written decision to either reverse or uphold the finding. The decision shall contain findings of fact and a conclusion of law on each issue raised at the hearing.

"(e) Any individual aggrieved by the decision of the hearing officer may appeal the decision in accordance with section 4-183. . . ."

misconduct are deemed substantiated.[12] Once the investigation is complete, the department must notify the child's parents or guardians, the alleged perpetrator, and the mandated reporter of the outcome of the investigation. Dept. of Children & Families, Policy Manual § 34-3-6 (Policy Manual).[13]

Section 17a-101k (a) requires the department to maintain a central registry of the names of individuals whom the department has found to have abused or neglected children pursuant to the investigative process. If the allegations of abuse or neglect are substantiated after the investigation, § 17a-101g (b) directs the department to additionally determine "whether: (1) [t]here is an identifiable person responsible for such abuse or neglect; and (2) such identifiable person poses a risk to the health, safety or well-being of children and should be recommended . . . for placement on the child abuse and neglect registry . . . ." See also Regs., Conn. State Agencies § 17a-101k-3 (a); Policy Manual, supra, § 34-2-8. In some cases, however, the placement of the alleged perpetrator's name on the central registry is required. See Regs., Conn. State Agencies § 17a-101k-3 (b).[14]

[12] Section 17a-101k-1 (11) of the Regulations of Connecticut State Agencies defines " '[s]ubstantiated' " to mean "that the department has found after investigation of a report, pursuant to section 17a-101g of the Connecticut General Statutes, that there is reasonable cause to believe that child abuse or neglect has occurred and that a specific person is the individual responsible for an act or acts of child abuse or neglect . . . ."

[13] We note that the aforementioned individuals are notified of the outcome of the department's initial investigation regardless of whether the allegations are substantiated or unsubstantiated. Policy Manual, supra, § 34-3-6. Furthermore, in the event that allegations of sexual abuse or serious physical abuse are substantiated, the department must notify the State's Attorney's Office, local law enforcement, and the Bureau Chief of Child Welfare Services. Id.

[14] Section 17a-101k-3 (b) of the Regulations of Connecticut State Agencies provides: "A person shall be deemed to pose a risk to the health, safety or well-being of children, and listed on the central registry, when: (1) the child abuse or neglect resulted in or involves (A) the death of a child, (B) the risk of serious physical injury of a child, or (C) the serious physical or emotional harm of a child; (2) the substantiation is for sexual abuse and

"If the commissioner determines that a person should be listed on the [central] registry, that information is confidential, except where authorized specifically by statute or regulation, and unlawful disclosure is a criminal offense. . . . Statutes that authorize disclosure are limited to specific governmental agencies or persons directly involved with child protection and agencies that license persons providing child care services or that employ persons charged with child protection, such as the [department], the [D]epartment of [P]ublic [H]ealth and the [D]epartment of [S]ocial [S]ervices. . . . Mindful of the potential effect of such disclosures, § 17a-101k (b) (3) provides in relevant part: 'Upon the issuance of a recommended finding that an individual is responsible for abuse or neglect of a child pursuant to subsection (b) of section 17a-101g, the commissioner shall provide notice of the finding . . . to the individual who is alleged to be responsible for the abuse or neglect.' " (Citations omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 570–71, 964 A.2d 1213 (2009).

Section 17a-101k further provides a two stage appeal process for individuals who have been substantiated as responsible for child abuse or neglect. Once an individual exercises his or her right to appeal the substantiation decision, "[t]he individual or the individual's representative may submit any documentation that is relevant to a determination of the issue and may, at the

the individual responsible is over sixteen (16) years of age; (3) there is a second substantiation for physical or emotional abuse; (4) the individual responsible for physical or emotional abuse is a person entrusted with the care of a child within the meaning of section 17a-101k-1 (6) of the Regulations of Connecticut State Agencies; (5) the individual responsible is arrested for the act of abuse or neglect that is substantiated; or (6) a petition alleging that a child is neglected or uncared for, or a petition alleging grounds for the termination of parental rights pursuant to section 46b-129 or section 17a-112 of the Connecticut General Statutes respectively, and based at least in part on the allegations that form the basis of the substantiation, is pending in Superior Court or on appeal."

discretion of the commissioner or the commissioner's designee, participate in a telephone conference or face-to-face meeting to be conducted for the purpose of gathering additional information that may be relevant to determining whether the recommended finding is factually or legally deficient." General Statutes § 17a-101k (c) (2); see also Regs., Conn. State Agencies § 17a-101k-5. The individual is also provided access to all documents in the possession of the department relevant to the substantiation of abuse or neglect. General Statutes § 17a-101k (c) (1). In the event that the recommended finding of abuse or neglect is found to be "factually or legally deficient," the department must notify the individual of the decision to reverse the recommended finding. General Statutes § 17a-101k (c) (3); see also Regs., Conn. State Agencies § 17a-101k-5 (e). If the finding is upheld, the department must notify the individual of the right to request an administrative hearing. General Statutes § 17a-101k (c) (3); see also Regs., Conn. State Agencies § 17a-101k-5 (f) and (g).

Section 22-12-6 of the Policy Manual provides that the alleged perpetrator and the department are the only parties to the administrative hearing.[15] Furthermore, although the hearing officer has the discretion to permit others to be present at the hearing, the Policy Manual specifically provides that "[t]he only authorized persons at the hearing shall be" the parties, their authorized representatives, and witnesses. Policy Manual, supra, § 22-12-6. The alleged perpetrator can seek legal representation for the hearing. General Statutes § 17a-101k (d) (2); see also Regs., Conn. State Agencies § 17a-101k-8 (a). Within thirty days, the hearing officer must issue a written decision, either reversing or upholding the substantiation finding. General Statutes § 17a-101k (d)

[15] Section 22-12-6 of the Policy Manual also provides that, in the event that the alleged perpetrator is a minor, the parent or guardian of such individual is also a party to the substantiation hearing.

(3). Section 17a-101k (e) permits "[a]ny individual aggrieved by the decision of the hearing officer" to appeal the decision pursuant to § 4-183. See also Regs., Conn. State Agencies § 17a-101k-11 (b).

With this procedural background in mind, we turn to the applicable legal principles and the standard of review. "Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words, statutorily aggrieved, or is classically aggrieved. . . . [Statutory] [s]tanding concerns the question [of] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . .

"The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Footnote omitted; internal quotation marks omitted.) *Handsome, Inc.* v. *Planning & Zoning Commission*, 317 Conn. 515, 525–26, 119 A.3d 541 (2015).

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . Because standing implicates the court's subject matter jurisdiction, the plaintiff ultimately bears the burden of establishing standing. . . . Furthermore,

[a] trial court's determination that it lacks subject matter jurisdiction because of a plaintiff's lack of standing is a conclusion of law that is subject to plenary review on appeal." (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 395, 941 A.2d 868 (2008). With these principles in mind, we turn to the plaintiff's claims.

The plaintiff contends that the trial court improperly determined that she lacks standing to appeal the department's decision.[16] Specifically, the plaintiff claims that she has a specific, personal and legal interest in (1) the entire substantiation process because it implicated her reputational and privacy interests by releasing sensitive information about allegations of sexual abuse against her without affording her the opportunity to participate in the substantiation hearing, and (2) the department's decision because the alleged perpetrator used that decision in a collateral family court proceeding, implicating her constitutional rights to safety and family integrity.[17] The department responds that the trial court correctly concluded that the plaintiff lacks standing to appeal from the department's decision. Specifically, the department claims that the plaintiff did

[16] We note that the plaintiff also contends on appeal that the victim's rights amendment of the Connecticut constitution is broad enough to afford the plaintiff protection in this case. See Conn. Const., amend. XXIX. At oral argument before the trial court, however, the plaintiff conceded that this constitutional provision does not apply to the present case. Therefore, we decline to address this claim on appeal.

[17] The plaintiff asserts that her constitutionally protected rights to safety and family integrity were harmed by a collateral family court proceeding and cites to *Santosky* v. *Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), *Wooley* v. *Baton Rouge*, 211 F.3d 913 (5th Cir. 2000), and *In re Angel A.*, Superior Court, judicial district of Middlesex, Child Protection Session at Middletown, 2004 WL 2167036, *1 (August 27, 2004), in support of her claim. We do not find these cases to be relevant authority because they involved parental rights termination and custody proceedings, which are not the subject of this appeal.

not establish that she has a specific, personal and legal interest in the substantiation process that is distinguishable from that of the general public and that the plaintiff's claims regarding the use of the substantiation decision in a collateral family court proceeding do not give rise to such an interest in the department's decision. We agree with the department.

Resolution of the plaintiff's claims requires us to examine the statutory scheme and the purpose of the central registry and the substantiation process. We have previously explained that the "legislature's stated purpose in requiring the department to maintain the [central] registry is 'to prevent or discover abuse of children . . . .' " *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 572–73, quoting General Statutes § 17a-101k (a). In *Hogan*, this court noted that, in enacting the central registry statutes, the legislature recognized the consequences of placing an individual's name on the central registry and expressed concern about ensuring that alleged perpetrators are provided with adequate procedural due process protections. *Hogan* v. *Dept. of Children & Families*, supra, 581.

The department claims, and the trial court found, that the present case is substantially similar to *Doe* v. *Board of Education*, United States District Court, Docket No. 3:11CV1581 (JBA) (D. Conn. September 17, 2012). The plaintiff claims that *Board of Education* is distinguishable from the present case because the reversal of the department's substantiation finding in *Board of Education* occurred at the time of the internal review rather than at the substantiation hearing, as in the present case. Although we are not bound by it, we agree with the reasoning of *Board of Education*, and find it useful for our resolution of the plaintiff's appeal.

In *Board of Education*, after an investigation, the department substantiated allegations that the plaintiff

minor child had been sexually abused by an educator in the town's school system. Id. After an internal review, the department reversed its finding that the educator had abused the minor child. Id. The department denied the repeated requests of the minor child's parents for an opportunity to participate in the department's review proceedings and to rebut the findings of the department's internal review. Id.

Thereafter, the plaintiffs, the minor child and his parents, brought a claim in federal court alleging, inter alia, that the department's "internal review process violated their constitutional rights under the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment [to the United States constitution] in that they were deprived of a meaningful opportunity to know the basis for the [department's] determination of abuse and to participate in a hearing or review if they disagreed with that determination." Id. In response, the department contended that the plaintiffs lacked standing to bring their due process claims because the department's "internal review process conducted under . . . § 17a-101k is an administrative enforcement decision akin to the decision whether or not to pursue a criminal prosecution." Id. The court in *Board of Education* granted the department's motion to dismiss for lack of standing, reasoning as follows: "A state child welfare agency's review of its decision to list an individual on the state [child abuse] registry is sufficiently similar to a prosecuting authority's review of a criminal complaint that a third party lacks a judicially cognizable interest in the prosecution or nonprosecution of that complaint . . . . While [the] [p]laintiffs here certainly had a personal interest in the outcome of [the department's] internal review of the decision to list [the educator's] name on the state [child abuse] registry, legally, this interest is not distinguishable from the general public's interest in protecting children. The internal review procedures were estab-

lished to safeguard the due process rights of those who have been accused of abuse and listed on the state [child abuse] registry, and thus [the educator], rather than [the] [p]laintiffs, was the party-in-interest for the internal review conducted by [the department]." Id.

We are persuaded by the court's reasoning in *Board of Education*. Like the trial court, we are unconvinced by the plaintiff's claim that *Board of Education* is distinct from the present case on the ground that, in *Board of Education*, the department reversed its substantiation finding at the internal review stage rather than at the substantiation hearing. As explained in *Hogan* and *Board of Education*, the purpose behind the substantiation appeal process is to ensure that alleged perpetrators of abuse or neglect are afforded an opportunity to present evidence to rebut the department's findings due to the potential adverse effects of being listed on the central registry. See *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 570–71; *Doe* v. *Board of Education*, supra, United States District Court, Docket No. 3:11CV1581 (JBA). In contrast to an abuse or neglect proceeding conducted pursuant to General Statutes § 46b-129 and a termination of parental rights proceeding pursuant to General Statutes § 17a-112, in which the alleged victim is a party in interest, the plaintiff in the present case was not an authorized party to the substantiation proceeding. See, e.g., *In re Melody L.*, 290 Conn. 131, 157, 962 A.2d 81 (2009) (holding that children have standing to appeal from judgment terminating parental rights of their parents), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 746–47, 91 A.3d 862 (2014); see also Policy Manual, supra, § 22-12-6.

At oral argument before this court, counsel for the plaintiff conceded that the central registry serves a "legitimate public purpose that is not unique to [the plaintiff]," but further explained to this court that this

acknowledgment was not salient to the plaintiff's argument because the plaintiff is more concerned with the substantiation of sexual abuse and emotional neglect than the listing of the alleged perpetrator's name on the central registry. Counsel for the plaintiff contended that the department had made two separate findings regarding the alleged perpetrator: (1) a finding substantiating claims of sexual abuse and emotional neglect against the plaintiff; and (2) a finding that the alleged perpetrator posed a risk to the general public. Counsel for the plaintiff asserted that the finding of substantiation directly affects the plaintiff herself. We disagree.

"The predicate to consideration for placement of one's name on the [central] registry is a 'finding that an individual is responsible for abuse or neglect of a child pursuant to subsection (b) of [§] 17a-101g . . . .' " *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 573, quoting General Statutes § 17a-101k (b). As previously noted in this opinion, the department must generally substantiate abuse or neglect and make an independent finding that the alleged perpetrator "poses a risk to the health, safety or well-being of children" before recommending that the individual's name be placed on the central registry. General Statutes § 17a-101g (b) (2); see also Regs., Conn. State Agencies § 17a-101k-3 (c); Policy Manual, supra, § 34-2-8. In some cases, however, the entry of the alleged perpetrator's name on the central registry is mandatory. See Regs., Conn. State Agencies § 17a-101k-3 (b); see also footnote 14 of this opinion. For example, an individual is automatically "deemed to pose a risk to the health, safety or well-being of children, and listed on the central registry, when . . . (2) the substantiation is for sexual abuse and the individual responsible is over sixteen . . . years of age . . . ." Regs., Conn. State Agencies § 17a-101k-3 (b). Furthermore, the name of an individual who

has been substantiated as the individual responsible for the sexual abuse of a child may be entered on the central registry prior to the exhaustion or waiver of all administrative appeals available to the alleged perpetrator. See General Statutes § 17a-101g (d).

In the present case, placement of the alleged perpetrator's name on the central registry was mandatory as sexual abuse was substantiated and the person responsible was more than sixteen years of age. Therefore, contrary to the plaintiff's argument, the department was not required to conduct a separate analysis of whether the alleged perpetrator "pose[d] a risk to the health, safety or well-being of children . . . ." Regs., Conn. State Agencies § 17a-101k-3 (b). Because the department in the present case was not required to make any additional findings other than the determination that the allegations of sexual abuse were substantiated before placing the alleged perpetrator's name on the central registry, we are not persuaded by the plaintiff's argument bifurcating the department's findings and we conclude that the plaintiff does not have a specific, personal and legally protected interest in the department's substantiation finding. This finding was an essential element of the department's determination that an individual's name should be entered on the central registry, which, as previously discussed in this opinion, is for the benefit of the general public. See *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 581; *Doe* v. *Board of Education*, supra, United States District Court, Docket No. 3:11CV1581 (JBA). We next consider the plaintiff's specific asserted interests.

The plaintiff first claims that she has a specific, personal and legal interest in the entire substantiation process because it implicated her reputational and privacy

interests.[18] Specifically, the plaintiff claims that because she was statutorily required to participate in the department's initial substantiation investigation and testified, revealing personal information, this created a personal and legal interest in the entire process during which sensitive information about the plaintiff was released. See General Statutes § 17a-101g (a) and (b). Although we recognize that the plaintiff was required to participate in the investigation and that her information must remain confidential throughout the investigative and substantiation appeal process, this does not give the

[18] The plaintiff cites to *Doe* v. *Boland*, 698 F.3d 877 (6th Cir. 2012), and *Doe* v. *Barrington*, 729 F. Supp. 376 (D.N.J. 1990), in support of her claim. We find these cases wholly inapplicable to the present case.

In *Boland*, in an attempt to help the defendants avoid child pornography charges, an attorney downloaded images of two identifiable children from a stock photography website and digitally manipulated the photographs to make it appear as though the children were engaged in sexual acts. *Doe* v. *Boland*, supra, 698 F.3d 879. The question presented in *Boland* was whether the plaintiffs satisfied the requirements for obtaining relief under 18 U.S.C. § 2255, which provides a civil remedy of a minimum of $150,000 for "[a]ny person who, while a minor, was a victim" of various sex crimes "and who suffers personal injury as a result . . . ." Id., 880. The court in *Boland* held that "[b]y sharing the morphed images with defense counsel and court staff and displaying the images in a courtroom, [the attorney] invaded [the children's legally protected reputational] interests" and that this sufficed "to establish standing . . . ." Id., 882.

The plaintiff further cites to *Doe* v. *Barrington*, supra, 729 F. Supp. 376, for the general proposition that an individual maintains a right to privacy under the fourteenth amendment. In *Barrington*, after police officers revealed to the plaintiff's neighbors that the plaintiff's husband had contracted Acquired Immune Deficiency Syndrome (AIDS), the neighbor contacted the media and the parents of children in the local school, which the plaintiff's four children also attended. Id., 378–79. The plaintiff, as guardian for her minor children, brought an action pursuant to 42 U.S.C. § 1983 against the police officers for violation of her children's rights to privacy. Id., 386. The court held that the plaintiff's "children ha[d] standing to sue for the violation of their right to privacy from governmental disclosure of their father's infection with AIDS" because a family member's diagnosis with AIDS constitutes a "personal matter" that is constitutionally protected. Id. Neither of these cases supports the plaintiff's claim that she has a specific, personal and legal interest in the proceeding in the present case because it implicated her reputational and privacy interests.

plaintiff a specific, personal and legal interest in the department's decision from which the plaintiff now appeals.

As we explained in *Hogan*, the department's determination to place an individual's name on the central registry is generally confidential. *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 570. There are limited statutory exceptions to this rule, however, to aid the department in its investigation of child abuse or neglect, and to permit specific governmental agencies or individuals who provide child protection services, child care service licensing agencies, and agencies "that employ persons charged with child protection" to request background checks. Id.; see also General Statutes § 17a-101k (b) (3); Regs., Conn. State Agencies § 17a-101k-15.

In the present case, upon receiving a report of possible child abuse, the department was statutorily required to initiate an investigation of the matter and to meet with the alleged victim and her family. General Statutes § 17a-101g (a) and (b); see also Policy Manual, supra, § 34-3-5. Furthermore, because the report in this case involved allegations of sexual abuse, the department was also required to notify the State's Attorney's Office, local law enforcement, and the Bureau Chief of Child Welfare Services once it had substantiated the allegations of abuse. Policy Manual, supra, § 34-3-6; see also footnote 13 of this opinion. In support of her claim regarding her reputational and privacy interests, the plaintiff relies solely on a newspaper article written about a criminal prosecution of the alleged perpetrator. The newspaper article discussed the plaintiff's age, the fact that the plaintiff was a relative of the alleged perpetrator, the location of the alleged incident, and a video that was used as evidence in support of the abuse in the collateral criminal proceeding. Nothing in this article indicates that the department revealed any confidential

information from the investigative process. Thus, the plaintiff fails to demonstrate that the department disclosed her information outside the requirements of the investigation into her allegations of abuse.

Although we recognize the importance of maintaining the confidentiality of the victims of abuse and neglect, their reputation and privacy rights do not give rise to a specific, personal and legal interest in the entire substantiation process. Therefore, an administrative appeal from the department's final decision at a substantiation hearing is not a proper avenue to vindicate the plaintiff's reputational and privacy interests.

The plaintiff further claims that the use of the department's decision in a collateral family court proceeding implicated her constitutional rights to safety and family integrity, which gave rise to a specific, personal and legal interest in the department's decision.[19] Specifically, the plaintiff asserts that the alleged perpetrator used the department's decision in a collateral family court proceeding as evidence that the alleged perpetrator had not sexually abused the plaintiff and that this substantially increased the chance of reunification with the plaintiff. We disagree. The fact that the department's decision, or prior substantiation finding, was used in a collateral family court proceeding does not create a specific, personal and legal interest in the department's decision. Instead, if the plaintiff challenges the use of the department's decision in the collateral proceeding, that must be addressed in that collateral proceeding or in an appeal therefrom.

[19] The plaintiff further claims that her interests were harmed because she was deprived of the protective services that flow from a substantiation finding. To the extent that the plaintiff contends that this gives her a specific, personal and legal interest in the substantiation process, we decline to address this contention because the plaintiff raised it for the first time in her reply brief. See, e.g., *Rathbun* v. *Health Net of the Northeast, Inc.*, 315 Conn. 674, 703–704, 110 A.3d 304 (2015).

Both of the plaintiff's claims, as we understand them, relate to the department's failure to notify her and allow her to participate in the substantiation hearing. Our resolution of the present appeal does not call upon us to conduct a substantive review of the department's procedures; therefore, we decline the plaintiff's invitation to do so now. In the present case, the plaintiff has failed to establish that she has any constitutional rights grounded in the department's decision and she may not assert interests that stem from a challenge to the department's overall substantiation appeal process in an attempt to circumvent the requirement of subject matter jurisdiction.

On the basis of the foregoing analysis, we conclude that the plaintiff has not established a specific, personal and legally protected interest in the department's decision greater than any other member of the community. The plaintiff's asserted interests in her reputation, privacy, safety, and family integrity constitute an insufficient basis upon which classical aggrievement may be claimed. Because the plaintiff has failed to satisfy the first prong of the classical aggrievement test, we need not reach the question of whether the plaintiff's asserted interest "has been specially and injuriously affected" by the department's decision. (Internal quotation marks omitted.) *Handsome, Inc.* v. *Planning & Zoning Commission*, supra, 317 Conn. 526.

The plaintiff does not specifically claim statutory aggrievement on appeal to this court. Nevertheless, to the extent that her claim that there is no statutory, regulatory, or Policy Manual provision that bars an alleged victim from participating in a substantiation hearing can be understood as a statutory aggrievement claim, we address it. The department contends that the statutory scheme does not entitle the alleged victim to formal participation in the administrative hearing process. We agree with the department and conclude

that, to the extent that the plaintiff contends that she was statutorily aggrieved by the department's substantiation appeal process, the statutory scheme does not create an interest for the alleged victim in the substantiation hearing.

A review of the statutory scheme demonstrates that the alleged victim is not a party to the substantiation appeal process and, as we have discussed previously in this opinion, the process is designed to protect the community. Although the alleged victim is entitled to be notified of the outcome of the department's initial investigation into the alleged victim's allegations of abuse or neglect; see Policy Manual, supra, § 34-3-6; the department's substantiation appeal process does not afford the alleged victim an opportunity to challenge the department's determination that such allegations are unfounded. Moreover, despite the fact that the department is required to provide the alleged perpetrator with notice of the substantiation hearing, no statute, regulation, or provision in the Policy Manual requires that the alleged victim be informed of the substantiation hearing or its outcome. Lastly, it is notable that the alleged victim who is the subject of the substantiation is prohibited from testifying at the substantiation hearing. Regs., Conn. State Agencies § 17a-101k-8 (h); see also Policy Manual, supra, § 22-12-7.

In support of her argument that she maintains an interest in the department's decision, the plaintiff cites to a provision in the Policy Manual that provides that "[o]ther persons may be permitted to be *present* for all or part of the hearing at the discretion of the hearing officer . . . ." (Emphasis added.) Policy Manual, supra, § 22-12-6. The fact that "other persons" may be present at a substantiation hearing at the discretion of the hearing officer, however, does not translate into a right for the alleged victim to participate in these hearings. In fact, in light of the lack of a provision entitling

the alleged victim to notice of the substantiation hearing and the prohibition on the alleged victim's testimony at the substantiation hearing, it seems clear that this provision is not intended to provide alleged victims with an opportunity to be present at substantiation hearings. See General Statutes § 17a-101k (c) (3); Regs., Conn. State Agencies § 17a-101k-8 (h). Nothing in the statutory scheme makes alleged victims parties to substantiation hearings or otherwise affords them rights to appeal from the reversal of a decision. Accordingly, we conclude that the plaintiff is not "within the zone of interests" intended to be covered by the statutory scheme. (Internal quotation marks omitted.) *Handsome, Inc.* v. *Planning & Zoning Commission*, supra, 317 Conn. 525.

The plaintiff cannot demonstrate that the statutory scheme was designed to protect any interest of hers or that she has a specific, personal and legal interest in the department's decision, or any part of the department's substantiation appeal process. Therefore, the plaintiff is not a proper party to request an adjudication of the issue. Accordingly, we conclude that the trial court properly dismissed the plaintiff's claims for lack of standing.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* VICTOR O.*
(SC 19459)

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

Syllabus

Pursuant to statute ([Rev. to 2001] § 53a-70 [b] [3], as amended by P.A. 02-138, § 5), any person found guilty of sexual assault in the first degree

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

"shall be sentenced to a term of imprisonment and a period of special parole . . . which together constitute a sentence of at least ten years."

The defendant, who had been convicted of the class A felony of sexual assault in the first degree in violation of the statute ([Rev. to 2001] § 53a-70 [a] [2], as amended by P.A. 02-138, § 5) prohibiting sexual intercourse with a person under thirteen years of age when the actor is more than two years older than that person, as well as two counts of risk of injury to a child, was sentenced to a total effective term of thirty years imprisonment, execution suspended after fifteen years, and twenty years of probation. The probationary term was imposed in connection with the defendant's conviction on the sexual assault and risk of injury counts. On appeal from the judgment of conviction, this court vacated the defendant's sentence and remanded the case for resentencing with respect to the sexual assault conviction on the basis of the state's concession that the sentence did not comply with the statutory scheme because it included a period of probation. In resentencing the defendant, the trial court retained the same term of imprisonment for the sexual assault violation but eliminated the term of probation for that violation. Because the sentences pertaining to the risk of injury counts remained the same, however, the defendant's total effective sentence also was the same as before resentencing. The defendant thereafter filed a motion to correct an allegedly illegal sentence, claiming, inter alia, that his new sentence was illegal because § 53a-70 (b) (3), as this court previously had interpreted that statute in the defendant's appeal from his criminal conviction in *State* v. *Victor O.* (301 Conn. 163), required the trial court to sentence the defendant to a period of special parole, which, when deducted from the defendant's term of imprisonment, would have reduced the amount of prison time that he was required to serve. The trial court denied the defendant's motion, concluding, inter alia, that § 53a-70 (b) (3) does not mandate that persons convicted of sexual assault in the first degree be sentenced to a period of imprisonment and special parole but only that, if a court does impose such a sentence, then the total combined period of imprisonment and special parole must total at least ten years. On the defendant's appeal from the trial court's denial of his motion to correct an illegal sentence, *held* that the trial court correctly concluded that § 53a-70 (b) (3) does not require a court to sentence a person convicted under § 53a-70 to a period of special parole, and, therefore, this court affirmed the trial court's denial of the defendant's motion to correct an illegal sentence: contrary to the defendant's contention, this court did not determine in *Victor O.* that a court is required to sentence a person convicted under § 53a-70 to a term of special parole, and § 53a-70 (b) (3), when read in relation to the broader sentencing scheme, reasonably could be construed as a mandatory minimum sentence provision requiring merely that any sentence of imprisonment and special parole for a conviction under § 53a-70 total a period of at least ten years; moreover, this court's interpretation

of § 53a-70 (b) (3) as a mandatory minimum sentence provision rather than as one requiring special parole avoided conflicts with or inconsistencies in other sentencing provisions in the Penal Code and comported with the legislative history surrounding the special parole statute (§ 54-125e) and the statute (§ 53a-29 [f]) governing the minimum and maximum periods of probation for class B felony convictions under § 53a-70, and the contrary interpretation that the defendant urged would run counter to the legislative intent, reflected throughout the sentencing scheme, that sentencing courts be afforded wide discretion to tailor sentences to fit particular defendants and their crimes and be provided with an array of tools with which to exercise such discretion.

Argued September 18, 2015—officially released January 19, 2016

Procedural History

Motion to correct an illegal sentence, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Kavanewsky, J.*, denied the motion, and the defendant appealed. *Affirmed.*

Stephan E. Seeger, with whom was *Igor G. Kuperman*, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Paul Ferencek*, senior assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The defendant, Victor O., appeals from the trial court's denial of his motion to correct an allegedly illegal sentence, which was imposed upon his conviction of, inter alia, sexual assault in the first degree in violation of General Statutes (Rev. to 2001) § 53a-70 (a) (2), as amended by Public Acts 2002, No. 02-138, § 5 (P.A. 02-138).[1] He claims that the trial court improperly

[1] General Statutes (Rev. to 2001) § 53a-70 (a), as amended by P.A. 02-138, § 5, provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

Hereinafter, all references to § 53a-70 are to the revision of 2001, as amended by P.A. 02-138, § 5, unless otherwise noted.

failed to sentence him to a period of special parole pursuant to § 53a-70 (b) (3), which provides that "[a]ny person found guilty under [§ 53a-70] shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28[2] which together constitute a sentence of at least ten years." (Footnote added.) The state contends that the sentence that the trial court imposed was proper because § 53a-70 (b) (3) does not *require* a period of special parole; rather, the state maintains, it requires only that any period of special parole that *may* be imposed shall, along with the accompanying term of imprisonment, constitute a total sentence of not less than ten years. We agree with the state and, accordingly, affirm the trial court's denial of the defendant's motion.

The following procedural history is relevant to our analysis of the defendant's claim. On November 17, 2005, following a jury trial, the defendant was found guilty of one count of sexual assault in the first degree in violation of § 53a-70 (a) (2), a class A felony; see General Statutes (Rev. to 2001) § 53a-70 (b) (2), as amended by P.A. 02-138, § 5;[3] and two counts of risk of injury to a child in violation of General Statutes (Rev. to 2001) § 53-21 (a) (2), as amended by P.A. 02-138, § 4. The court presiding over the defendant's criminal trial rendered judgment in accordance with the jury verdict and sentenced the defendant to a total effective term of thirty years imprisonment, execution suspended after

[2] General Statutes § 53a-28 (b) authorizes the imposition of various sentences, including a term of imprisonment and a period of special parole. See footnote 6 of this opinion.

[3] Section 53a-70 (b) (2) provides that a violation of § 53a-70 (a) (2) is a class A felony. Section 53a-70 (b) (2) also provides for a nonsuspendable sentence of ten years if the victim of a sexual assault under § 53a-70 (a) (2) is less than ten years of age. Because the defendant's victim was under ten years of age when the sexual assault occurred, the trial court was required to sentence the defendant to a nonsuspendable prison term of not less than ten years.

fifteen years, and twenty years of probation. More specifically, the court sentenced the defendant to twenty years of incarceration, execution suspended after twelve years, and twenty years of probation with respect to count one (first degree sexual assault), twenty years of incarceration, execution suspended after twelve years, and twenty years of probation with respect to count two (risk of injury), to run concurrently with the sentence imposed in connection with count one, and ten years of incarceration, execution suspended after three years, and twenty years of probation with respect to count three (risk of injury), to run consecutively to the sentence imposed in connection with count one.

The defendant appealed from the judgment of conviction, claiming, inter alia, that the sentence that the court imposed for his conviction of sexual assault in the first degree was illegal because § 53a-70 (b) (3), by its plain terms, requires that persons convicted of that offense be sentenced to a period of special parole. See *State* v. *Victor O.*, 301 Conn. 163, 166, 193, 20 A.3d 669, cert. denied, 565 U.S. 1039, 132 S. Ct. 583, 181 L. Ed. 2d 429 (2011). In its brief to this court, the state agreed that the court had imposed an illegal sentence but not for the reason asserted by the defendant. The state argued, rather, that the case should be remanded for resentencing because the defendant's conviction under § 53a-70 (a) (2) was a class A felony, and, under General Statutes § 53a-29 (a),[4] probation is prohibited for persons con-

[4] General Statutes § 53a-29 (a) provides: "The court may sentence a person to a period of probation upon conviction of any crime, other than a class A felony, if it is of the opinion that: (1) Present or extended institutional confinement of the defendant is not necessary for the protection of the public; (2) the defendant is in need of guidance, training or assistance which, in the defendant's case, can be effectively administered through probation supervision; and (3) such disposition is not inconsistent with the ends of justice."

Although § 53a-29 has been amended several times since the defendant's commission of the crimes that formed the basis of his conviction, those amendments have no bearing on the merits of this appeal. In the interest

victed of a class A felony. See *State* v. *Victor O.*, Conn. Supreme Court Records & Briefs, December Term, 2010, State's Brief p. 40. The state observed, however, that sexual assault in the first degree under § 53a-70 can be either a class A or class B felony, depending on the circumstances, and that, when the offense is a class B felony, § 53a-29 (f)[5] expressly authorizes a sentence of probation of "not less than ten years or more than thirty-five years . . . ." The state maintained, therefore, that, contrary to the defendant's interpretation of the statutory scheme, and § 53a-70 (b) (3) in particular, a sentencing court is authorized to impose a period of probation for a violation of § 53a-70 that is a class B felony, but, for a class A felony violation, the only authorized form of supervised release is special parole.

Without any discussion of the parties' competing interpretations, this court remanded the case for resentencing with respect to the defendant's conviction of sexual assault in the first degree, stating in relevant part: "As the state concedes, the sentence that the trial court imposed does not comply with § 53a-70 (b) (3) because it includes a period of probation rather than a period of special parole. Accordingly, the case must be remanded . . . for resentencing [with respect to] the defendant's conviction of sexual assault in the first degree." *State* v. *Victor O.*, supra, 301 Conn. 193.

Thereafter, the trial court resentenced the defendant to a term of imprisonment of twelve years for his convic-

of simplicity, we refer to the current revision of § 53a-29 throughout this opinion.

[5] General Statutes § 53a-29 (f) provides in relevant part: "The period of probation, unless terminated sooner as provided in section 53a-32, shall be not less than ten years or more than thirty-five years for conviction of a violation of subdivision (2) of subsection (a) of section 53-21 or section 53a-70 . . . ."

Subsection (f) of § 53a-29 was codified at General Statutes § 53a-29 (e), as amended by Public Acts 2001, No. 01-84, § 14, when the defendant committed the crimes that formed the basis of his conviction. The relevant language of that statutory provision has not changed in any material respect.

tion of sexual assault in the first degree. The defendant's sentences on the other two counts remained the same. Accordingly, the defendant's total effective sentence after resentencing was the same as before his resentencing: thirty years of incarceration, execution suspended after fifteen years, and twenty years of probation. Subsequently, the defendant filed a motion to correct an allegedly illegal sentence in which he claimed that the new sentence was illegal under § 53a-70 (b) (3), as interpreted by this court in *State* v. *Victor O.*, supra, 301 Conn. 193, because the sentence did not include a period of special parole. The defendant further claimed that, because a new sentence cannot exceed the original total effective sentence imposed; see *State* v. *Raucci*, 21 Conn. App. 557, 563, 575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990); and because parole is deemed to be an extension of the original period of incarceration; see *State* v. *Tabone*, 292 Conn. 417, 429–30, 973 A.2d 74 (2009); the trial court was required to deduct the period of special parole mandated by § 53a-70 (b) (3) from his original total effective prison sentence, thereby leaving him with fourteen rather than fifteen years to serve.

The trial court denied the defendant's motion. The court concluded that *Victor O.* did not hold that the defendant's original sentence was unlawful for the reason advanced by the defendant, namely, that, under § 53a-70 (b) (3), all persons who commit first degree sexual assault must be sentenced to a period of special parole. The court concluded, rather, that the defendant's sentence was unlawful because it included a period of probation, which is prohibited for persons convicted of a class A felony. The trial court further explained, consistent with the interpretation advocated by the state, that § 53a-70 (b) (3) simply requires that, in the event that the court elects to impose a split sentence of incarceration and special parole, as author-

ized by General Statutes § 53a-28 (b) (9),[6] the minimum combined sentence must total a period of at least ten years.

In reaching its determination, the trial court observed that, under well established principles of statutory construction, a legislative scheme must be construed so as to harmonize and give effect to its various parts. The court further observed that, under General Statutes § 54-128 (c),[7] a sentence that consists of incarceration followed by a period of special parole cannot exceed the maximum sentence authorized for the underlying offense. The court explained that, under the defendant's interpretation of § 53a-70 (b) (3), a sentencing court could never impose the maximum term of imprisonment authorized for a class A felony violation of § 53a-70 because of the requirement that the sentence include a period of special parole, which, in combination with any term of imprisonment, cannot exceed the maximum

[6] General Statutes § 53a-28, which sets forth the nine sentences that may be imposed for the commission of an offense, provides in relevant part: "(a) Except as provided in section 17a-699 and chapter 420b, to the extent that the provisions of said section and chapter are inconsistent herewith, every person convicted of an offense shall be sentenced in accordance with this title.

"(b) Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences: (1) A term of imprisonment; or (2) a sentence authorized by section 18-65a or 18-73; or (3) a fine; or (4) a term of imprisonment and a fine; or (5) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a period of probation or a period of conditional discharge; or (6) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a fine and a period of probation or a period of conditional discharge; or (7) a fine and a sentence authorized by section 18-65a or 18-73; or (8) a sentence of unconditional discharge; or (9) a term of imprisonment and a period of special parole as provided in section 54-125e. . . ."

[7] General Statutes § 54-128 (c) provides in relevant part: "The total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted."

allowable sentence. The court concluded that the legislature reasonably could not have intended such a result.

On appeal to this court,[8] the defendant renews the claim he raised in the trial court, namely, that § 53a-70 (b) (3), by its plain and unambiguous terms, and as interpreted by this court in *State* v. *Victor O.*, supra, 301 Conn. 193, requires that he be sentenced to a period of special parole for his conviction of sexual assault in the first degree. We disagree.

We first address the defendant's contention that the issue of statutory interpretation presented in this appeal was decided by this court in *State* v. *Victor O.*, supra, 301 Conn. 193. This claim merits little discussion. Although, in hindsight, it would have benefited the parties if we *had* decided the issue in that case, we did not do so in light of the state's concession that the defendant's sentence was illegal. See id. Instead, in light of that concession, we simply remanded the case to the trial court for resentencing, without considering whether, on remand, the trial court was required to sentence the defendant to a period of special parole. See id. Indeed, our entire discussion of the defendant's claim relating to his sentence consisted of four sentences at the end of the decision, in which we set forth the claim, the relevant statute, the state's concession, and our disposition of the case in light of that concession. Id. To the extent that anything we may have said therein can be construed as deciding the somewhat challenging question of statutory interpretation presented by the present appeal, it was not our intention to do so.[9] We now turn to that question.

[8] The defendant appealed to the Appellate Court from the trial court's denial of the defendant's motion, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[9] As we previously noted, in support of his contention that § 53a-70 (b) (3) requires that he be sentenced to a period of special parole, the defendant relies on our statement in *State* v. *Victor O.*, supra, 301 Conn. 163, that, "[a]s the state concedes, the sentence that the trial court imposed does not comply with § 53a-70 (b) (3) because it includes a period of probation rather

It is axiomatic that, in construing a statute, the objective of this court is to ascertain and give effect to the apparent or expressed intent of the legislature. See, e.g., *State* v. *Smith*, 317 Conn. 338, 346, 118 A.3d 49 (2015). Toward that end, "General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to [the broader statutory scheme]. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *State* v. *Pond*, 315 Conn. 451, 467, 108 A.3d 1083 (2015). It also is well established that, "[i]n cases in which more than one [statutory provision] is involved, we presume that the legislature intended [those provisions] to be read together to create a harmonious body of law . . .

than a period of special parole." Id., 193. Although we recognize that it is possible to construe this statement as indicating that the defendant must be resentenced to a period of special parole instead of a period of probation, we intended only to explain that probation was prohibited and that special parole was the only form of supervised release that could be imposed. Indeed, the state did *not* concede that the defendant's sentence was illegal because it should have included a period of special parole; the state conceded only that probation was not an authorized sentence because the defendant had been convicted of a class A felony. In fact, the state expressly argued that the trial court is never *required* to sentence a defendant to special parole but that, if the court does elect to impose such a sentence, then the term of imprisonment and period of special parole together must total at least ten years.

and we construe the [provisions], if possible, to avoid conflict between them." (Internal quotation marks omitted.) *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 552, 46 A.3d 112 (2012); see also *State* v. *Tabone*, supra, 292 Conn. 434 ("we are bound to harmonize otherwise conflicting statutes to the maximum extent possible without thwarting their intended purpose").

As we previously explained, § 53a-70 (b) (3) provides in relevant part that any person who is found guilty of sexual assault in the first degree under § 53a-70 "shall be sentenced to a term of imprisonment and a period of special parole . . . which together constitute a sentence of at least ten years." Contrary to the defendant's contention, we do not believe that § 53a-70 (b) (3) is susceptible of only one interpretation. If one focuses solely on the first clause, as the defendant does, the statute is most reasonably understood to require that all persons convicted of first degree sexual assault shall be sentenced to a term of imprisonment and a period of special parole. If, however, one reads the second clause as a restrictive modifier of the first, as the state does, the provision reasonably may be construed as a mandatory minimum sentence provision requiring merely that any sentence of imprisonment and special parole add up to a period of at least ten years. We agree with the state and the trial court that, when the statute is read in relation to the broader sentencing scheme, it becomes evident that the second interpretation is the more reasonable one because it harmonizes the statutory scheme into a coherent and cohesive whole, whereas the interpretation advocated by the defendant creates ambiguity within that scheme.

As the state contends, construing § 53a-70 (b) (3) as a minimum sentencing provision rather than as requiring special parole in all cases avoids two fundamental conflicts. First, it avoids a conflict with General Statutes

§ 53a-35a (4),[10] which, with exceptions inapplicable to this case, authorizes a maximum term of imprisonment of twenty-five years for persons convicted of any class A felony. As the trial court explained, if we were to adopt the defendant's interpretation of § 53a-70 (b) (3), a sentencing court never could impose that sentence on a person convicted of violating § 53a-70 because of the requirement of § 54-128 (c) that the length of the combined sentence of imprisonment and special parole not exceed the maximum sentence authorized for the underlying offense. The second interpretation also avoids an inconsistency in § 53a-29 (f), which expressly authorizes the trial court to sentence persons convicted of certain violations of § 53a-70 to a term of probation.[11] See General Statutes § 53a-29 (f) ("[t]he period of probation, unless terminated sooner as provided in section 53a-32, shall be not less than ten years or more than thirty-five years for conviction of a violation of . . . section 53a-70"). As the state maintains, were we to adopt the defendant's interpretation of § 53a-70 (b) (3) as requiring special parole in all cases, it would effectively nullify the portion of § 53a-29 (f) expressly authorizing probation in some of those cases, which would be in contravention of the rule that, whenever possible, we must read statutes to avoid "conflict that would result in a nullification of one by the other . . . ."[12]

[10] Section 53a-35a (4) was codified at General Statutes (Rev. to 2001) § 53a-35a (3) when the defendant committed the crimes that formed the basis of his conviction. Although the language of that statutory provision has changed somewhat, those changes do not bear on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute, unless otherwise noted.

[11] As we previously noted, under § 53a-29 (a), the court may not impose probation for a violation of § 53a-70 that constitutes a class A felony but may do so for a violation of § 53a-70 that constitutes a class B felony. See footnotes 4 and 5 of this opinion and accompanying text.

[12] Relying on the principle "that specific terms in a statute covering a given subject matter will prevail over the more general language of the same or another statute that otherwise might be controlling"; (internal quotation marks omitted) *Branford* v. *Santa Barbara*, 294 Conn. 803, 813, 988 A.2d 221 (2010); the defendant argues that there is no conflict between §§ 53a-70

(Internal quotation marks omitted.) *Stern* v. *Allied Van Lines, Inc.*, 246 Conn. 170, 179, 717 A.2d 195 (1998); see also *Franco* v. *East Shore Development, Inc.*, 271 Conn. 623, 632, 858 A.2d 703 (2004) (in absence of any indication that one statute was intended to supersede or to nullify another, we read two provisions to give both of them effect).

Our interpretation also comports with the legislative history surrounding § 53a-29 (f) and General Statutes § 54-125e, the special parole statute. As this court previously has explained, prior to 1995, "the maximum term of probation for . . . a violation of § 53a-70 . . . was five years. See [e.g.] General Statutes (Rev. to 1985) § 53a-29 (d). In 1995, the legislature, in response to a growing concern about sex offender recidivism, amended . . . § 53a-29 . . . by enacting No. 95-142, § 2, of the 1995 Public Acts, to require the term of probation to be set at not less than ten nor more than

(b) (3) and 53a-35a (4) because the latter statute provides that the sentencing ranges established thereunder shall apply "unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise"; General Statutes § 53a-35a; and § 53a-70 (b) (3) can be interpreted as creating such an exception to § 53a-35a. The defendant's argument is unavailing because § 53a-70 (b) (3) does not purport to provide a sentencing range for persons convicted of first degree sexual assault but, instead, establishes the minimum length of a combined sentence of imprisonment and special parole. Thus, the trial court is still required to consult § 53a-35a to determine the upper limits of a sentence for violations of § 53a-70.

In reliance on the tenet of statutory construction that, "[w]hen two legislative enactments are in conflict and cannot reasonably be reconciled, the later one repeals the earlier one to the extent of the repugnance"; *New Haven Water Co.* v. *North Branford*, 174 Conn. 556, 565, 392 A.2d 456 (1978); the defendant further argues that, because there is an irreconcilable conflict between §§ 53a-29 (f) and 53a-70 (b) (3), the latter must be deemed to have repealed the former to the extent of that conflict. As the defendant's argument acknowledges, however, this principle has applicability only if, after resort to established tools of statutory interpretation, there is no way to reasonably reconcile the two provisions. Because we are satisfied that there is a reasonable interpretation that gives effect to both statutes, we have no occasion to apply this tenet of statutory construction.

thirty-five years for a defendant convicted of violating § 53a-70." (Footnote omitted.) *State* v. *Kelly*, 256 Conn. 23, 89, 770 A.2d 908 (2001). Thereafter, in 1998, "[t]he legislature created the concept of 'special parole' as a new sentencing option . . . by enacting § 54-125e. See Public Acts 1998, No. 98-234, § 3 [P.A. 98-234]." *State* v. *Boyd*, 272 Conn. 72, 78, 861 A.2d 1155 (2004). The legislative history surrounding § 54-125e "indicates that it was intended to operate as a sentencing option in cases [in which] the judge wanted additional supervision of a defendant after the completion of his prison sentence. Michael Mullen, the chairman of the Connecticut [B]oard of [P]arole, testified before the [J]udiciary [C]ommittee and described special parole as a 'sentencing option [that] ensures intense supervision of convicted felons after they're released to the community and allows the imposition of parole stipulations on . . . released inmate[s] to ensure their successful incremental [reentry] into society or if they violate their stipulations, speedy [reincarceration] before they commit [other] crime[s].' " (Emphasis omitted.) Id., 79 n.6, quoting Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1998 Sess., p. 1013.

At the same time that it enacted § 54-125e, the legislature amended § 54-128 to provide that a sentence consisting of a term of imprisonment followed by a period of special parole "shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted." P.A. 98-234, § 4, codified at General Statutes § 54-128 (c). As we explained in *State* v. *Tabone*, supra, 292 Conn. 417, the legislature, in enacting § 54-125e "intended to permit the imposition of special parole as a sentencing option [that] ensures intense supervision of convicted felons after [they are] released to the community and allows the imposition of parole stipulations on the released inmate. At the same time, the legislature intended to prevent the trial

court from sentencing a defendant to a term of imprisonment and to a period of special parole, the total combined length of which exceeds the maximum sentence of imprisonment for the offense [of] which the defendant was convicted."[13] (Internal quotation marks omitted.) Id., 434–35. "It is clear, therefore, that the legislature intended that special parole, as a form of supervised release, should be available to trial courts, provided that its imposition, in combination with a term of incarceration, does not exceed the maximum statutory period of incarceration permitted by law." Id., 435.

As originally enacted, subsection (c) of § 54-125e provided that "[t]he period of special parole shall be not less than one year nor more than ten years except that such period shall be not less than ten years nor more than thirty-five years" for persons who committed cer-

[13] We have explained that "[t]he provision that is now codified at § 54-128 (c) . . . was adopted in response to the testimony of Deborah Del Prete Sullivan, executive assistant public defender and legal counsel for the [O]ffice of the [C]hief [P]ublic [D]efender. Sullivan submitted a letter to the [J]udiciary [C]ommittee stating that the bill as originally drafted . . . would allow the total number of years of imprisonment and the term of special parole (for which a person can be incarcerated) combined to exceed the maximum sentence [that] can be imposed for the offense. As a result, a person could be incarcerated for [a] . . . period of time well in excess of the maximum sentence permitted by the penal statute if [he was] to violate special parole. The concept of parole is that it is an extension of the original period of incarceration imposed as a sentence by the court. The language proposed would not pass constitutional muster, as a person could receive increased penalties without due process. These additional penalties could also violate the constitutional right against double jeopardy." (Internal quotation marks omitted.) *State* v. *Tabone*, 279 Conn. 527, 540–41, 902 A.2d 1058 (2006). To remedy these infirmities, Sullivan proposed that the following language be added to § 54-128 (c): "The total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1998 Sess., p. 1325. As we noted in *State* v. *Tabone*, supra, 279 Conn. 527, the legislature's wholesale adoption of Sullivan's proposed language makes clear "that the legislature intended to resolve the alleged constitutional infirmities [in] the original bill by adding the language recommended by Sullivan . . . ." Id., 541.

tain offenses, including first and second degree sexual assault. P.A. 98-234, § 3, codified at General Statutes (Rev. to 1999) § 54-125e (c).[14] This provision mirrored the requirement of § 53a-29 (f)—then General Statutes (Rev. to 1999) § 53a-29 (e)—that the period of probation for first and second degree sexual assault, among other crimes, be "not less than ten years or more than thirty-five years . . . ." General Statutes § 53a-29 (f). Within one year of its enactment, however, it became apparent that the ten year mandatory minimum requirement of General Statutes (Rev. to 1999) § 54-125e (c), when added to the nine month mandatory minimum prison sentence for second degree sexual assault; see General Statutes (Rev. to 1999) § 53a-71 (b); exceeded the ten year maximum sentence authorized for second degree sexual assault under § 54-128 (c). See *State* v. *Tabone*, 279 Conn. 527, 543–44, 902 A.2d 1058 (2006) (discussing conflict between General Statutes [Rev. to 1999] § 54-125e [c] and § 54-128 [c], as applied to General Statutes [Rev. to 1999] § 53a-71).

To remedy this problem, and to prevent others like it from occurring, the legislature passed Public Acts, Spec. Sess., June, 1999, No. 99-2, § 52 (Spec. Sess. P.A. 99-2), which amended General Statutes (Rev. to 1999) § 54-125e (c)[15] to make the imposition of a term of special parole of more than ten years discretionary rather than mandatory. See *State* v. *Tabone*, supra, 292 Conn.

[14] General Statutes (Rev. to 1999) § 54-125e (c) provides in relevant part: "The period of special parole shall be not less than one year nor more than ten years except that such period shall be not less than ten years nor more than thirty-five years for a person convicted of a violation of . . . section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b . . . ."

[15] General Statutes (Rev. to 1999) § 54-125e (c), as amended by Public Acts, Spec. Sess., June, 1999, No. 99-2, § 52, provides: "The period of special parole shall be not less than one year nor more than ten years except that such period may be for more than ten years for a person convicted of a violation of . . . section 53a-70, *as amended by this act*, 53a-70a, *as amended by this act*, 53a-70b, 53a-71, 53a-72a or 53a-72b, *as amended by this act* . . . ." (Emphasis added.)

435–36 ("the legislature, in apparent recognition of the confusion it had created upon enacting [General Statutes (Rev. to 1999)] § 54-125e [c], amended that statute shortly after its enactment to remove the mandatory minimum period of special parole"). Specifically, Spec. Sess. P.A. 99-2, § 52, amended General Statutes (Rev. to 1999) § 54-125e (c) to provide that the period of special parole for the specified offenses "*may* be for more than ten years" rather than providing that it "shall be not less than ten years nor more than thirty-five years . . . ." (Emphasis added.) Spec. Sess. P.A. 99-2, § 52. In the same public act, the legislature amended General Statutes (Rev. to 1999) § 53a-70 (b)[16] to include the language at issue in this appeal. See Spec. Sess. P.A. 99-2, § 49,[17] codified at General Statutes (Rev. to 2001) § 53a-70 (b). The legislature added similar language to General Statutes (Rev. to 1999) § 53a-70a[18]

[16] General Statutes (Rev. to 1999) § 53a-70 (b) provides: "Sexual assault in the first degree is a class B felony for which one year of the sentence imposed may not be suspended or reduced by the court or, if the victim of the offense is under ten years of age, for which ten years of the sentence imposed may not be suspended or reduced by the court."

[17] General Statutes (Rev. to 1999) § 53a-70 (b), as amended by Spec. Sess. P.A. 99-2, § 49, provides in relevant part: "Sexual assault in the first degree is a class B felony for which two years of the sentence imposed may not be suspended or reduced by the court or, if the victim of the offense is under ten years of age, for which ten years of the sentence imposed may not be suspended or reduced by the court, *and any person found guilty under this section shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of at least ten years*." (Emphasis added.)

In 2002, the legislature enacted Public Acts 2002, No. 02-138, § 5, which amended General Statutes (Rev. to 2001) § 53a-70 (b) to make certain violations of that statute class A felonies with longer, nonsuspendable sentences and transferred the foregoing italicized language to its own subdivision within § 53a-70 (b).

[18] General Statutes (Rev. to 1999) § 53a-70a (b), as amended by Spec. Sess. P.A. 99-2, § 50, provides in relevant part: "Aggravated sexual assault in the first degree is a class B felony and any person found guilty under this section shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court *and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of twenty years*." (Emphasis added.)

(aggravated sexual assault in first degree) and General Statutes (Rev. to 1999) § 53a-72b[19] (third degree sexual assault with firearm). See Spec. Sess. P.A. 99-2, §§ 50 and 51. In all three statutes, the language was added to the section of the statute containing the nonsuspendable portion of a defendant's sentence.

Although our research has not revealed any legislative history explaining the rationale for these amendments, it is well established that, "[i]n determining the true meaning of a statute when there is genuine uncertainty as to how it should apply, identifying the problem in society to which the legislature addressed itself by examining the legislative history of the statute under litigation is helpful." *State* v. *Campbell*, 180 Conn. 557, 562, 429 A.2d 960 (1980). In the present case, the problem that the legislature sought to address in 1999 when it amended General Statutes (Rev. to 1999) § 54-125e (c) was the irreconcilable conflict between that provision and the requirement of § 54-128 (c) that the total combined period of imprisonment and special parole not exceed the maximum authorized sentence for an offense. Because there is no indication that the legislature had any other purpose in amending General Statutes (Rev. to 1999) § 54-125e (c), the most likely reason for the simultaneous amendments to General Statutes (Rev. to 1999) §§ 53a-70, 53a-70a and 53a-72b was to ensure that, notwithstanding the change to General Statutes (Rev. to 1999) § 54-125e (c), which was needed to harmonize certain provisions of the new special parole statute, persons who commit the most serious sexual offenses would remain subject to a longer mini-

[19] General Statutes (Rev. to 1999) § 53a-72b (b), as amended by Spec. Sess. P.A. 99-2, § 51, provides in relevant part: "Sexual assault in the third degree with a firearm is a class C felony for which two years of the sentence imposed may not be suspended or reduced by the court *and any person found guilty under this section shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of ten years*." (Emphasis added.)

mum period of special parole in cases in which the trial court chooses to impose such a sentence on them.

This interpretation is sensible not only because it comports with the original intent of § 54-125e (c), that is, requiring a longer period of special parole for certain offenses, but also because we do not believe that the legislature would, in so cryptic a fashion, turn what was intended to be a new sentencing option into a sentencing directive without any discussion of its reasons for doing so. We agree with the state, moreover, that tying a sentencing court's hands in this manner—that is, limiting it to a single punishment for persons convicted of first degree sexual assault—runs counter to the legislative intent, reflected throughout the sentencing scheme, that sentencing courts be afforded "wide discretion to tailor a just sentence in order to fit a particular defendant and his crimes"; (internal quotation marks omitted) *State* v. *Johnson*, 316 Conn. 34, 40, 111 A.3d 447 (2015); and be provided with an array of tools with which to exercise such discretion. See, e.g., General Statutes § 53a-28 (b) (authorizing nine different sentences from which trial court may choose in sentencing convicted persons).

We also can perceive no reason, and the defendant has proffered none, why the legislature, having extended the maximum period of supervised release for sexual offenders to thirty-five years, would reduce by almost 50 percent (seventeen years) the amount of time that the most serious sexual offenders are subject to supervised release. That is precisely what would occur, however, if we were to adopt the defendant's interpretation of § 53a-70 (b) (3).[20] To the extent that

[20] This is so because the maximum authorized sentence for a class B felony violation of § 53a-70 is twenty years; see General Statutes § 53a-35a (6); with a minimum, nonsuspendable sentence of two years. General Statutes § 53a-70 (b) (1). Because the length of a combined sentence of imprisonment and special parole cannot exceed the maximum authorized sentence for the offense; General Statutes § 54-128 (c); the longest period of special parole that could be imposed on a person who commits a class

the defendant contends that the legislature may have intended this anomalous result because special parole allows for more intensive supervision of convicts after they are released from prison, we are not persuaded. Although it may be true that the terms of release for special parolees are more restrictive than they are for probationers in the short term, it is undisputed that probation exposes a defendant to imprisonment for a much longer period of time, arguably making it, depending on one's perspective, a considerably more onerous punishment.[21] For this reason, and for the reasons that we previously discussed, we conclude that the trial court correctly determined that § 53a-70 (b) (3) does not mandate that persons convicted of first degree sexual assault be sentenced to a period of imprisonment and special parole; it provides, rather, that, if the court elects to impose such a sentence, then the total combined period of imprisonment and special parole must total at least ten years.[22]

B felony violation of § 53a-70 would be eighteen years. In contrast, § 53a-29 (f) authorizes up to thirty-five years of probation for that offense.

[21] As we previously have explained, "[p]ursuant to § 54-128 (c), when a defendant violates special parole, he is subject to incarceration only for 'a period equal to the unexpired portion of the period of special parole.' Thus, for a violation that occurs on the final day of the defendant's special parole term, the defendant would be exposed to one day of incarceration. Special parole, therefore, exposes a defendant to a decreasing period of incarceration as the term of special parole is served. On the other hand, when a defendant violates his probation, the court may revoke his probation, and, if revoked, 'the court shall require the defendant to serve the sentence imposed or impose any lesser sentence.' . . . Accordingly, if [a] defendant . . . violate[s] his probation on the final day of [the probationary] term, he would be exposed to the full suspended sentence of . . . incarceration [whatever that sentence may be]. Thus, in contrast to a term of special parole, the defendant is exposed to incarceration for the full length of the suspended sentence, with no decrease in exposure as the probationary period is served, for the entirety of the probationary period." (Citation omitted; footnote omitted.) *State* v. *Tabone*, supra, 292 Conn. 429.

[22] We note that the defendant argues that the rule of lenity compels us to strictly construe § 53a-70 (b) (3) against the state. It is well established that "courts do not apply the rule of lenity unless a reasonable doubt persists about a statute's intended scope even after resort to the language and

In reaching our conclusion, we are mindful that our rather intricate sentencing scheme is not always a model of clarity and that sometimes it is difficult to ascertain the rationale underlying all of its components. Nevertheless, it is our duty to seek to reconcile that scheme into a coherent system, in a manner that effectuates, to the greatest extent possible, the legislative intent behind the scheme. We believe that we have done so in the present case.

The trial court's denial of the defendant's motion to correct an illegal sentence is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JASON B.*
(SC 19446)

Rogers, C. J., and Palmer, Zarella, Eveleigh and McDonald, Js.

Syllabus

Pursuant to statute ([Rev. to 2005] § 53a-70 [b] [3]), any person found guilty of sexual assault in the first degree "shall be sentenced to a term of imprisonment and a period of special parole . . . which together constitute a sentence of at least ten years."

The defendant, who had been convicted of, inter alia, the class B felony of sexual assault in the first degree in violation of the statute ([Rev. to 2005] § 53a-70 [a] [1]) prohibiting a person from compelling another person to engage in sexual intercourse by use of force, was sentenced to a total effective term of twenty-five years of incarceration, execution suspended after fifteen years, and thirty-five years of probation. The Appellate Court affirmed the judgment of conviction. Thereafter, the defendant filed a motion to correct an allegedly illegal sentence, claiming

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structure, legislative history, and motivating policies of the statute." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lutters*, 270 Conn. 198, 219, 853 A.2d 434 (2004). There is no role for the rule of lenity in the present case because, after applying the traditional tools of statutory interpretation in seeking to construe § 53a-70 (b) (3), we are not left with a reasonable doubt as to the meaning of that provision.

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

that his sentence for his conviction of sexual assault in the first degree was illegal because § 53a-70 (b) (3), as interpreted by this court in *State* v. *Victor O.* (301 Conn. 163), required that the defendant be sentenced for his conviction under § 53a-70 to a period of special parole, which, when combined with his term of imprisonment, would have reduced the amount of prison time that he was required to serve. The trial court granted the defendant's motion in part, concluding that the defendant was entitled to be resentenced to a term of imprisonment and a period of special parole. The trial court concluded, however, that the period of special parole did not need to be deducted from the defendant's total effective sentence so as to avoid expanding the defendant's original sentence. The court thereupon resentenced the defendant to a total effective term of fifteen years incarceration and ten years of special parole. On the defendant's appeal and the state's cross appeal from the court's decision with respect to resentencing and the defendant's motion to correct, *held* that, in light of this court's decision in the companion case of *State* v. *Victor O.* (320 Conn. 239), § 53a-70 (b) (3) does not mandate that persons convicted of sexual assault in the first degree be sentenced to a period of imprisonment and special parole but, rather, provides that, if a court elects to impose such a sentence, the total combined period of imprisonment and special parole must add up to at least ten years; consequently, this court reversed the trial court's partial granting of the defendant's motion to correct an illegal sentence and its resentencing of the defendant, and remanded the case to the trial court with direction to deny the defendant's motion to correct.

Argued September 18, 2015—officially released January 19, 2016

Procedural History

Motion to correct an illegal sentence, brought to the Superior Court in the judicial district of Fairfield, where the court, *Devlin, J.*, granted the motion in part and resentenced the defendant; thereafter, the defendant appealed, and the state cross appealed. *Reversed*; *judgment directed.*

Mark Rademacher, assistant public defender, for the appellant-cross appellee (defendant).

Adam E. Mattei, assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee-cross appellant (state).

PALMER, J. The defendant, Jason B., appeals[1] and the state cross appeals from the the trial court's granting in part of the defendant's motion to correct an allegedly illegal sentence and its subsequent resentencing of the defendant. The state claims that the trial court incorrectly concluded that General Statutes (Rev. to 2005) § 53a-70 (b) (3),[2] which provides that "[a]ny person found guilty [of sexual assault in the first degree] shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of at least ten years," required the court to sentence the defendant to a period of special parole for his conviction of first degree sexual assault. The state maintains that § 53a-70 (b) (3) requires only that any period of special parole that may be imposed shall, along with the accompanying term of imprisonment, constitute a total sentence of not less than ten years. The defendant claims that the trial court correctly determined that § 53a-70 (b) (3) requires that he be sentenced to a period of special parole but incorrectly concluded that the period of special parole need not be deducted from the defendant's original total effective sentence. We agree with the state.

The following procedural history is relevant to our analysis of the parties' claims. In 2006, following a jury trial, the defendant was found guilty of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), a class D felony; see General Statutes

[1] The defendant appealed to the Appellate Court from the trial court's decision with respect to the defendant's motion to correct an allegedly illegal sentence and with respect to resentencing, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] Hereinafter, all references to § 53a-70 are to the 2005 revision unless otherwise noted.

§ 53a-95 (b); and sexual assault in the first degree in violation of § 53a-70 (a) (1), a class B felony. See General Statutes (Rev. to 2005) § 53a-70 (b) (1). In accordance with the jury verdict, the defendant was sentenced to five years of incarceration for his conviction of unlawful restraint and to a consecutive term of twenty years of incarceration, execution suspended after ten years, and thirty-five years of probation, for his conviction of first degree sexual assault. Accordingly, the total effective sentence for his conviction of both offenses was twenty-five years of incarceration, execution suspended after fifteen years, and thirty-five years of probation.

The defendant appealed from the judgment of conviction to the Appellate Court, which affirmed. See *State* v. *Jason B.*, 111 Conn. App. 359, 360, 368, 958 A.2d 1266 (2008), cert. denied, 290 Conn. 904, 962 A.2d 794 (2009). Subsequently, the defendant filed a motion to correct an allegedly illegal sentence, in which he argued that his sentence for first degree sexual assault was illegal because § 53a-70 (b) (3), as interpreted by this court in *State* v. *Victor O.*, 301 Conn. 163, 193, 20 A.3d 669, cert. denied, 565 U.S. 1039, 132 S. Ct. 583, 181 L. Ed. 2d 429 (2011), requires that persons convicted of that offense be sentenced to a term of imprisonment and a period of special parole. The defendant further claimed that, because a new sentence cannot exceed the original total effective sentence imposed; see *State* v. *Raucci*, 21 Conn. App. 557, 563, 575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990); and because parole is deemed to be an extension of the original period of incarceration; see *State* v. *Tabone*, 292 Conn. 417, 429–30, 973 A.2d 74 (2009); the trial court was required to deduct the period of special parole mandated by § 53a-70 (b) (3) from his original total effective prison sentence, thereby leaving him with fourteen rather than fifteen years to serve.

The trial court agreed with the defendant that, under § 53a-70 (b) (3), he was entitled to be resentenced to a term of imprisonment and a period of special parole. The court disagreed, however, that the period of special parole must be deducted from his total effective sentence so as to avoid an unlawful expansion of the original sentence. The court concluded, rather, that, pursuant to the aggregate package theory of sentencing, its role in resentencing the defendant was to ensure that the corrected sentence reflected the intent of the original sentencing court to the greatest extent possible. Toward that end, and noting that the intent of the original sentencing court was to sentence the defendant to thirty-five years of probation, the longest period of supervised release authorized by law, the court sentenced the defendant to five years of imprisonment for his conviction of unlawful restraint and to a consecutive term of ten years of imprisonment and ten years of special parole for his conviction of first degree sexual assault.

On appeal, the state claims that the trial court incorrectly determined that, under § 53a-70 (b) (3), it was required to resentence the defendant to a period of special parole for his conviction of first degree sexual assault. The defendant claims that the trial court correctly interpreted § 53a-70 (b) (3) but incorrectly concluded that it was not required to deduct the period of special parole from the defendant's original total effective sentence. The defendant cannot prevail on his claim in light of our decision today in the companion case of *State* v. *Victor O.*, 320 Conn. 239, 128 A.3d 940 (2016), in which we addressed and rejected a claim that General Statutes (Rev. to 2001) § 53a-70 (b) (3), as amended by Public Acts 2002, No. 02-138, § 5,[3] requires

[3] The 2002 version of § 53a-70 (b) (3) is identical to the 2005 revision of that statute, the latter of which is applicable to the defendant in the present case based on the date on which he committed the conduct that led to his conviction of first degree sexual assault.

that persons convicted of first degree sexual assault be sentenced to a term of imprisonment and a period of special parole. As we explained in that case, contrary to the defendant's contention in the present case, this court did not decide the issue of statutory interpretation presented by this appeal in *State* v. *Victor O.*, supra, 301 Conn. 193. *State* v. *Victor O.*, supra, 320 Conn. 247. As we further explained, application of established tools of statutory interpretation to § 53a-70 (b) (3) compels the conclusion that that provision does not mandate that persons convicted of first degree sexual assault be sentenced to a period of imprisonment and special parole; rather, it provides that, if the sentencing court *elects* to impose such a sentence, then the total combined period of imprisonment and special parole must add up to at least ten years.[4] Id., 258.

The trial court's partial granting of the defendant's motion to correct an illegal sentence and its resentencing of the defendant are reversed and the case is remanded with direction to deny the defendant's motion.

In this opinion the other justices concurred.

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[4] In light of our conclusion that the trial court was not required to resentence the defendant to a term of imprisonment and a period of special parole, it is unnecessary for us to address the defendant's claim that the trial court should have deducted the period of special parole from his original total effective sentence in order to avoid an unlawful expansion of his original sentence.

STATE OF CONNECTICUT *v.* ORLANDO BERRIOS, JR.
(SC 19494)

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

Syllabus

The defendant, who was convicted of the crime of robbery in the first degree, appealed, claiming that the trial court had improperly denied his motion for a mistrial on the ground that his mother, M, tampered with the jury by speaking to a juror outside of the courthouse about the evidence. The court had learned of the encounter through a note from the juror, J, on the third day of trial. In response to questioning by the court, J testified that M had approached him and asked if he realized that a particular witness had lied. J also testified that he had informed the rest of the jury about the encounter and had discovered that one other juror, E, had witnessed it. Finally, J testified that his ability to decide the case based solely on the evidence had not been compromised as a result of the encounter. E then testified that he recognized M from the courtroom, that he had seen the encounter, and that his ability to decide the case based solely on the evidence also had not been affected. The court then individually questioned each of the remaining jurors, who each testified that they could decide the case based solely on the evidence presented. On the basis of this testimony, the court concluded that the misconduct did not deprive the defendant of a trial before a fair and impartial jury, and denied the defendant's motion for a mistrial. The jury subsequently returned a guilty verdict and the court rendered judgment in accordance with the verdict. On the defendant's appeal, *held*:

1. This court concluded that the presumption of prejudice established in *Remmer* v. *United States* (347 U.S. 227) is still good law with respect to external interference with the jury's deliberative process via private communication, contact, or tampering with jurors that relates directly to the matter being tried, and that the presumption is triggered once the trial court determines that jury tampering has occurred, thus shifting the burden to the state to prove that there was no reasonable possibility that any juror was affected in his or her freedom of action as a juror; furthermore, the defendant here had met his burden of showing a prima facie entitlement to the presumption of prejudice because there was no dispute that the comments made by M to J concerned the veracity of a witness and, therefore, directly related to the matter before the jury.
2. The trial court did not abuse its discretion in denying the defendant's motion for a mistrial, the state having met its burden of establishing that there was no reasonable possibility that M's actions affected the jury's ability to act fairly and impartially in deciding the case; the trial

court reasonably could have believed the testimony of J and the other jurors that M's actions did not affect their impartiality or their ability to decide the case based solely on the evidence admitted at trial.

Argued October 16, 2015—officially released January 26, 2016

Procedural History

Substitute information charging the defendant with the crime of robbery in the first degree, brought to the Superior Court in the judicial district of New Haven, and tried to the jury before *Blue*, *J.*; thereafter, the court denied the defendant's motion for a mistrial; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Richard E. Condon, Jr., senior assistant public defender, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Roger Dobris*, senior assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. This appeal requires us to consider the continuing vitality of the presumption of prejudice in jury tampering cases articulated by the United States Supreme Court in *Remmer* v. *United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954) (*Remmer I*), which is a question that has divided state and federal courts for more than thirty years in the wake of *Smith* v. *Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), and *United States* v. *Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). The defendant, Orlando Berrios, Jr., appeals[1] from the judgment of the trial court convicting him, following a jury trial, of rob-

[1] The defendant appealed from the judgment of the trial 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.

bery in the first degree in violation of General Statutes § 53a-134 (a) (4). On appeal, the defendant claims that the trial court improperly denied his motion for a mistrial on the ground that his mother[2] had tampered with the jury by approaching a juror outside the courthouse and speaking to him about the evidence in this case. Relying on the presumption of prejudice articulated in *Remmer I* (*Remmer* presumption), the defendant contends that his mother's jury tampering violated his constitutional right to a fair trial because the state failed to carry its " 'heavy burden' " of proving that her actions did not affect the jury's impartiality. Although we conclude that the *Remmer* presumption remains good law in cases of external interference with the jury's deliberative process via private communication, contact, or tampering with jurors about the pending matter, we also conclude that the state proved that there was no reasonable possibility that the actions of the defendant's mother affected the jury's ability to decide this case fairly and impartially. Accordingly, we affirm the judgment of the trial court.

The record reveals the following background facts, which the jury reasonably could have found, and procedural history. On December 4, 2011, at approximately 7:20 a.m., the defendant and another man, Bernard Gardner, were driving in a black Hyundai Santa Fe (car) on Cedar Street in the city of New Haven when they came upon the victim, Javier Ristorucci, who was out for a walk. The defendant stopped and exited the car, and while Gardner watched, robbed the victim at gunpoint. The victim gave the defendant his cell phone, cash, and the gray hooded sweatshirt and black jacket that he was wearing at the time. After being flagged down by Leonardo Ayala, a friend of the victim who had just left the scene, Francisco Ortiz, an officer in the New Haven Police Department, saw the car stopped

[2] We note that the name of this individual is not apparent from the record.

in the middle of the street with its brake lights on; the defendant was sitting in the driver's seat smoking crack. The victim then told Ortiz that a man in the car with a gun had robbed him.

When Ortiz attempted to stop the car, the defendant drove away, causing a high speed pursuit through the streets of New Haven onto Interstate 91, which ended when the car came to a rest against the guardrail near exit 11 in North Haven. After a brief foot pursuit, Ortiz and several other police officers apprehended the defendant, who had been driving the car. In the meantime, other police officers apprehended Gardner, who was pinned against the highway guardrail in the passenger seat. Following a showup identification, the victim identified the defendant by his hat, clothing, and face as the person who had robbed him. Ortiz found the victim's gray sweatshirt and black jacket when he searched the car; the gun, cash, and cell phone were not recovered.

The state charged the defendant with robbery in the first degree in violation of § 53a-134 (a) (4), and the case was tried to a jury. During trial, a juror, J,[3] informed the trial court that the defendant's mother had approached him on the street outside the courthouse and commented on the veracity of one of the witnesses. Following voir dire of J and the rest of the jurors, the defendant moved for a mistrial on the ground of jury tampering. The trial court denied that motion. The jury subsequently returned a verdict finding the defendant guilty of robbery in the first degree. The trial court rendered a judgment of guilty in accordance with the jury's verdict, and sentenced the defendant to a total effective sentence of fifteen years imprisonment, fol-

[3] In accordance with our usual practice, we identify jurors by initial in order to protect their privacy interests. See, e.g., *State* v. *Osimanti*, 299 Conn. 1, 30 n.28, 6 A.3d 790 (2010).

lowed by five years of special parole. This appeal followed.

The record reveals the following additional facts and procedural history relevant to the defendant's claim that the trial court abused its discretion in denying his motion for a mistrial on the ground that the jury's impartiality had been compromised by jury tampering. On the third day of evidence, the clerk informed the trial court that J had reported to the clerk that the defendant's mother had approached him "and some communication had occurred." The trial court then read a note from J in which he stated that he had been "approached by the defendant's mother in the parking lot yesterday . . . [at] approximately 3:30 p.m. She attempted to engage me in conversation. I did not respond to her comments." The trial court then questioned J in open court about the note and he stated: "I guess [the defendant's mother] was concerned for which way we were leaning and [she] was asking me if I . . . realized that that last cop was lying. And I made no comment to her and I told her [to] be careful of the gateway that we were walking over so she didn't trip, and I said have a nice evening. So, that was the total."[4] J further testified that he had informed the rest of the jury about that encounter while he was preparing the note. J assured the trial court that his ability to decide the case based solely on the evidence had not been compromised as a result of the encounter.[5]

[4] Additional voir dire questioning by the state established that the encounter occurred on the street near the courthouse parking lot, and that J recognized the defendant's mother from the courtroom. After describing her appearance, J testified that he walked "slower" because of his physical limitations, and that "[s]he came up behind me and she said, boy, I hope everything turns out okay, and then I looked and then I recognized her."

[5] The trial court and J engaged in the following colloquy:

"The Court: I'll probably have to interview each of [the other jurors], but speaking only for you, let me ask you this: As you know, the rule in this and in every case, civil or criminal, the jury must make its decision based exclusively on the evidence presented in court.

"[J]: Of course.

In response to voir dire questions from the defendant, J testified that he did not tell any friends or family what had happened, and had informed only the other jurors. When asked whether the conversation would affect his ability to "continu[e] to be fair and impartial to the state and to the defendant," J responded, "[n]o, not at all." J further testified that he viewed the actions of the defendant's mother as those of "a concerned mother." When asked whether he would "decide this case based on anything that happened yesterday [at] about 3:30 [p.m.] outside of this courtroom," J responded, "[n]o." J also testified that he had learned from the other jurors that one juror, E, had witnessed the encounter with the defendant's mother.

Before questioning the other jurors, the trial court excluded the defendant's mother from the courtroom. E then testified that, while stopped on his bicycle at the intersection of Orange and Grove Streets, he saw a woman, who he recognized from the courtroom, approach J from behind while talking. E further testified that he did not see or hear J communicate with her. E also testified, in response to questions from the trial court and the defendant, that the incident would not affect his ability to decide the case based solely on the evidence presented in court.

"The Court: I, of course, wish lots of things, it's certainly not proper that anybody connected with any side approach you and tell you anything. We know from sad experience this has happened prior times in the history of the world, and the question, you are still under sworn duty to decide the case based entirely on the evidence and only on the evidence presented in court, so do you feel that your ability to do so has in any way been compromised?

"[J]: Not at all.

"The Court: You feel that you could—you haven't heard all the evidence yet?

"[J]: No.

"The Court: You could make your decision fair and square based upon the evidence?

"[J]: Correct."

Having interviewed the two witnesses to the incident, the trial court then summoned the remaining members of the jury for individual questioning.[6] The next juror, M, testified that J had told the other members of the jury that "he was approached by the defendant's mother, but he didn't say anything, he just walked off." When asked by the trial court whether she would "decide [the] case based 100 percent on the evidence," M responded, "[y]es." M offered a similar assurance in response to questions from the defendant, agreeing that what she heard from J had not affected her ability to be "fair and impartial in this matter," and that her impartiality remained the "[s]ame as it was when [she was] sworn in . . . ."

Another juror, S, testified that J had said "he was approached by the defendant's [mother]." S stated that she "believe[d]" J had spoken about "two young ladies behind him" at that time "with cell phones and [J] wasn't . . . sure whether he was being taped or not, so he needed to tell [the trial court]." S similarly assured the trial court that her ability to discharge her sworn duty to decide the case impartially "based 100 percent on the evidence in court" had not been compromised. In response to further questions from the defendant, S stated that J "wasn't sure" about being recorded because the two young women "had cell phones out, so he wasn't sure whether he was being taped, you

[6] The trial court advised the jury that: "Ladies and gentlemen, I am sorry to delay things here, but there is something that I have to do. This won't come as any surprise to you from what I understand, but I understand [J] may—and no criticism of him at all—may have made some statement to you about an incident that apparently happened yesterday. I need to question each of you about it to ensure that you could be fair, continue to be fair and impartial jurors and decide the case based exclusively on the evidence presented in court, and I have talked with [J] and [E], and I'm going to try to briefly individually voir dire each of the rest of you. In the meantime, and, in fact, throughout the rest of this proceeding, please do not discuss this incident among yourselves or with anyone else."

know, for a mistrial, he wasn't sure, so he wanted to tell the [trial court] because he wasn't sure about being taped or not. He saw the two young ladies, I guess, with cell phones, and he wanted to tell it just in case."[7] When asked by defense counsel whether anything had "changed since the day [she was] sworn in" with respect to her ability to decide the case fairly in accord with her oath, S responded, "[n]o."

Another juror, D, testified that she wrote the note for J at his request after he told the other members of the jury that "he had been approached by [who] he believed to be the defendant's mother in the parking lot and that he didn't engage in conversation with her." D testified, in response to questions from the defendant, that, being an educator, she wrote the note for J because "[h]e [had] expressed that his writing skills were not as good as he hoped them to be." D stated that J had been "fairly vague in his sharing" and had not provided any "details or anything to that nature. It was merely that he had been approached and he didn't respond, and that was essentially the end of it." When asked by the trial court whether she could keep an open mind and "decide the case based fairly and squarely 100 percent on the evidence in court," D responded in the affirmative.

The final juror, L testified that J had "said that he was approached by a person that he figured was the mother of the defendant, and that he did not pay attention to what she said, and did not respond to anything she said, he did not report to us what she said. And [J]

[7] In further questioning by defense counsel about whether J had "said something about a mistrial," S stated: "He didn't, he wasn't sure whether that—what they were—you know, he wasn't sure whether he was being taped so they could say mistrial because of him talking to the [defendant's mother], so he wanted to say something this morning." S stated that J did not explain his understanding of the term "mistrial" to the other members of the jury.

said that his only concern was that somebody might be watching the encounter and videotaping it so that they could sort of say, hey, look, the jury has been tampered with and call for a mistrial, that was his concern, and that is why he wanted to report it . . . .'' When asked by the trial court whether his ability to decide the case ''based 100 percent on the evidence presented in court'' had been compromised, L responded, ''I don't think so at all.'' When asked whether he would ''continue to be open-minded and fair and decide this case based exclusively on the evidence presented in court,'' L responded, ''absolutely.''[8] L further explained, in response to questioning by defense counsel, that J did not explain his understanding of the terms ''tampering'' or ''mistrial'' in expressing his concerns to the other jurors, that L believed that the defendant's mother ''must be very upset and very concerned'' about this case, and that J appeared concerned about the effect of the encounter. L stated that he had not discussed anything else about the case with the other jurors.

The defendant then moved for a mistrial. He argued that a mistrial was ''in the interest of justice'' because the other jurors' voir dire testimony indicated that J had not been completely forthcoming with the details about his encounter with the defendant's mother, in particular, his failure to inform the trial court about the presence of the two young women who might have recorded the encounter with their cell phones, and his use of legal terminology such as ''mistrial'' in explaining his concerns to the other members of the jury. The trial court denied the defendant's motion, stating that ''the

[8] In assuring the trial court that he would decide the case based solely on the evidence presented in court in accordance with the juror's oath, L acknowledged his assumption that ''everybody involved in the case has very high emotions about it and, you know, has a lot of skin in the game, has big stakes in their lives concerning it, but that's not what we're being presented. We're being presented with the evidence of what happened and that's what we have to decide on.''

idea that the defendant's mother can approach a member of the jury with this kind of communication and then the defendant can get a mistrial out of this is just outrageous. It's outrageous. Obviously, if the jury had, in fact, been contaminated, then that would be another story, but the court and counsel have interviewed each of the six members of the jury and it's very apparent that they are very fair and they are very committed to deciding this case based 100 percent on what is said in court, on the evidence presented in court."[9] The trial court then excluded the defendant's mother from the courtroom for the remainder of the trial, noting that any prosecution decisions with respect to her conduct lay with the state.

Before turning to the defendant's specific claims on appeal, we note the following general principles. "We begin with the standard of review that governs this case. In our review of the denial of a motion for mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Anderson*, 255 Conn. 425, 435, 773 A.2d 287 (2001).

"Potential juror bias is considered akin to other misconduct that similarly might affect a juror's impartiality,

[9] In denying the defendant's renewed motion for a mistrial premised on his disagreement with the findings underlying its initial ruling, the trial court emphasized that it did not find or suggest that the defendant or his mother had intentionally tried to provoke a mistrial but, rather, that the defendant "shouldn't be the beneficiary if his mother approaches a member of the jury with this kind of communication." The trial court reiterated its view that the actions of the defendant's mother were "an outrageous act," and that "for a mistrial to result . . . would be outrageous unless the jury had, in fact, been contaminated. And I have found, after a thorough voir dire by both court and counsel that the jury has not, in fact, been contaminated."

thus potentially violating a core requirement of the right to trial by jury guaranteed by the constitution of Connecticut, article first, § 8, and by the sixth amendment to the United States constitution." (Internal quotation marks omitted.) *State* v. *Osimanti*, 299 Conn. 1, 32, 6 A.3d 790 (2010); see also, e.g., *State* v. *Brown*, 235 Conn. 502, 522, 668 A.2d 1288 (1995). Judicial inquiry into jury tampering is governed by the same standards as other possible instances of jury bias. See, e.g., *State* v. *Dixon*, 318 Conn. 495, 507, 122 A.3d 542 (2015). Thus, "[w]ith respect to allegations that a juror potentially may be biased, [e]ven where a juror has formed some preconceived opinion as to the guilt of an accused, a juror is sufficiently impartial if he or she can set aside that opinion and render a verdict based on evidence in the case. . . . Only where a juror has indicated a refusal to consider testimony and displayed evidence of a closed mind concerning [the] defendant's innocence can it be said that [the court] abused its discretion in refusing to [remove] a juror [from the panel]. . . . It is enough if a juror is able to set aside any preconceived notions and decide the case on the evidence presented and the instructions given by the court. . . . While we recognize that a juror's assurances that he or she is equal to the task are not dispositive of the rights of an accused . . . we are aware of the broad discretion of a trial judge which includes his determination of the credibility to be given a juror's statement in this context. . . .

"The trial court's assessment of the juror's assurances, while entitled to deference, must be realistic and informed by inquiries adequate in the context of the case to ascertain the nature and import of any potential juror bias. . . . The inquiry need not, however, be lengthy, so long as the questions, viewed in the context of the juror's answers, are adequate for the trial court to determine that the juror can indeed serve fairly and impartially. . . . The nature and quality of the juror's

assurances is of paramount importance; the juror must be unequivocal about his or her ability to be fair and impartial." (Internal quotation marks omitted.) Id.

In this appeal, the defendant contends that: (1) under *Remmer I*, supra, 347 U.S. 229, jury tampering in the form of a communication to a juror by a third party, here, his mother, was presumptively prejudicial; and (2) the record demonstrates that the state failed to carry its " 'heavy burden' " of proving that the jury tampering did not lead to the "reasonable possibility that [J] or any juror 'was . . . affected in his freedom of action as a juror.' "[10] We address each claim in turn.

I

We begin with the defendant's claim that the presumption of prejudice articulated in *Remmer I*, supra,

[10] We note that the defendant does not appear to challenge the manner or scope of the hearing in which the trial court considered the allegation of jury tampering in accordance with *State* v. *Brown*, supra, 235 Conn. 526, under which a "trial court must conduct a preliminary inquiry, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case, regardless of whether an inquiry is requested by counsel. Although the form and scope of such an inquiry lie within a trial court's discretion, the court must conduct some type of inquiry in response to allegations of jury misconduct. That form and scope may vary from a preliminary inquiry of counsel, at one end of the spectrum, to a full evidentiary hearing at the other end of the spectrum, and, of course, all points in between. Whether a preliminary inquiry of counsel, or some other limited form of proceeding, will lead to further, more extensive, proceedings will depend on what is disclosed during the initial limited proceedings and on the exercise of the trial court's sound discretion with respect thereto." (Footnote omitted.) "We recognize that the trial judge has a superior opportunity to assess the proceedings over which he or she personally has presided . . . and thus is in a superior position to evaluate the credibility of allegations of jury misconduct, whatever their source. There may well be cases, therefore, in which a trial court will rightfully be persuaded, solely on the basis of the allegations before it and the preliminary inquiry of counsel on the record, that such allegations lack any merit. In such cases, a defendant's constitutional rights may not be violated by the trial court's failure to hold an evidentiary hearing, in the absence of a timely request by counsel." (Citations omitted.) Id., 527–28; see also *State* v. *Dixon*, supra, 318 Conn. 506.

347 U.S. 229, continues to apply in cases concerning jury tampering, thus shifting the burden to the state to prove that there was no reasonable possibility that any juror was "affected in his [or her] freedom of action as a juror." *Remmer* v. *United States*, 350 U.S. 377, 381, 76 S. Ct. 425, 100 L. Ed. 435 (1956) (*Remmer II*). Acknowledging an apparent inconsistency in our case law on this point; see, e.g., *State* v. *Osimanti*, supra, 299 Conn. 38–39 n.32; the defendant also notes a split among federal Circuit Courts about whether the *Remmer* presumption remains good law in light of the Supreme Court's subsequent decisions in *Smith* v. *Phillips*, supra, 455 U.S. 209, and *United States* v. *Olano*, supra, 507 U.S. 725. The defendant then urges us to follow the vast majority of the federal Circuit Courts, which continue to employ the *Remmer* presumption in cases of significant jury misconduct, including tampering, thus requiring the state to prove harmlessness at an evidentiary hearing. Relying on *United States* v. *Dutkel*, 192 F.3d 893, 895–96 (9th Cir. 1999), the defendant emphasizes that the presumption is particularly applicable in cases concerning jury tampering, which is a "serious intrusion into the jury's processes and poses an inherently greater risk to the integrity of the verdict," because tampering is an act likely to give rise to resentment of the defendant by the jurors.

In response, the state relies on the line of this court's cases cited in *State* v. *Rhodes*, 248 Conn. 39, 48, 726 A.2d 513 (1999), which follow *Smith* v. *Phillips*, supra, 455 U.S. 215, for the proposition that, under *Remmer I*, supra, 347 U.S. 229, claims of juror misconduct require only "a hearing where the focus of the inquiry must be whether the intrusion affected the jury's deliberation and thereby its verdict." This line of cases places the burden on the defendant to prove that: (1) misconduct occurred; and (2) that misconduct resulted in actual

prejudice.[11] We, however, agree with the defendant that the *Remmer* presumption remains good law and was triggered once the trial court determined that jury tampering had occurred in this case, thus requiring the state to prove that there was no reasonable possibility that the tampering affected the impartiality of the jury.

We begin by reviewing the trilogy of United States Supreme Court cases giving rise to this issue on appeal, namely, *Remmer I*, supra, 347 U.S. 227, *Smith* v. *Phillips*, supra, 455 U.S. 209, and *United States* v. *Olano*, supra, 507 U.S. 725. In *Remmer I*, supra, 228, the defendant was convicted by a jury of several counts of tax evasion. After the trial, the defendant and his attorneys learned from a newspaper article that the trial judge and the prosecutors had acted ex parte to have the Federal Bureau of Investigation (FBI) investigate the potential offer of a bribe to a juror, and then did nothing further after the FBI determined that the offer had been made in jest. Id. The Supreme Court held that the District Court improperly failed to afford the defendant a hearing with respect to the potential jury tampering, stating that: "In a criminal case, *any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. *The presumption is not conclusive*,

[11] The state further argues that the hearing held by the trial court in this case complied with the mandates of *Remmer I*, supra, 347 U.S. 229, because "all parties were aware of the approach by the defendant's mother to [J] immediately after it occurred," and the court "conducted a thorough hearing in the defendant's presence and with his participation in order to determine whether the defendant's right to an unbiased jury was compromised." As noted previously; see footnote 10 of this opinion; the defendant does not challenge the scope of the hearing in this case, beyond the allocation of the burden of proof.

but the burden rests heavily upon the [*g*]*overnment to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.*" (Emphasis added.) Id., 229. Accordingly, the Supreme Court remanded the case to the District Court for a hearing to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial . . . ."[12] Id., 229–30.

We next turn to *Smith* v. *Phillips*, supra, 455 U.S. 212, which arose from a federal habeas corpus petition claiming that the petitioner had been deprived of a fair trial by the fact that one of jurors had, at the time of the trial, an application pending for employment as an investigator with the Office of the District Attorney that was prosecuting him. Although the trial prosecutors became aware of the juror's pending employment application, they did not inform the petitioner or the trial court of that fact until after the trial ended with a guilty verdict. Id., 212–13. After a hearing, the state trial court found that the juror's application " 'was indeed an indiscretion' but that it 'in no way reflected a premature conclusion as to the [habeas petitioner's] guilt, or prejudice against [him], or an inability to consider the guilt

[12] On appeal after remand, the Supreme Court concluded that the bribe offer and subsequent FBI investigation deprived the defendant of a fair trial. *Remmer II*, supra, 350 U.S. 382. After reviewing the entire record, the Supreme Court emphasized that the evidence showed that the juror had been under " 'terrific pressure,' " and that the "evidence, covering the total picture, reveals such a state of facts that neither [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror. From [the juror's] testimony it is quite evident that he was a disturbed and troubled man from the date of the [bribe offer] until after the trial. Proper concern for protecting and preserving the integrity of our jury system dictates against our speculating that the [FBI] agent's interview with [the juror], whatever the [g]overnment may have understood its purpose to be, dispersed the cloud created by [the bribe offer]." Id., 381; see also id., 382 (observing that juror "had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made").

or innocence of the [habeas petitioner] solely on the evidence.' " Id., 213–14. In holding that the petitioner was not entitled to a new trial, the Supreme Court cited *Remmer I*, supra, 347 U.S. 229, as illustrative of the proposition that it "has long held that the remedy for allegations of juror partiality is a hearing *in which the defendant has the opportunity to prove actual bias*,"[13] and the court stated that *Remmer I* "recognized the seriousness not only of the attempted bribe, which it characterized as 'presumptively prejudicial,' but also of the undisclosed investigation," but nevertheless "did not require a new trial like that ordered in this case. Rather, the [Supreme] Court instructed the trial judge to 'determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a hearing with all interested parties permitted to participate.' . . . *In other words, the* [*Supreme*] *Court ordered precisely the remedy which was accorded by* [*the state court*] *in this case*."[14] (Citation omitted; emphasis altered.) *Smith* v. *Phillips*, supra, 215–16.

The final case in this trilogy is *United States* v. *Olano*, supra, 507 U.S. 737, wherein the Supreme Court concluded that the presence of alternate jurors during jury

[13] To this end, the Supreme Court rejected the petitioner's reliance on the doctrine of imputed bias in support of his contention that "a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question." *Smith* v. *Phillips*, supra, 455 U.S. 215.

[14] The court further observed that, if due process required "a new trial every time a juror has been placed in a potentially compromising situation . . . few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. *Such determinations may properly be made at a hearing like that ordered in* [*Remmer I*] *and held in this case*." (Emphasis added.) *Smith* v. *Phillips*, supra, 455 U.S. 217.

deliberations, in violation of rule 24 (c) of the Federal Rules of Criminal Procedure, was "not the kind of error that 'affect[s] substantial rights,' " and, thus, did not require reversal under the federal plain error rule. See Fed. R. Crim. P. 52 (b). In so concluding, the Supreme Court observed that "[w]e generally have analyzed outside intrusions upon the jury for prejudicial impact," describing *Remmer I*, supra, 347 U.S. 227, as a "prime example," and citing *Smith* v. *Phillips*, supra, 455 U.S. 217, for a "summar[y]" of the court's " 'intrusion' jurisprudence," particularly the proposition that " '[d]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.' " *United States* v. *Olano*, supra, 738. In *Olano*, the Supreme Court stated that "[t]here may be cases where an intrusion should be presumed prejudicial . . . but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" (Citations omitted.) Id., 739; see also id. ("[w]e cannot imagine why egregious comments by a bailiff to a juror [*Parker* v. *Gladden*, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)] or an apparent bribe followed by an official investigation [*Remmer I*, supra, 277] should be evaluated in terms of 'prejudice,' while the mere presence of alternate jurors during jury deliberations should not" [emphasis omitted]). In *Olano*, the Supreme Court held that the presence of the alternate jurors did not require reversal under the federal plain error rule because, although the alternates might "[i]n theory . . . prejudice a defendant" by " 'chilling' " deliberations or improperly participating therein, there was no evidence on the record that they did so, particularly given the presumption that they would have followed the trial judge's instruction not to participate. *United States* v. *Olano*, supra, 739–41. The court also stated that it did not "think that the mere presence of alternate jurors

entailed a sufficient risk of 'chill' to justify a presumption of prejudice . . . ." Id., 741; see also id. ("[w]hether the [g]overnment could have met its burden of showing the absence of prejudice . . . if [the] respondents had not forfeited their claim of error, is not at issue here").

The Supreme Court's decisions in *Phillips* and *Olano* created a great deal of uncertainty with respect to the continuing viability of the *Remmer* presumption, leading to a split among the federal Circuit Courts nationally, and to inconsistencies in our own case law. This conflict was brought to the fore locally in *State* v. *Rhodes*, supra, 248 Conn. 40, wherein the defendant sought a new trial on the ground of juror misconduct, namely, multiple conversations about the trial between a juror and her incarcerated boyfriend. The defendant in *Rhodes* argued that, under *Remmer I* and *State* v. *Rodriguez*, 210 Conn. 315, 325–26, 554 A.2d 1080 (1989), the federal due process clause "requires the state to establish the harmlessness of any juror misconduct beyond a reasonable doubt."[15] *State* v. *Rhodes*, supra,

[15] This court applied the *Remmer* presumption in numerous cases of jury misconduct or tampering through the 1989 decision in *State* v. *Rodriguez*, supra, 210 Conn. 319–27, which held that the state had rebutted the presumption of prejudice arising from a sexual assault defendant's act of approaching a known juror at a food truck outside the courthouse before the trial began. See also, e.g., *State* v. *Asherman*, 193 Conn. 695, 736, 478 A.2d 227 (1984) (The court cited *Remmer I* and stated that "[c]onsideration of extrinsic evidence is presumptively prejudicial because it implicates the defendant's constitutional right to a fair trial before an impartial jury. . . . A presumption of prejudice may also arise in cases involving communications between a juror and third persons. . . . But unless the nature of the misconduct on its face implicates [the defendant's] constitutional rights the burden is on [him] to show that the error of the trial court is harmful." [Citations omitted.]), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). Interestingly, in *State* v. *Rodriguez*, supra, 327–28, when applying the presumption of prejudice, this court also cited *Smith* v. *Phillips*, supra, 455 U.S. 215, and *State* v. *Almeda*, 189 Conn. 303, 313, 455 A.2d 1326 (1983), for the proposition that "the United States Supreme Court [has] 'long held that the remedy for allegations of juror partiality is a hearing *in which the defendant has the opportunity to prove actual bias*.' " (Emphasis added.)

48. In so arguing, the defendant invited the court to "reconsider our precedent that places the burden on the defendant to show that he or she was actually prejudiced by the juror misconduct when the trial court is in no way responsible for the impropriety."[16] Id.; see, e.g., *State* v. *Newsome*, 238 Conn. 588, 628, 682 A.2d 972 (1996); *Asherman* v. *State*, 202 Conn. 429, 442, 521 A.2d 578 (1987). In response, the state relied on *Smith* v. *Phillips*, supra, 455 U.S. 215, for the proposition that "more recently, the United States Supreme Court has indicated that [*Remmer I*] stands only for the proposition that a defendant is entitled to a hearing at which the defendant bears the burden of proving actual prejudice." *State* v. *Rhodes*, supra, 49; see also id., 49–50 n.16 (describing circuit split on this issue). This court, however, declined "to revisit [its] prior case law regarding the burden or standard of proof in juror misconduct cases because the defendant cannot prevail, even under the rule he urges us to adopt." Id., 50. We subsequently declined similar invitations to address this issue in two recent cases. See *State* v. *Dixon*, supra, 318 Conn. 507–508; *State* v. *Osimanti*, supra, 299 Conn. 38–39 n.32; see also *State* v. *Walker*, 80 Conn. App. 542, 557 and n.8, 835 A.2d 1058 (2003) (discussing *Rhodes* and collecting cases), cert. denied, 268 Conn. 902, 845 A.2d 406 (2004).

[16] This line of cases cited *Smith* v. *Phillips*, supra, 455 U.S. 215, as standing for the proposition that the defendant bears the burden of proving actual bias at a hearing considering allegations of juror misconduct, presuming prejudice only when the misconduct was "authorized by the trial court," whose instructions the jurors are presumed to follow. *State* v. *Castonguay*, 194 Conn. 416, 435–36 n.19, 481 A.2d 56 (1984); compare id., 435–36 (remanding for hearing at which state would bear burden of proving harmlessness beyond reasonable doubt after trial court improperly instructed jury that it could discuss case prior to deliberations), with *State* v. *Newsome*, 238 Conn. 588, 628–30, 682 A.2d 972 (1996) (citing, inter alia, *Castonguay* and *Phillips* in requiring defendant to prove prejudice arising from presubmission discussion by jury and single juror's views of crime scene), and *State* v. *Almeda*, 189 Conn. 303, 311–14, 455 A.2d 1326 (1983) (citing *Phillips* in remanding case for hearing at which defendant would have opportunity to prove actual bias arising from jury foreman's failure to disclose during voir dire his significant connections with law enforcement).

In resolving this conflict in our case law, we review other jurisdictions' approaches to the continuing viability of the *Remmer* presumption in light of *Phillips* and *Olano*. Three federal Circuit Courts, namely, the United States Courts of Appeals for the Sixth, Fifth, and District of Columbia Circuits, hold that the *Remmer* presumption has been significantly modified or overruled. The Sixth Circuit takes the most extreme position, concluding that the *Remmer* presumption is a completely dead letter because *Smith* v. *Phillips*, supra, 455 U.S. 215, stands for the proposition that "[*Remmer I*] does not govern the question of the burden of proof where potential jury partiality is alleged. Instead, [*Remmer I*] only controls the question of how the [D]istrict [C]ourt should proceed where such allegations are made, i.e., a hearing must be held during which the defendant is entitled to be heard. . . . In light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed."[17] (Citation omitted.) *United States* v. *Pennell*, 737 F.2d 521, 532 (6th Cir. 1984), cert. denied, 469 U.S. 1158, 105 S. Ct. 906, 83 L. Ed. 2d 921 (1985); see also, e.g., *United States* v. *Orlando*, 281 F.3d 586, 597–98 (6th Cir.) (reaching same conclusion), cert. denied sub nom. *Daniels* v. *United States*, 537 U.S. 947, 123 S. Ct. 411, 154 L. Ed. 2d 290 (2002). The Fifth Circuit does not take such an extreme approach, but nonetheless has significantly circumscribed the *Remmer* presumption within its borders, stating that it "cannot survive *Phil-*

[17] Rejecting the defendant's attempt to distinguish *Smith* v. *Phillips*, supra, 455 U.S. 218, as arising from a federal habeas corpus challenge to a state court proceeding, rather than a direct review of a federal proceeding as in *Remmer I*, the Sixth Circuit emphasized that "[*Remmer I*] placed a heavy burden of proof upon the government. Accordingly, *Phillips* worked a substantive change in the law." *United States* v. *Pennell*, 737 F.2d 521, 532–34 and n.10 (6th Cir. 1984), cert. denied, 469 U.S. 1158, 105 S. Ct. 906, 83 L. Ed. 2d 921 (1985).

lips and *Olano*," and that its use is a discretionary decision for the trial court, upon a showing of sufficient prejudice.[18] *United States* v. *Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998). The District of Columbia Circuit Court of Appeals has adopted a similar approach. See *United States* v. *Williams-Davis*, 90 F.3d 490, 495–97 (D.C. Cir. 1996) (observing that *Phillips* and *Olano* "narrow[ed]" *Remmer I*, thus affording trial court discretion to determine whether "any particular intrusion showed enough of a likelihood of prejudice to justify assigning the government a burden of proving harmlessness" in case concerning encouragement from juror's husband to "nail" defendant [internal quotation marks omitted]), cert. denied, 519 U.S. 1128, 117 S. Ct. 986, 136 L. Ed. 2d 867 (1997).

In our view, these courts' understanding of *Phillips* to alter or eviscerate the *Remmer* presumption is wholly inconsistent with the context of the *Phillips* opinion and well established norms for the reading of judicial opinions. As aptly noted by the United States Court of Appeals for the Fourth Circuit in *United States* v. *Lawson*, 677 F.3d 629, 642 (4th Cir.), cert. denied sub

[18] The Fifth Circuit requires that "the trial court . . . first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the government be required to prove its absence. This rule comports with our [long-standing] recognition of the trial court's considerable discretion in investigating and resolving charges of jury tampering." *United States* v. *Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998); see also id., 934–35 (concluding that trial court improperly conducted ex parte inquiry into jury tampering and remanding case for "a hearing to determin[e] whether the jury was prejudiced by the outside contacts" when multiple jurors received telephone calls about case); compare *United States* v. *Smith*, 354 F.3d 390, 395–96 (5th Cir. 2003) (trial court properly declined to impose presumption given "de minimis intrusion" when jury learned of existence of transcript that was not in evidence because they did not review transcript, and its content was cumulative of trial testimony), cert. denied, 541 U.S. 953, 124 S. Ct. 1698, 158 L. Ed. 2d 386 (2004), with *United States* v. *Mix*, 791 F.3d 603, 608–11 (5th Cir. 2015) (defendant showed sufficient likelihood of prejudice to justify shift of burden to government when juror overheard information in elevator about prosecutions of defendant's colleagues).

nom. *Hutto* v. *United States*, 568 U.S. 889, 133 S. Ct. 393, 184 L. Ed. 2d 162 (2012), *Phillips* is factually and procedurally distinct from *Remmer I*. Factually, *Phillips* concerned juror impairment or predisposition, rather than third-party jury tampering or extrinsic influences on the jury, and legally, *Phillips* was a federal habeas corpus review of a state court proceeding rather than direct appellate review of a trial court's actions. See *Smith* v. *Phillips*, supra, 455 U.S. 215–18. Moreover, although the Supreme Court stated in *Phillips* that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias" it did so after acknowledging the *Remmer* presumption and citing *Remmer I* approvingly as requiring only a hearing, rather than a new trial, as a remedy for claims of improper juror influence. Id., 215–17. Nothing at issue before the Supreme Court in *Phillips* concerned the allocation of the burden of proof or production at such hearings. Indeed, to read *Phillips* as categorically eliminating the *Remmer* presumption is inconsistent with the Supreme Court's later recognition that "[*t*]*here may be cases where an intrusion should be presumed prejudicial* . . . ." (Citations omitted; emphasis added.) *United States* v. *Olano*, supra, 507 U.S. 739.

Particularly given its factually and legally inapposite nature, interpreting the Supreme Court's absolute silence on this point in *Phillips* as categorically eliminating the *Remmer* presumption contravenes the well established maxim that, "absent clear indications from the Supreme Court itself, lower courts should not lightly assume that a prior decision has been overruled sub silentio merely because its reasoning and result appear inconsistent with later cases." *Williams* v. *Whitley*, 994 F.2d 226, 235 (5th Cir.), cert. denied, 510 U.S. 1014, 114 S. Ct. 608, 126 L. Ed. 2d 572 (1993); see also, e.g., *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S.

1, 18, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000) (Supreme Court "does not normally overturn, or so dramatically limit, earlier authority sub silentio"); *United States* v. *Mitchell*, 690 F.3d 137, 143–45 (3d Cir. 2012) (concluding that, despite some courts' determinations to contrary, silence in *Phillips* did not foreclose use of implied bias doctrine because conclusion otherwise would have "Supreme Court abandon a centuries-old doctrine sub silentio").

Indeed, the majority of the federal Circuit Courts hold that the *Remmer* presumption is still good law with respect to egregious external interference with the jury's deliberative process via private communication, contact, or tampering with jurors about the matter. In particular, we observe that the United States Court of Appeals for the Second Circuit[19] has consistently followed *Remmer I* and considers it "well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial. . . . A government showing that the information is harmless will overcome this presumption."[20] (Citation omitted.) *United States* v. *Greer*, 285 F.3d 158, 173 (2d Cir. 2002); see also, e.g., *United States* v. *Farhane*, 634 F.3d 127, 168–69 (2d Cir.)

[19] "In considering this circuit split, we note that it is well settled that decisions of the Second Circuit, while not binding upon this court, nevertheless carry particularly persuasive weight in the resolution of issues of federal law when the United States Supreme Court has not spoken on the point." (Internal quotation marks omitted.) *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 783, 23 A.3d 1192 (2011).

[20] In assessing the severity of the harm "[w]here an extraneous influence is shown," the Second Circuit requires the court to "apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror. . . . A trial court's [postverdict] determination of extra-record prejudice must be an objective one, focusing on the information's probable effect on a hypothetical average juror." (Citation omitted; internal quotation marks omitted.) *United States* v. *Greer*, 285 F.3d 158, 173 (2d Cir. 2002); see also id. (rule 606 [b] of Federal Rules of Evidence precludes court from inquiring about or considering degree to which extra-record information influenced deliberations themselves, although court can consider circumstances under which external interference occurred).

(government rebutted *Remmer* presumption in case arising from juror's Google search that revealed codefendant's guilty plea), cert. denied sub nom. *Sabir* v. *United States*, 565 U.S. 1088, 132 S. Ct. 833, 181 L. Ed. 2d 542 (2011); *United States* v. *Weiss*, 752 F.2d 777, 782–83 (2d Cir.) (government rebutted *Remmer* presumption with respect to contamination allegations arising from juror bringing accounting textbook excerpt into deliberations), cert. denied, 474 U.S. 944, 106 S. Ct. 308, 88 L. Ed. 2d 285 (1985); but see *United States* v. *Morrison*, 580 Fed. Appx. 20, 21 n.1 (2d Cir. 2014) (summary order noting that government conceded applicability of *Remmer* presumption and declining to address circuit split "[b]ecause that issue has not been presented").

Similarly, the Fourth Circuit holds that "once a defendant introduces evidence that there was an extrajudicial communication that was more than innocuous, the *Remmer* presumption is triggered automatically, and [t]he burden then shifts to the [government] to prove that there exists no reasonable possibility that the jury's verdict was influenced by an improper communication." (Internal quotation marks omitted.) *United States* v. *Lawson*, supra, 677 F.3d 642; see also id., 641–43 (discussing circuit cases holding *Remmer* presumption applicable in cases concerning attempts to bribe jurors, comments made by restaurant owner to dining jurors about case, and juror's contact of media outlets during penalty phase of capital trial, in applying presumption to juror's unauthorized use of Internet encyclopedia during deliberations).

The United States Courts of Appeals for the First, Third, Seventh, Eighth, Ninth, and Tenth Circuits accord with the approaches of the Second and Fourth Circuits with respect to serious, or not "innocuous" claims of external influence, such as jury tampering, bribery, or

use of extra-record evidence.[21] See, e.g., *Stouffer* v. *Trammell*, 738 F.3d 1205, 1214 n.5 (10th Cir. 2013); *United States* v. *Honken*, 541 F.3d 1146, 1167 (8th Cir. 2008), cert. denied, 558 U.S. 1091, 130 S. Ct. 1011, 175 L. Ed. 2d 618 (2009); *United States* v. *Al-Shahin*, 474 F.3d 941, 949 (7th Cir. 2007); *United States* v. *Rutherford*, 371 F.3d 634, 643 (9th Cir. 2004); *United States* v. *Lloyd*, 269 F.3d 228, 238–39 (3d Cir. 2001); *United States* v. *Boylan*, 898 F.2d 230, 261 (1st Cir.), cert. denied, 498 U.S. 849, 111 S. Ct. 139, 112 L. Ed. 2d 106 (1990); see also *United States* v. *Tejeda*, 481 F.3d 44, 48–52 (1st Cir.) (declining to apply *Remmer* presumption when older man, later identified to be defendant's grandfather, made throat-slitting gesture in courtroom that was witnessed by two jurors because gesture did not pertain to evidence in case and court did "not want to create an incentive for such gesturing" by individuals associated with criminal defendants), cert. denied, 552 U.S. 1021, 128 S. Ct. 612, 169 L. Ed. 2d 393 (2007); *United States* v. *Boylan*, supra, 261 (limiting applicability of *Remmer* presumption "to cases of significant ex parte contacts with sitting jurors or those involving aggravated circumstances").

Finally, many of our sister states that have considered the issue[22] hold that the *Remmer* presumption remains

[21] We note that the Eleventh Circuit has continued to apply the *Remmer* presumption, while acknowledging, but declining to resolve, questions concerning its continued viability. See, e.g., *United States* v. *Siegelman*, 640 F.3d 1159, 1182 n.33 (11th Cir. 2011); *United States* v. *Ronda*, 455 F.3d 1273, 1299 and n.36 (11th Cir. 2006).

[22] Our research indicates that the courts of the following states apply the *Remmer* presumption without having specifically considered its continuing vitality in light of *Phillips* and *Olano*. See *Smith* v. *State*, Docket No. A-5636, 1996 WL 596942, *4–5 (Alaska App. October 9, 1996); *In re Price*, 51 Cal. 4th 547, 560, 247 P.3d 929, 121 Cal. Rptr. 3d 572 (2011); *Black* v. *State*, 3 A.3d 218, 220–21 and n.8 (Del. 2010); *Amazon* v. *State*, 487 So. 2d 8, 11 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); *State* v. *Chin*, 135 Haw. 437, 446–47, 353 P.3d 979 (2015); *Hodge* v. *Commonwealth*, 68 S.W.3d 338, 342 (Ky. 2001); *State* v. *Compton*, 66 So. 3d 619, 637–39 (La. App.), writ denied, 76 So. 3d 1177 (La. 2011); *Commonwealth* v. *Dixon*, 395 Mass. 149, 152, 479 N.E.2d 159 (1985); *State* v. *Erickson*, 610

good law in addressing claims of extrajudicial communications or jury tampering.[23] See *State* v. *Miller*, 178

N.W.2d 335, 338–39 (Minn. 2000); *State* v. *Rideout*, 143 N.H. 363, 367, 725 A.2d 8 (1999); *State* v. *Scherzer*, 301 N.J. Super. 363, 487, 694 A.2d 196, cert. denied, 151 N.J. 466, 700 A.2d 878 (1997); *People* v. *Anderson*, 123 App. Div. 2d 770, 773, 507 N.Y.S.2d 246 (1986), appeal denied, 69 N.Y.2d 824, 506 N.E.2d 541, 513 N.Y.S.2d 1030 (1987); *Bruckshaw* v. *Frankford Hospital*, 619 Pa. 135, 155–56 and n.7, 58 A.3d 102 (2012); *State* v. *Adams*, 405 S.W.3d 641, 650–51 (Tenn. 2013); *State* v. *McKeen*, 165 Vt. 469, 474, 685 A.2d 1090 (1996); *Lenz* v. *Warden*, 267 Va. 318, 329, 593 S.E.2d 292, cert. denied sub nom. *Lenz* v. *True*, 542 U.S. 953, 124 S. Ct. 2933, 159 L. Ed. 2d 836 (2004); *In the Matter of Woods*, 154 Wn. 2d 400, 414, 114 P.3d 607 (2005); *State* v. *Babiak*, Docket No. 2007AP169-CR, 2008 WL 786530, *4–5 (Wis. App. March 26, 2008), review denied, 310 Wis. 2d 707, 754 N.W.2d 850 (2008); *Martinez* v. *State*, 128 P.3d 652, 665 and n.15 (Wyo. 2006); see also *People* v. *Budzyn*, 456 Mich. 77, 88–89, 566 N.W.2d 229 (1997) (applying burden shift as matter of state law, requiring state to prove extraneous influence harmless beyond reasonable doubt once defendant proves that jury was exposed to extraneous influence that "created a real and substantial possibility that [it] could have affected the jury's verdict" by being "substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict"); *People* v. *France*, 436 Mich. 138, 157–58 and n.26, 461 N.W.2d 621 (1990) (describing *Remmer I* as "leading" case and characterizing Sixth Circuit's decision in *Pennell* as outlier); *Robinson* v. *State*, 851 S.W.2d 216, 230 (Tex. Crim. App. 1991) (applying rebuttable presumption as matter of state law), cert. denied, 512 U.S. 1246, 114 S. Ct. 2765, 129 L. Ed. 2d 879 (1994); *Mize* v. *State*, 754 S.W.2d 732, 738–39 (Tex. App. 1988) (citing *Remmer I* in accord with Texas law), petition for discretionary review refused (Tex. Crim. App. April 5, 1989).

The highest courts of Maine and New Jersey have identified, but not yet resolved this issue. See *State* v. *Cheney*, 55 A.3d 473, 480–81 (Me. 2012); *State* v. *Harris*, 181 N.J. 391, 505–506, 859 A.2d 364 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

[23] We note that some of our sister states have concluded that the *Remmer* presumption no longer is good law. We note that Kansas and Ohio follow the Sixth Circuit's unpersuasive reading of *Remmer I* and *Phillips*. See *State* v. *Jones*, 283 Kan. 186, 206–207, 151 P.3d 22 (2007); *State* v. *Phillips*, 74 Ohio St. 3d 72, 88–89, 656 N.E.2d 643 (1995), cert. denied, 517 U.S. 1213, 116 S. Ct. 1835, 134 L. Ed. 2d 938 (1996). Colorado, New Mexico, and Idaho deem the *Remmer* presumption superfluous and outdated, instead adopting an objective analysis centered on the hypothetical average juror in assessing the severity of juror misconduct or tampering. These state courts focus on rules of evidence that render the presumption difficult to rebut by prohibiting examination of jurors about their thought processes or deliberations. See *People* v. *Wadle*, 97 P.3d 932, 935–36 (Colo. 2004); *Roll* v. *Middleton*, 115 Idaho 833, 838–39, 771 P.2d 54 (App. 1989); *Kilgore* v. *Fuji Heavy Industries, Ltd.*, 148 N.M. 561, 569, 240 P.3d 648 (2010). The South Carolina Supreme Court appears to hold that the burden is on the defendant to prove actual

Ariz. 555, 559 n.2, 875 P.2d 788 (1994); *People* v. *Runge*, 234 Ill. 2d 68, 103–104, 917 N.E.2d 940 (2009), cert. denied, 559 U.S. 1108, 130 S. Ct. 2402, 176 L. Ed. 2d 925 (2010); *Ramirez* v. *State*, 7 N.E.3d 933, 936–38 (Ind. 2014); *Jenkins* v. *State*, 375 Md. 284, 317–19, 825 A.2d 1008 (2003); *Meyer* v. *State*, 119 Nev. 554, 564–65, 80 P.3d 447 (2003); *Trice* v. *Baldwin*, 140 Or. App. 300, 304–306, 915 P.2d 456 (1996); see also *Hill* v. *United States*, 622 A.2d 680, 684 (D.C. 1993) ("[W]here, following a hearing, the defendant has established a substantial likelihood of actual prejudice from the unauthorized contact . . . all reasonable doubts [about the juror's ability to render an impartial verdict must] be resolved in favor of the accused. . . . In this sense [the] allocation of the burden [of proving harmlessness to the government in *Remmer I*] remains the law . . . ." [Citations omitted; internal quotation marks omitted.]); *Greer* v. *Thompson*, 281 Ga. 419, 421, 637 S.E.2d 698 (2006) (questions continued viability of *Remmer* presumption, but notes similar presumption as matter of

bias, but does not mention the presumption, despite citations to both *Remmer I* and *Phillips*. *State* v. *Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157 (2003) (per curiam).

South Dakota's most recent decision appears to abandon the *Remmer* presumption without saying so, which conflicts with an earlier decision on point. Compare *White* v. *Weber*, 768 N.W.2d 144, 146 (S.D. 2009) (citing *Remmer I* and *Phillips*, but stating that defendant bears burden of proof at hearing without discussing apparent conflict), with *State* v. *Boykin*, 432 N.W.2d 60, 62–63 (S.D. 1988) (stating that "[t]he standard set forth by the United States Supreme Court in [*Remmer I*], is controlling . . . [i]n a criminal case" and that "South Dakota case law is entirely consistent with [*Remmer I*]" [internal quotation marks omitted]).

Finally, West Virginia severely limits the presumption under *Remmer* by reconciling it and *Smith* v. *Phillips*, supra, 455 U.S. 209, with state case law holding that the presumption of prejudice only applies when misconduct, including extraneous influence, is induced by an interested party to litigation, specifically, the state, the defendant, or their attorneys. See *State* v. *Sutphin*, 195 W. Va. 551, 559–60, 466 S.E.2d 402 (1995); *State* v. *Daniel*, 182 W. Va. 643, 647–48, 391 S.E.2d 90 (1990); see also *State* v. *Trail*, 236 W. Va. 167, 177, 778 S.E.2d 616 (2015) ("a person's concern for a defendant does not make them an 'interested party' to the litigation").

state criminal procedure with respect to unauthorized communication to juror).

Having considered these authorities in light of our reading of the United States Supreme Court opinions, we conclude that the *Remmer* presumption is still good law with respect to external interference with the jury's deliberative process via private communication, contact, or tampering[24] with jurors that relates directly to the matter being tried.[25] We agree with the observation, made by the Court of Appeals of Maryland in rejecting the argument that "the *Remmer* presumption . . . has been eroded in cases where egregious juror and witness misconduct occurs," that the *Remmer* presumption ensures "that a criminal defendant receives adequate due process. A right as fundamental as the right to an impartial jury cannot be compromised by even the hint

[24] We note that, "[i]n this context, the term 'jury tampering' refers to improper external communication with a juror about a matter pending before the jury." *Stouffer* v. *Trammell*, supra, 738 F.3d 1213.

[25] In determining whether the presumption is triggered, "we refer back to the factors the Supreme Court deemed important in [*Remmer I*] itself. . . . Those factors are: any private communication; any private contact; any tampering; directly or indirectly with a juror during trial; about the matter before the jury." (Citation omitted; internal quotation marks omitted.) *Barnes* v. *Joyner*, 751 F.3d 229, 245 (4th Cir. 2014), cert. denied, U.S. , 135 S. Ct. 2643, 192 L. Ed. 2d 944 (2015); see also id. (cataloging "[e]xtrajudicial communications or contact with a juror" sufficient to "trigger" *Remmer* presumption such as bribe offers, suggestions or pressure to vote certain way from third parties such as spouses or local citizens, and commentary about case from court personnel such as bailiffs). Put differently, the improper contact must pertain directly to the merits of the matter, rather than merely relate to the trial more topically. See, e.g., *Wisehart* v. *Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (The *Remmer* presumption must be considered in "context" because "it is so easy to imagine situations in which a 'private communication . . . with a juror during a trial about the matter pending before the jury' would not create a rational presumption of prejudice. Suppose a juror's spouse said to the juror, 'I saw you on television in the jury box, and you looked great.' That would be a private communication concerning the case, but it would not be suggestive of jury tampering."), cert. denied sub nom. *Buss* v. *Wisehart*, 547 U.S. 1050, 126 S. Ct. 1617, 164 L. Ed. 2d 353 (2006).

of possible bias or prejudice that is not affirmatively rebutted." (Emphasis omitted.) *Jenkins* v. *State*, supra, 375 Md. 319; see id., 321–25 (applying presumption and requiring new trial when juror and witness sought each other out at weekend religious retreat held midtrial, had lunch together, and sat next to each other during seminar, particularly given court's no contact instructions, despite lack of evidence that they had discussed case). Thus, the "burden properly rests on the state for several reasons: the overarching importance of protecting the defendant's constitutional right to a fair trial, the continuing maintenance of the integrity of the jury system and the necessity of continuing to preserve the trust reposed in criminal jury verdicts." *State* v. *Rodriguez*, supra, 210 Conn. 328.

We emphasize, however, that the burden remains on the defendant to show prima facie entitlement to the *Remmer* presumption; evidence, rather than speculation, is required to shift the burden of proof to the state.[26] See *State* v. *Savage*, 161 Conn. 445, 450, 290 A.2d 221 (1971) (declining to apply *Remmer* presumption when "the trial court fully developed the facts by interrogating the jurors in question, and as a result of this interrogation the court concluded that there had been no conversation between these jurors, the complainant and her mother"); *State* v. *Zapata*, 119 Conn. App. 660, 686–87, 989 A.2d 626 (declining to apply *Remmer* presumption because "[t]here are no factual findings in the record—indeed, no facts in the record—to support the contention that [the juror's] sibling knew the victim"

[26] The defendant may, of course, make this prima facie showing in the context of a hearing conducted by the trial court in response to its obligation, "when presented with any allegations of jury misconduct, [to] conduct a preliminary inquiry, sua sponte if necessary, in order to assure itself that a defendant's constitutional right to a trial before an impartial jury has been fully protected." *State* v. *Brown*, supra, 235 Conn. 528; see also id., 529 (noting trial court's discretion to determine scope of hearing in light of nature of allegations).

and defendant's argument was "predicated on assumptions"), cert. denied, 296 Conn. 906, 922 A.2d 1136 (2010), overruled on other grounds by *State* v. *Dixon*, 318 Conn. 495, 509 n.4, 122 A.3d 542 (2015); see also *Ramirez* v. *State*, supra, 7 N.E.3d 939 (defendant entitled to presumption of prejudice "only after making two showings, by a preponderance of the evidence: [1] [extrajudicial] contact or communications between jurors and unauthorized persons occurred, and [2] the contact or communications pertained to the matter before the jury"). Accordingly, because there is no dispute in the present case that the comments made by the defendant's mother to J concerned the veracity of a witness and, therefore, directly related to the matter before the jury, we conclude that the *Remmer* presumption was triggered in this case.

Finally, the *Remmer* presumption is "not conclusive. The burden rests heavily on the government to establish that the contact was harmless." *United States* v. *Moore*, 641 F.3d 812, 828 (7th Cir.), cert. denied, 565 U.S. 957, 132 S. Ct. 436, 181 L. Ed. 2d 283 (2011). The state bears this "heavy burden" of proving that there was no " 'reasonable possibility' " that the tampering or misconduct affected the jury's impartiality. *United States* v. *Rutherford*, supra, 371 F.3d 641; accord *United States* v. *Cheek*, 94 F.3d 136, 142 (4th Cir. 1996); *State* v. *Asherman*, 193 Conn. 695, 741–42, 478 A.2d 227 (1984) (state proved improper experimentation by jury harmless beyond reasonable doubt), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985).

II

Accordingly, we now turn to the defendant's claim that the state did not meet its " 'heavy burden' " of rebutting the *Remmer* presumption in this case. The defendant argues that the trial court improperly relied on J's assurances of impartiality in finding that the

misconduct in the present case did not deprive him of a trial before a fair and impartial jury. Specifically, the defendant claims that the record demonstrates that J was not candid with the court when he failed to disclose numerous "critical" details about his encounter with the defendant's mother, namely, his concern about the presence of the two young women with cell phones who might record the incident to prove jury tampering and cause a mistrial. The defendant also contends that the "close familial relationship" between himself and the person who tampered with the jury was "extraordinarily prejudicial" because it would lead jurors to suspect that the defendant instigated the jury tampering in an effort to cause a mistrial, leading them to resent him in their deliberations. The defendant further argues that the jury itself committed misconduct by discussing the encounter among themselves prior to the court summoning them for voir dire. He also posits that, "where [J] and [the] other jurors had already discussed the matter, there is reason to believe [the] jurors would disregard the court's instruction during the hearing not to discuss the matter, if only briefly and reference [the] defendant's mother."

In response, the state argues that it satisfied its burden of proving that the encounter between J and the defendant's mother did not violate the defendant's right to a fair trial before an impartial jury. The state emphasizes that J's credibility was a matter for the trial court to assess, and that the record does not indicate that he intentionally withheld information from the court. The state maintains that J was not sure whether the two women outside the courthouse were videotaping the encounter, thus, furnishing a reason for not conveying that fact to the trial court. We agree with the state, and conclude that the record and the findings of the trial court demonstrate that the state carried its burden of proving that there was no reasonable possibility that

the actions of the defendant's mother affected the jury's impartiality.

Having reviewed the record in this case, we are satisfied that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.[27] The trial court, with its superior vantage point to assess the credibility of the testifying jurors, reasonably could have believed the testimony of J and the other jurors that the actions of the defendant's mother did not affect their impartiality or their ability to decide the case based solely on the evidence admitted at trial. "The nature and quality of the juror's assurances is of paramount importance; the juror must be unequivocal about his or her ability to be fair and impartial." *State* v. *Osimanti*, supra, 299 Conn. 36. Thus, we note that the transcript

[27] We acknowledge the trial court's view that it was "outrageous" that the defendant conceivably could benefit from jury tampering by his mother, but emphasize that the trial court properly conducted a full voir dire of the jury when it learned of her improper actions. As the United States Court of Appeals for the Fifth Circuit stated in rejecting the government's request to "categorically dismiss" a claim of jury tampering on the ground that it was the defendant "himself who initiated the contact that may have poisoned the jury," the court observed that the defendant "has been convicted of jury tampering and for that misconduct is subject to punishment. That is an entirely discrete matter. At issue in his trial in this case was whether [the defendant] had dealt in stolen goods, not whether he had tried to corrupt the judicial system. A fair and impartial jury cannot be permitted to draw the conclusion that, because a defendant attempted to fix his trial, he is guilty of the offense for which he is being tried. It is conceivable that a defendant, innocent of the charge being tried, might attempt to tamper with a jury to assure a favorable verdict. Some may suggest that our holding today will encourage defendants to tamper with juries, furnishing defendants with a 'heads-I-win, tails-you-lose' proposition: a successful effort secures an acquittal, an unsuccessful effort secures reversal on appeal. We reject that suggestion. The possibility of attempts at jury tampering are ever present. The penalties for that misconduct are serious and can markedly compound a defendant's punishment." *United States* v. *Forrest*, 620 F.2d 446, 458 (5th Cir. 1980); see also, e.g., *United States* v. *Dutkel*, supra, 192 F.3d 897 (*Remmer* presumption "arises automatically" when "the intrusion is [or is suspected to be] on behalf of the defendant raising the claim of prejudice . . . because jurors will no doubt resent a defendant they believe has made an improper approach to them").

does not reveal any equivocation by the jurors in attesting to their continued impartiality. Evaluation of any equivocation evinced in tone or manner remains in the province of the trial judge.[28] See, e.g., *State* v. *Newsome*, supra, 238 Conn. 631; *State* v. *Cubano*, 203 Conn. 81, 92, 523 A.2d 495 (1987); see also *United States* v. *Farhane*, supra, 634 F.3d 169–70 (The trial court reasonably concluded that a juror's discovery of a codefendant's guilty plea through an impermissible Internet search did not require a mistrial when "no juror indicated that he or she would have a problem following . . . instructions" to consider only evidence admitted at trial and not to " 'draw any inference, favorable or unfavorable, toward the government or the defendant from the fact that any person in addition to the defendant is not on trial here. You also may not speculate as to the reasons why other persons are not on trial.' "). Further, J's act of coming forward on his own supports the trial court's assessment of his credibility and lack

[28] The defendant also argues that E's assurances of impartiality were equivocal and conditional on his understanding that the woman involved in the encounter was not the defendant's mother. To this end, the defendant states that E had ample time after being released from questioning, but before the trial court instructed the jury not to discuss the matter further, to learn that the woman who approached J was in fact the defendant's mother. The trial court and E engaged in the following colloquy:

"The Court: . . . [B]ased upon what you personally saw yesterday and what you heard from [J] today, has your impartiality been compromised in any way?

"[E]: I don't think so. So, I at first I had assumed a relationship between this woman and the defendant, but after thinking about it, I don't really know how, if they are related or if there is a relationship at all.

"The Court: I see.

"[E]: So, you know, I don't think so."

In the absence of an articulation from the trial court finding to the contrary, we disagree with the defendant's reading of E's testimony. We read E's testimony on this point as avoiding jumping to conclusions as to the identity of the woman who approached J, particularly given his consistent testimony later, upon questioning by defense counsel and the court, that the incident would not affect his impartiality or ability to decide the case fairly and impartially in accordance with the evidence.

of animus toward the defendant. Had the actions of the defendant's mother "left [J] inclined to be less than fair and impartial toward the defendant, [J] likely would have kept that information to himself in an attempt to ensure that he remained on the jury to vote to convict the defendant." *State* v. *Osimanti*, supra, 37. To the extent that the defendant relies on J's failure to mention during voir dire the presence of the two young women with cell phones or his concern for a mistrial, the trial court reasonably could have attributed those omissions to J's lack of certitude on that point, given that cell phones with cameras are ubiquitous, and the testimony of S and L that J's observations about the women were vague and speculative.

Finally, some of the jurors, specifically, J himself and L, expressed understanding for the actions of the defendant's mother, given her obvious concern for the defendant's future. This strongly supports the trial court's determination that the jurors were not biased against the defendant as a result of his mother's actions.[29] Cf. *State* v. *Rhodes*, supra, 248 Conn. 50–51 (The juror's improper conversations with her boyfriend "were not prejudicial to the defendant" because they "provided [her] with reasons to view the state's case with suspicion. [The boyfriend's] other trial-related comments to [the juror] also could not reasonably be construed as harmful or otherwise unfavorable to the

[29] To this end, we disagree with the defendant's reliance on *United States* v. *Moore*, supra, 641 F.3d 830, for the proposition that J's belief that the defendant tampered with the jury to cause a mistrial "demonstrates that [J] harbored 'notion[s] of perceived guilt,' " and that he "contaminated other jurors by suggesting the same to them." First, nothing in J's testimony evinces a belief that the defendant's mother acted at his direction. Second, although it would have been misconduct for the jurors to discuss the evidence in this case before deliberations in violation of the trial court's instruction to that effect; see, e.g., *State* v. *Washington*, 182 Conn. 419, 428–29, 438 A.2d 1144 (1980); as in *Moore*, there is no indication in the record that J "discussed the facts of the case against [the defendant], or any notion of perceived guilt or innocence." *United States* v. *Moore*, supra, 830.

defendant."). We, therefore, conclude that the state has established that there is no reasonable possibility that the actions of the defendant's mother affected the jury's ability to act fairly and impartially in deciding this case. Accordingly, the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

The judgment is affirmed.

In this opinion the other justices concurred.

JANICE MCCULLOUGH *v.* SWAN ENGRAVING, INC., ET AL.
(SC 19480)

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

Syllabus

Pursuant to statute (§ 31-294c [a]), "[n]o proceedings for compensation . . . shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. . . ."

The plaintiff appealed from the decision of the Compensation Review Board reversing the decision of the Workers' Compensation Commissioner awarding the plaintiff certain survivor's benefits following the death of her husband, who had died as a result of exposure to certain toxins during the course of his employment with the named defendant, S Co. The decedent, whose condition was diagnosed in 2000, filed a timely claim for disability benefits in 2002 and died as a result of his condition in 2005. At no time prior to the decedent's death was his claim accepted or were benefits paid thereon. Fifty-five weeks after the decedent's death, the plaintiff filed a claim for survivor's benefits. Thereafter, S Co., its insurer, and the defendant Connecticut Insurance Guaranty Association accepted the decedent's underlying claim for benefits. At a hearing before the commissioner, the defendants claimed that the plaintiff's claim for survivor's benefits was untimely because it was filed more than one year after the decedent's death. The plaintiff claimed

that the timely filing and acceptance of the decedent's claim for benefits pursuant to § 31-294c satisfied the limitation period for all potential claims under the Workers' Compensation Act. The commissioner agreed that the plaintiff's claim was timely and ordered the defendants to pay survivor's benefits to her. The defendants appealed from the commissioner's decision to the Compensation Review Board, which concluded that the plaintiff was required to file a separate claim for survivor's benefits within one year from the decedent's death. The review board reversed the decision of the commissioner and remanded the case for further proceedings, and the plaintiff appealed. *Held* that the review board improperly concluded that the plaintiff had failed to satisfy the requirements of § 31-294c, there being no language in that statute creating a statute of limitations for a claim for survivor's benefits or language requiring a dependent to file a separate claim for survivor's benefits where, as here, the decedent had filed a timely notice of claim for benefits during his lifetime, and this court would not engraft language into § 31-294c requiring a dependent to file a separate claim for survivor's benefits in such a situation because the issue of whether a survivor should be denied benefits on the ground that he or she failed to file a separate notice of claim under the act is for the legislature to decide, not the courts; although the review board previously had read § 31-294c as requiring a survivor to file a separate claim within one year from the decedent's date of death, this court, applying established rules of statutory construction, determined that that interpretation was not supported by the text of § 31-294c and, therefore, was not reasonable and entitled to deference.

Argued October 7, 2015—officially released February 2, 2016

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Eighth District awarding the plaintiff certain survivor's benefits, brought to the Compensation Review Board, which reversed the decision of the commissioner and remanded the matter for further proceedings, and the plaintiff appealed. *Reversed; decision directed.*

Christopher Meisenkothen, with whom, on the brief, was *Catherine Ferrante*, for the appellant (plaintiff).

Joseph J. Passaretti, Jr., with whom was *Tushar G. Shah*, for the appellees (defendants).

Robert F. Carter filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

EVELEIGH, J. The sole issue in this appeal is whether the plaintiff, Janice McCullough, was required to file a separate timely notice of claim for survivor's benefits under the Workers' Compensation Act (act), General Statutes § 31-275 et seq., where her husband, Arthur McCullough (decedent), had filed a timely claim for disability benefits during his lifetime with the defendant Swan Engraving, Inc. (Swan Engraving).[1] The plaintiff appeals from a decision of the Workers' Compensation Review Board (board) reversing the decision of the Workers' Compensation Commissioner (commissioner) awarding the plaintiff survivor's benefits.[2] On appeal, the plaintiff claims that she was not required to file a separate notice of claim for survivor's benefits because the timely filing of any claim for benefits under the act satisfies the limitation period for all potential claims under the act. We agree with the plaintiff and, accordingly, reverse the decision of the board.

The relevant, undisputed facts and procedural history are as follows. The plaintiff is the widow and presump-

[1] We note that the Connecticut Insurance Guaranty Association was named as a defendant in this matter and joined in the brief filed by Swan Engraving. For the sake of simplicity, we refer to Swan Engraving and the Connecticut Insurance Guaranty Association collectively as the defendants in this opinion.

[2] Although the board reached the legal conclusion that "claims under [General Statutes] § 31-306 . . . must be commenced under the time limitations of [General Statutes] § 31-294c . . . subject to the limited exceptions expressly provided for under [General Statutes] § 31-306b," it remanded the matter to the commissioner for a de novo hearing to determine whether the plaintiff's filing of a notice of claim in this matter, three weeks beyond the statute of limitations provided in § 31-294c, is saved by the provisions of § 31-306b.

tive dependent of the decedent.[3] The decedent was employed by Swan Engraving from 1970 to 1998 as a photograph engraver. During the course of his employment, he was exposed to toxins through his use of carbon arc lamps. In February, 2000, he was diagnosed with disabling pulmonary fibrosis as a result of his work exposure to toxins. In May, 2002, the decedent filed a timely claim for benefits. After seeking medical treatment for his pulmonary fibrosis, including a lung transplant, the decedent succumbed to his illness and died on March 31, 2005. At no time prior to the decedent's death was the claim accepted or were benefits paid.

On April 19, 2006, fifty-five weeks after the decedent's death, the plaintiff filed a claim for death and survivor's benefits. Thereafter, the defendants accepted the decedent's underlying claim for benefits and the parties entered into a voluntary agreement as to that claim on February 26, 2013.

The commissioner conducted a hearing on the plaintiff's claim for survivor benefits. At the hearing, the defendants claimed that the plaintiff's claim for survivor benefits was not timely because it was filed more than one year after the decedent's death and more than six years after the date of the decedent's first manifestation of symptoms of a work-related injury. In response, the plaintiff claimed that the timely filing and acceptance of the decedent's claim for benefits satisfied the limitation period for all potential claims under the act. The commissioner agreed with the plaintiff and determined that her claim for survivor benefits was timely and ordered the defendants to pay survivor's benefits to the plaintiff.

[3] " 'Presumptive dependents' means . . . persons who are conclusively presumed to be wholly dependent for support upon a deceased employee," including "[a] wife upon a husband with whom she lives at the time of his injury or from whom she receives support regularly . . . ." General Statutes § 31-275 (19) (A).

The defendants appealed from the commissioner's decision to the board. The defendants challenged the commissioner's finding that the decedent's timely filing of a claim for benefits under the act satisfied the statute of limitations requirement for the plaintiff's claim for survivor's benefits and asserted that the plaintiff was required to file a separate timely claim for benefits within one year from the decedent's death. The board reversed the decision of the commissioner, concluding that the statutory scheme requires a dependent filing for survivor's benefits to file a separate claim and that "claims under [General Statutes] § 31-306[4] . . . must be commenced under the time limitations of [General Statutes] § 31-294c[5] . . . subject to the limited exceptions expressly provided for under [General Statutes]

[4] General Statutes § 31-306 (a) provides in relevant part that "[c]ompensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease . . . ."

[5] General Statutes § 31-294c (a) provides: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. Notice of a claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. As used in this section, 'manifestation of a symptom' means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed."

§ 31-306b[6] . . . ."[7] (Footnotes added.) This appeal followed.[8]

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals.

[6] General Statutes § 31-306b provides: "(a) Not later than thirty days after the date an employer or insurer discontinues paying weekly disability benefits to an injured employee under the provisions of this chapter due to the death of the injured employee, the employer or insurer shall send by registered or certified mail to the last address to which the injured employee's workers' compensation benefit checks were mailed, a written notice stating, in simple language, that dependents of the deceased employee may be eligible for death benefits under this chapter, subject to the filing and benefit eligibility requirements of this chapter.

"(b) Not later than October 1, 1998, the chairman of the Workers' Compensation Commission shall develop a standard form that may be used by employers and insurers to provide the notice required under subsection (a) of this section.

"(c) The failure of an employer or insurer to comply with the notice requirements of subsection (a) of this section shall not excuse a dependent of a deceased employee from making a claim for compensation within the time limits prescribed by subsection (a) of section 31-294c unless the dependent of the deceased employee demonstrates, in the opinion of the commissioner, that he was prejudiced by such failure to comply. Each dependent who, in the opinion of the commissioner, demonstrates that he was prejudiced by the failure of an employer or insurer to comply with the notice requirements of subsection (a) of this section shall be granted an extension of time in which to file a notice of claim for compensation with the deceased employee's employer or insurer pursuant to section 31-294c, but such extension shall not exceed the period of time equal to the interim between the end of the thirty-day period set forth in subsection (a) of this section and the date the notice required under said subsection was actually mailed."

[7] The board remanded the matter for a de novo hearing to consider "whether the [defendants] appropriately complied with their obligation under § 31-306b . . . and whether their compliance, or lack thereof, has prejudiced the [plaintiff] . . . ." The parties have, however, conceded on appeal that the notice requirements of § 31-306b do not apply to the present case because the defendants were not paying benefits at the time of the decedent's death. Accordingly, on appeal, we only address the board's legal conclusion that the statutory scheme requires that the plaintiff file a separate timely claim for survivor's benefits.

[8] The plaintiff appealed from the board's decision to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and . . . board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Citation omitted; internal quotation marks omitted.) *Sullins* v. *United Parcel Service, Inc.*, 315 Conn. 543, 550, 108 A.3d 1110 (2015). "In addition to being time-tested, an agency's interpretation must also be reasonable . . . ." *Stec* v. *Raymark Industries, Inc.*, 299 Conn. 346, 356, 10 A.3d 1 (2010). "Even if time-tested, we will defer to an agency's interpretation of a statute only if it is 'reasonable'; that reasonableness is determined by '[application of] our established rules of statutory construction.' " *Freedom of Information Officer, Dept. of Mental Health & Addiction Services* v. *Freedom of Information Commission*, 318 Conn. 769, 781, 122 A.3d 1217 (2015).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) Id. In doing so, we are guided by the mandates of Gen-

eral Statutes § 1-2z. The issue of statutory interpretation presented in this case is a question of law subject to plenary review. Id., 782.

Furthermore, "[i]t is well established that, in resolving issues of statutory construction under the act, we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *Sullins* v. *United Parcel Service, Inc.*, supra, 315 Conn. 550–51.

On appeal, the plaintiff asserts that her claim is not barred by the statute of limitations in § 31-294c because the timely filing of the decedent's notice of claim satisfied the requirements of that statute and there is no requirement that she file a separate claim. In response, the defendants assert, and the board concluded, that the plaintiff was obligated to file a separate claim for survivor's benefits within the statute of limitations provided for in § 31-294c (a).

In order to resolve this question, we begin by examining the plain language of § 31-294c. Section 31-294c (a) provides in relevant part: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the

case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. . . .''

Nothing in the plain language of § 31-294c seems to apply to the exact situation in the present case. First, it is undisputed that the decedent complied with the terms of § 31-294c (a) by giving notice of his claim on May 30, 2002, which was within three years from the first manifestation of the disease. Thereafter, the decedent died on March 31, 2005, and the defendants have agreed that his death was as a result of his occupational disease. The defendants eventually accepted the decedent's claim and issued voluntary agreements on that claim.

Second, the only language in § 31-294c regarding a dependent filing a claim for benefits is not applicable in the present case. The only phrase addressing dependents provides as follows: ''[*I*]*f death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease*, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later.'' (Emphasis added.) General Statutes § 31-294c (a). In the present case, the decedent's death did not occur within two years of the date of the first manifestation of a symptom of the occupational disease. Accordingly, based on its plain language, § 31-294c not only does not seem to provide a statute of limitations for the plaintiff's claim, it does not seem to apply to the plaintiff's claim at all.

Third, the plain language of the act provides that one notice of claim is required. Specifically, it provides that "[n]o proceedings for compensation under the provisions of this chapter shall be maintained unless *a written notice of claim for compensation* is given . . . ." (Emphasis added.) General Statutes § 31-294c (a). By explicitly providing that "a written notice of claim" is required, the legislature demonstrated that a claim is barred unless a singular written notice of claim is filed to satisfy the requirements of § 31-294c. The fact that the legislature chose to use the singular form of notice of claim in this provision indicates that it intended that a singular notice of claim would satisfy the requirements of the statute and that further claims would not require additional notice.

Furthermore, a review of the entire act demonstrates that the legislature did not include any explicit provisions for filing a claim for survivor's benefits under the act. None of the other sections of the act either require that a survivor file a separate claim or provide a statute of limitations for such a claim.

The defendants assert, however, that the board has a time-tested approach of interpreting § 31-294c to apply to claims of survivor's benefits and requiring a survivor to file a separate notice of claim or request a hearing on the specific subject of survivor's benefits within one year from the date of death. The defendants further assert that because the board's interpretation of § 31-294c is time-tested, it is subject to deference and should be applied in the present case. In support of their claim, the defendants cite to *Sellew* v. *Northeast Utilities*, 12 Conn. Workers' Comp. Rev. Op. 135 (1994). In *Sellew*, the board, without reliance on specific statutory language in § 31-294c, concluded that "a widow cannot rely on the claim filed by her deceased husband to satisfy . . . jurisdictional notice requirements

. . . .” Id., 138. The board has continued to follow this interpretation of the act for more than twenty years.

As we explained previously herein, “[e]ven if time-tested, we will defer to an agency’s interpretation of a statute only if it is ‘reasonable’; that reasonableness is determined by ‘[application of] our established rules of statutory construction.’ ” *Freedom of Information Officer, Dept. of Mental Health & Addiction Services* v. *Freedom of Information Commission*, supra, 318 Conn. 781. In the present case, we find no support for the board’s interpretation of § 31-294c in the text of the statute.[9]

It is a well established principle of statutory interpretation that “we cannot accomplish a result that is contrary to the intent of the legislature as expressed in the [statute’s] plain language. . . . [A] court must construe a statute as written. . . . Courts may not by construction supply omissions . . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say.” (Internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, 297 Conn. 66, 80–81, 3 A.3d 783 (2010). “In the absence of any indication of the legislature’s intent concerning this issue, we cannot engraft language onto the statute. . . . [W]e will not impute to the legislature an intent that is not apparent from unambiguous statutory language in the absence of a compelling reason to do so. Rather, [w]e are bound to interpret legislative intent by referring to what the legislative text contains, not by what it might have contained. . . . It is not the function of the courts to enhance or supplement a statute containing clearly expressed language.” (Citations omitted; inter-

[9] At oral argument before this court, counsel for the defendants conceded that the text of the act does not contain a statute of limitations for filing a claim for survivor’s benefits and that the defendants’ position requires the reading of language into the statute.

nal quotation marks omitted.) *Laliberte* v. *United Security, Inc.*, 261 Conn. 181, 186, 801 A.2d 783 (2002).

In the present case, there is no language in § 31-294c creating a statute of limitations for a claim for survivor's benefits or language requiring that a dependent file a separate claim for survivor's benefits if the employee filed a timely claim for benefits during his or her lifetime. If the legislature had intended to require such a filing and to provide a statute of limitations period, it could have done so. In the face of a legislative omission, it is not our role to engraft language onto the statute to require a dependent to file a claim for survivor's benefits in such a situation.

Indeed, requiring such a filing, and imposing a statute of limitations thereon, would create a new exclusion for dependents, such as the plaintiff in the present case. "[I]t is not the court's role to acknowledge an exclusion when the legislature painstakingly has created such a complete statute. We consistently have acknowledged that the act is an intricate and comprehensive statutory scheme. *Dowling* v. *Slotnik*, 244 Conn. 781, 811, 712 A.2d 396, cert. denied sub nom. *Slotnik* v. *Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998); *Libby* v. *Goodwin Pontiac-GMC Truck, Inc.*, 241 Conn. 170, 174, 695 A.2d 1036 (1997); *Durniak* v. *August Winter & Sons, Inc.*, 222 Conn. 775, 781, 610 A.2d 1277 (1992). The complex nature of the workers' compensation system requires that policy determinations should be left to the legislature, not the judiciary. See *Discuillo* v. *Stone & Webster*, 242 Conn. 570, 577, 698 A.2d 873 (1997)." *Laliberte* v. *United Security, Inc.*, supra, 261 Conn. 187.

On the basis of the foregoing, we conclude that whether a survivor should be denied benefits on the ground that he or she failed to file a separate notice of claim under the act is for the legislature to decide, not

the courts. See id., 187–88; *Winchester* v. *Northwest Associates*, 255 Conn. 379, 389, 767 A.2d 687 (2001); *Dowling* v. *Slotnik*, supra, 244 Conn. 811; *Panaro* v. *Electrolux Corp.*, 208 Conn. 589, 605, 545 A.2d 1086 (1988). Therefore, we reject the board's imposition of a one year statute of limitations for the filing of survivor's benefits when a valid claim has previously been filed by either the employee or a representative.

Furthermore, our conclusion is consistent with the purposes underlying the broad remedial purpose of the act. "It is well established that the act should be construed to further its humanitarian purposes. *Gil* v. *Courthouse One*, 239 Conn. 676, 682, 687 A.2d 146 (1997). Construing the act liberally advances its underlying purpose—to provide financial protection to the recipient and the recipient's family. *Crook* v. *Academy Drywall Co.*, 219 Conn. 28, 32, 591 A.2d 429 (1991); *English* v. *Manchester*, 175 Conn. 392, 397–98, 399 A.2d 1266 (1978). By recognizing limitations not delineated by the legislature, the court risks denying the beneficent purposes of the act. See *Doe* v. *Stamford*, 241 Conn. 692, 698, 699 A.2d 52 (1997); *Misenti* v. *International Silver Co.*, 215 Conn. 206, 210, 575 A.2d 690 (1990)." *Laliberte* v. *United Security, Inc.*, supra, 261 Conn. 188.

The defendants also assert that § 31-294c must be read in conjunction with § 31-306b. Specifically, the defendants claim that the language of § 31-306b demonstrates that a dependent must comply with the one year statute of limitations contained in § 31-294c. We disagree.

It is well established "that the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute

. . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Brennan* v. *Brennan Associates*, 316 Conn. 677, 685, 113 A.3d 957 (2015).

Section 31-306b (c) provides in relevant part that "[t]he failure of an employer or insurer to comply with the notice requirements . . . shall not excuse a dependent of a deceased employee from making a claim for compensation within the time limits prescribed by subsection (a) of section 31-294c . . . ." As we have explained previously in this opinion, the plain language of § 31-294c does not include any provision applicable to claims by a dependent for survivor's benefits if a timely claim has already been filed by the employee during his or her lifetime. The defendants suggest that in order to make §§ 31-294c and 31-306b (c) harmonious, we must read additional language into § 31-294c and apply the one year statute of limitations as a catchall limitation. We reject this approach, and instead understand the provisions of § 31-306b (c) to apply only in those situations wherein an employee is receiving workers' compensation benefits from the employer prior to filing an official claim, such as cases where a collective bargaining agreement requires that such benefits be paid immediately.

The defendants and the plaintiff rely on various cases from this court and the Appellate Court to support their positions. A review of our previous case law, however, demonstrates, that neither this court nor the Appellate Court has directly addressed whether a dependent needs to file a separate timely claim for survivor's benefits where the employee filed a timely notice of claim under the act during his or her lifetime.

For instance, the plaintiff asserts that in *Fredette* v. *Connecticut Air National Guard*, 283 Conn. 813, 824–

25, 930 A.2d 666 (2007), this court held that if an employee files a timely claim during his lifetime, that claim satisfies the limitations period for claims by dependents for survivor's benefits. We disagree that this issue was decided in *Fredette*. To the contrary, the employee in *Fredette* did not file any claim for benefits during his lifetime and the issue this court addressed was whether the filing of a claim by a dependent within three years of the first manifestation of the employee's occupational disease satisfied the statute of limitations in § 31-294c. Id., 816. In doing so, this court explained: "This does not mean, however, and we do not suggest, that after the death of a decedent who had filed a timely claim during his lifetime, there is no subsequent time limitation on the filing of a separate claim by his dependents or legal representative. . . . We need not decide that question in the present case, however, because the only claim filed was that of the plaintiff, and it was filed within three years of the first manifestation of a symptom of the disease." (Emphasis omitted.) Id., 825 n.12. On the basis of the foregoing language, we disagree with the plaintiff's reading and conclude that the issue in the present case was not decided in *Fredette*.

The defendants also assert that previous case law from this court is instructive in the present case. In support of their position, the defendants rely on *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, 265 Conn. 525, 526–27, 829 A.2d 818 (2003), in which this court affirmed the dismissal of a widow's claim for failure to file a separate timely notice of claim even though the employee had filed a timely notice of claim during his lifetime. We disagree that *Kuehl* is relevant to the present case. First, that case is factually distinguishable. In *Kuehl*, although the employee filed a notice of claim approximately six months after his injury and before his death, the employee's claim for benefits had not

been accepted at the time of the appeal regarding the survivor's benefits. Id., 528–29. In the present case, it is undisputed that the employee satisfied the requirements of § 31-294c by filing a timely notice of claim for benefits that was accepted and paid. Second, in *Kuehl*, the plaintiff did not challenge the Appellate Court's prior adoption of the board's interpretation of § 31-294c as requiring a separate timely notice by a dependent for survivor's benefits. Id., 530 n.8. Indeed, this court explicitly noted that the plaintiff did not challenge that requirement in her appeal. Therefore, in *Kuehl*, this court did not address whether that interpretation of § 31-294c was reasonable. Accordingly, we conclude that this court's decision in *Kuehl* is distinguishable from the present case.

Contrary to the claims of the parties, we conclude that the prior case law of this court is inapplicable to the precise question on appeal in the present case. To the extent that any prior case law from this court or the Appellate Court is inconsistent with our interpretation of § 31-294c, we take this opportunity to clarify it.

On the basis of the foregoing, we conclude that the board improperly concluded that the plaintiff had failed to satisfy the requirements of § 31-294c and improperly remanded the matter for a de novo hearing to determine whether the plaintiff was able to establish prejudice pursuant to § 31-306b. Instead, we conclude that the plaintiff was not required to file a separate timely notice of claim for survivor's benefits when the decedent had filed a timely notice of claim for benefits during his lifetime.

The decision of the Workers' Compensation Review Board is reversed and the case is remanded with direction to affirm the decision of the Workers' Compensation Commissioner.

In this opinion the other justices concurred.

DOMINICK CARUSO ET AL. *v.* ZONING BOARD OF APPEALS OF THE CITY OF MERIDEN ET AL.
(SC 19380)

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

Syllabus

The plaintiffs, the city of Meriden and two of its zoning officers, appealed to the trial court from the decision of the defendant Zoning Board of Appeals of the City of Meriden granting a variance to the defendant M Co. allowing it to operate a used car dealership on a certain parcel of real property. The trial court rendered judgment sustaining the plaintiffs' appeal in part and remanding the case to the board for further proceedings, concluding that, although substantial evidence supported the board's conclusion that the property had been practically confiscated by the applicable zoning regulations, one member of the board should have disqualified himself from the proceedings due to a conflict of interest. Thereafter, M Co. appealed from the judgment of the trial court to the Appellate Court, arguing that the trial court improperly concluded that the board member should have disqualified himself and, therefore, improperly remanded the case to the board. The plaintiffs cross appealed, claiming, inter alia, that the trial court had improperly determined that substantial evidence supported the board's finding of practical confiscation. The Appellate Court concluded that M Co. had failed to prove practical confiscation before the board and, accordingly, reversed the judgment of the trial court and remanded the case with direction to sustain the plaintiffs' appeal. From that judgment, M Co., on the granting of certification, appealed to this court. *Held* that the Appellate Court properly reversed the judgment of the trial court, M Co. having failed to prove practical confiscation because it did not demonstrate that the property had been deprived of all reasonable use and value under the regulations and, therefore, the board could not reasonably have concluded that the regulations had greatly decreased or practically destroyed the property's value for any of the uses to which it could reasonably be put; the evidence contained within the record in this case did not indicate that the property was unfit for any of the permitted uses because of a peculiar characteristic of the land, and did not squarely address or negate some of the permitted uses, and M Co. provided no specific information regarding the value of the property other than M Co.'s own purchase price, and provided no information on its efforts to market, sell, or develop the property for any permitted use.

Argued October 5, 2015—officially released February 2, 2016

Procedural History

Appeal from the decision of the named defendant granting an application for a variance to the defendant Mark Development, LLC, brought to the Superior Court in the judicial district of New Haven and tried to the court, *A. Robinson, J.*; judgment sustaining the appeal in part and remanding the case to the named defendant for further proceedings, from which, on the granting of certification, the defendant Mark Development, LLC, appealed and the plaintiffs cross appealed to the Appellate Court, *Beach*, *Bear* and *Borden*, *Js.*, which reversed the trial court's judgment and remanded the case with direction to sustain the plaintiffs' appeal, and the defendant Mark Development, LLC, on the granting of certification, appealed to this court. *Affirmed.*

Daniel J. Krisch, with whom was *Dennis A. Ceneviva*, for the appellant (defendant Mark Development, LLC).

Joseph P. Williams, with whom was *Beth Bryan Critton*, for the appellees (plaintiffs).

Opinion

ROBINSON, J. This certified appeal arises from the decision of the named defendant, the Zoning Board of Appeals of the City of Meriden (board), to grant a variance to the defendant Mark Development, LLC,[1] to use a certain parcel of real property, located in a regional development zone, as a used car dealership, on the ground that the property has been practically confiscated. The defendant appeals,[2] upon our grant of its

[1] The board was also named as a defendant in the plaintiffs' complaint, but is not a party to the present appeal. For the sake of simplicity, we refer to Mark Development, LLC, as the defendant.

[2] We granted the defendant's petition for certification to appeal limited to the following question: "Did the Appellate Court properly determine that the [board] erroneously granted a variance to [the defendant]?" *Caruso* v. *Zoning Board of Appeals*, 314 Conn. 912, 100 A.3d 849 (2014).

petition for certification, from the judgment of the Appellate Court reversing the judgment of the trial court and remanding the case with direction to sustain the appeal of the plaintiffs, the city of Meriden (city), Dominick Caruso,[3] and James Anderson,[4] from the board's decision granting the variance. *Caruso* v. *Zoning Board of Appeals*, 150 Conn. App. 831, 832–33, 93 A.3d 617 (2014). On appeal, the defendant claims that the Appellate Court improperly concluded that: (1) substantial evidence did not support the board's conclusion that the property had been practically confiscated; and (2) evidence of the property's diminution in value was required. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The record reveals the following facts and procedural history. In 2003, the defendant purchased an approximately forty-eight acre parcel in Meriden for more than one million dollars.[5] The property is located in an area zoned as a " 'Regional Development District' " (development district). Id., 833. The Meriden Zoning Regulations (regulations),[6] provide that, six uses are permitted "by right" on such properties. Meriden Zoning Regs., § 213-26.2 (C) (1) (a) (1) through (6) (2008). These uses include: conference center hotels; executive offices; research and development; medical centers; colleges or universities accredited by the state; and distribution facilities combined with executive offices or research

[3] Caruso is the city's director of development and enforcement and also serves as the city's planner.

[4] Anderson is the city's zoning enforcement officer and environmental planner.

[5] The defendant's property also includes approximately six acres in the neighboring town of Wallingford. *Caruso* v. *Zoning Board of Appeals*, supra, 150 Conn. App. 833 n.3. Only the acreage in Meriden is at issue in the present appeal. Id. Accordingly, we refer to the forty-eight acre parcel in Meriden as the property throughout this opinion.

[6] We note that the regulations were enacted, as an ordinance, by the Meriden City Council and are presently set forth in chapter 213 of the Meriden City Code.

and development.[7] Id. The regulations further provide that "[n]o building or premises may be used, in whole or in part, for any purpose except those listed . . . ." Id., § 213-26.2 (C) (1). The stated purpose of the development district, created in 1986, is to "further the economic base of the city by providing for development of a regional scale along the interstate highway system, in an attractive, efficient, [and] environmentally sensitive campus setting." Id., § 213-26.2 (A). Two other properties in Meriden are zoned as part of the development district, one of which contains the Midstate Medical Center, the other of which is owned by the state.

In August, 2008, the defendant applied to the board for a variance seeking permission to use its property for a used car dealership. The defendant claimed that the regulations "drastically [reduce the property's] value for any of the uses to which it could reasonably be put, and/or the effect of applying the regulations is so severe as to amount to a practical confiscation." At a public hearing on September 2, 2008, the defendant submitted, inter alia, an appraiser's report and a letter from a local attorney in support of its variance application.[8] Immediately following the hearing, the board granted the variance by a four to one vote.[9]

[7] Heliports, coliseums, arenas, and stadiums are also permitted uses in the development district, subject to the issuance of a special exception from the board. Meriden Zoning Regs., § 213-26.2 (C) (1) (b) (1) and (2) (2008).

[8] The defendant also submitted information on the impact that the used car dealership would have on the surrounding neighborhood. The defendant's attorney argued in favor of the variance and explained this impact to the board. The plaintiffs did not submit any evidence, although Anderson and another zoning official attended the hearing.

[9] By letter dated September 3, 2008, Anderson informed the defendant that the board had granted the variance because the regulations "drastically reduce[d] [the property's] value for any of the uses to which it could reasonably be put, and/or the effect of applying the regulations is so severe as to amount to a practical confiscation." The board's attorney later represented that the letter reflected the reasons for the board's decision.

The plaintiffs appealed from the board's decision to the trial court, claiming, inter alia, that the defendant failed to demonstrate that the regulations had caused a practical confiscation of the property and that one board member should have disqualified himself from the proceedings due to a purported conflict of interest.[10] The trial court concluded that substantial evidence supported the board's conclusion that the property had been practically confiscated, noting that the property had been vacant and unused for nearly thirty years and cannot practically be used in any of the ways contemplated within the development district. The court nonetheless sustained the plaintiffs' appeal in part on the alternative ground that one board member should have disqualified himself from considering the defendant's variance application because of his personal relationship with the defendant's attorney. Accordingly, the trial court rendered judgment sustaining the plaintiffs' appeal in part and remanded the case to the board for further proceedings.

The defendant appealed from the judgment of the trial court to the Appellate Court, arguing that the trial court improperly concluded that the board member should have disqualified himself from the proceedings and, therefore, improperly remanded the case for further proceedings.[11] *Caruso* v. *Zoning Board of Appeals*, supra, 150 Conn. App. 833. The plaintiffs cross appealed, asserting that the trial court improperly determined that

[10] The plaintiffs also argued that the trial court should sustain the appeal because: (1) the board failed to make the required findings for granting a variance under § 213-59 (C) of the regulations; (2) the board exceeded its authority in granting the variance; (3) the variance impairs the comprehensive zoning plan; and (4) the purchaser with knowledge rule bars the defendant's variance application. The trial court rejected these contentions.

[11] The Appellate Court did not address the issue of disqualification because it determined that the plaintiffs' contention that the defendant had failed to prove practical confiscation was dispositive. *Caruso* v. *Zoning Board of Appeals*, supra, 150 Conn. App. 841.

substantial evidence supported the defendant's practical confiscation claim, but properly sustained their appeal on the disqualification ground. Id. The Appellate Court agreed with the plaintiffs in part, holding that the defendant failed to prove practical confiscation before the board. Id., 838, 841. The court stated that substantial evidence did not support the board's conclusion that the property had been deprived of all reasonable uses because the defendant offered no evidence of the current value of the property or its efforts to market, sell, or develop the property for any permitted use within the development district. Id., 835, 839–40. The Appellate Court therefore reversed the judgment of the trial court, and remanded the case to that court with direction to sustain the plaintiffs' appeal. Id., 841. This certified appeal followed. See footnote 2 of this opinion.

On appeal to this court, the defendant contends that the Appellate Court improperly concluded that substantial evidence did not support the defendant's practical confiscation claim. The defendant further claims that the Appellate Court improperly required evidence of the property's diminished value in proving practical confiscation and, in doing so, created a categorical rule that all practical confiscation claims must contain such evidence, contrary to our precedent. The plaintiffs dispute this reading of the Appellate Court's decision and maintain that substantial evidence did not support the board's conclusion that the property had been practically confiscated.[12] We agree with the plaintiffs.

[12] The plaintiffs also reassert several arguments that they made to the trial court and the Appellate Court, including: (1) that the board failed to make the required findings for granting a variance under § 213-59 (C) of the regulations; see footnote 13 of this opinion; (2) that the variance impairs the comprehensive zoning plan; (3) that the purchaser with knowledge rule bars the defendant's variance application; see, e.g., *Kalimian* v. *Zoning Board of Appeals*, 65 Conn. App. 628, 632–33, 783 A.2d 506 (property owner barred from obtaining variance because property owner was "charged with notice" of zoning regulations in effect when purchasing property and could not

As a preliminary matter, we set forth our standard of review. A zoning board of appeals "is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal." (Internal quotation marks omitted.) *Green Falls Associates, LLC* v. *Zoning Board of Appeals*, 138 Conn. App. 481, 492, 53 A.3d 273 (2012). A reviewing court is "bound by the substantial evidence rule, according to which, [c]onclusions reached by [the board] must be upheld by the trial court if they are reasonably supported by the record. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [board] supports the decision reached. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Citations omitted; internal quotation marks omitted.) *Municipal Funding, LLC* v. *Zoning Board of Appeals*, 270 Conn. 447, 453, 853 A.2d 511 (2004).

"A variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town." *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 206, 658 A.2d 559 (1995). A zoning board of appeals is statutorily authorized to grant a variance if two requirements are met: (1) the variance will not "affect substantially the comprehensive zoning plan"; and (2) the application of the regulation causes "unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan." (Internal quotation marks omitted.) *Moon* v. *Zoning Board of Appeals*, 291 Conn.

"now be heard to complain that the zoning regulations are unjust"), cert. denied, 258 Conn. 936, 785 A.2d 231 (2001); and (4) that one board member should have disqualified himself from considering the defendant's variance application. See footnotes 10 and 11 of this opinion. We need not address these arguments because we conclude that substantial evidence does not support the board's conclusion that the defendant's property has been practically confiscated.

16, 24, 966 A.2d 722 (2009); see also General Statutes § 8-6 (a) (3).[13] "The hardship must be different in kind from that generally affecting properties in the same zoning district. . . . It is well settled that the granting of a variance must be reserved for unusual or exceptional circumstances." (Internal quotation marks omitted.) *Garlasco* v. *Zoning Board of Appeals*, 101 Conn. App. 451, 456, 922 A.2d 227, cert. denied, 283 Conn. 908, 927 A.2d 917 (2007).

Unusual hardship may be shown by demonstrating that the zoning regulation has deprived the property of all reasonable use and value, thereby practically confiscating the property. This contention "sits at the intersection of two related, yet distinct, areas of law: land use regulation and constitutional takings jurisprudence." *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 699, 111 A.3d 473 (2015). In Connecticut, a taking occurs "when a landowner is prevented from making any beneficial use of its land—as if the government had, in fact, confiscated it." *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 256, 662 A.2d 1179 (1995). Accordingly, a zoning regulation "permanently restricting the enjoyment of property to such an extent

[13] The regulations also list four factors that the board must consider in deciding whether to grant a variance. Meriden Zoning Regs., § 213-59 (C) (2008). Specifically, the regulations provide that "there must be a finding by the [board] that all of the following conditions exist" before granting a variance on the basis of unusual difficulty or unreasonable hardship: (1) "[t]hat if the owner complied with the provisions of [the zoning] regulations, he would not be able to make any reasonable use of his property"; (2) "[t]hat the difficulties or hardship are peculiar to the property in question, in contrast with those of other properties in the same district"; (3) "[t]hat the hardship was not the result of the applicant's own action"; and (4) "[t]hat the hardship is not merely financial or pecuniary." Id. The regulations further require that the board only grant a variance if it finds that: (1) "[t]he new use will not create a traffic or fire hazard"; (2) "[t]he new use will not block or hamper the town pattern of highway circulation"; and (3) "[t]he new use will not tend to depreciate the value of property in the neighborhood or be otherwise detrimental or aggravating to the neighborhood or its residents or alter the neighborhood's essential characteristics." Id., § 213-59 (B).

that it cannot be utilized for any reasonable purpose goes beyond valid regulation and constitutes a taking without due process." (Internal quotation marks omitted.) *Verrillo* v. *Zoning Board of Appeals*, supra, 710. The same analysis is used in the variance context because, when the regulation "practically destroys or greatly decreases [the property's] value for any permitted use to which it can reasonably be put"; *Libby* v. *Board of Zoning Appeals*, 143 Conn. 46, 51, 118 A.2d 894 (1955); the loss of value alone may rise to the level of a hardship. Cf. *Ward* v. *Zoning Board of Appeals*, 153 Conn. 141, 144–45, 215 A.2d 104 (1965) ("[e]vidence of financial considerations, short of a drastic depreciation in the value of the property, will not suffice [to show hardship]"). "This test is used in the extreme situation where the application of a regulation renders property practically worthless . . . ." Id. In this "exceptional set of circumstances"; *Libby* v. *Board of Zoning Appeals*, supra, 52; the zoning regulation "operate[s] in a confiscatory manner . . . justifying the exercise of the variance power." *Verrillo* v. *Zoning Board of Appeals*, supra, 699.

Thus, in accordance with our takings jurisprudence, we have continually held in variance cases that "[w]hen a reasonable use of the property exists, there can be no practical confiscation." Id., 701. Additionally, "[e]vidence that a property is not ' "practically worthless" ' but 'still possesses value' precludes a finding of practical confiscation." Id., 702. For example, in *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 297, 947 A.2d 944 (2008), we concluded that a lot in a subdivision had not been practically confiscated because a reasonable use of the property remained; the property could continue to be used, as it had for many years, to supply water to the subdivision through a well on the property. Likewise, in *Grillo* v. *Zoning Board of Appeals*, 206 Conn. 362, 369–73, 537 A.2d 1030 (1988),

this court held that a lot had not been practically confiscated because it retained some value as a side yard to the property owner as well as her neighbors. Thus, Connecticut courts similarly rejected practical confiscation claims when zoning regulations prevented a property owner from building on the property in a particular way, so long as the property retained some reasonable use under the regulation. See, e.g., *Moon* v. *Zoning Board of Appeals*, supra, 291 Conn. 25–26 (additional living space on second floor); *Kelly* v. *Zoning Board of Appeals*, 21 Conn. App. 594, 595, 575 A.2d 249 (1990) (multifamily dwellings in single-family zone); *Green Falls Associates, LLC* v. *Zoning Board of Appeals*, supra, 138 Conn. App. 495–96 (inability to build three bedroom house did not deprive property of "all economically beneficial or productive use of the land").

Conversely, when the property retains no reasonable use or value under the zoning regulation, a practical confiscation occurs. For instance, in *Pike* v. *Zoning Board of Appeals*, 31 Conn. App. 270, 275–76, 624 A.2d 909 (1993), the Appellate Court held that a lot had been practically confiscated because the property could only reasonably be used for two of the fourteen permitted uses in the zone because of soil problems, and a variance was required in order to use the property in those ways. The Appellate Court noted that there were "no reasonable alternative uses" for the property and that the value of the lot would "be greatly decreased, if not totally destroyed" without a variance. Id., 276. Similarly, in *Culinary Institute of America, Inc.* v. *Board of Zoning Appeals*, 143 Conn. 257, 260–61, 121 A.2d 637 (1956), and *Libby* v. *Board of Zoning Appeals*, supra, 143 Conn. 52–53, this court held that properties containing homes with a large number of rooms had been practically confiscated because the prohibitive cost of maintenance meant that they could no longer reasonably be used, sold, or marketed as single-family residences,

despite the owners' best efforts. Thus, "to compel such a use would be confiscatory." *Culinary Institute of America, Inc.* v. *Board of Zoning Appeals*, supra, 259; see also *Nielsen* v. *Zoning Board of Appeals*, 152 Conn. 120, 124–25, 203 A.2d 606 (1964) (factory building in industrial zone practically confiscated because interior design of building no longer suited for industrial purposes); *Lessner* v. *Zoning Board of Appeals*, 151 Conn. 165, 168–70, 195 A.2d 437 (1963) (variance properly granted to permit construction of one story house on vacant lot because property "cannot be used for any permitted purpose without a variance").

In the present case, like in *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 297, and *Grillo* v. *Zoning Board of Appeals*, supra, 206 Conn. 369–73, the defendant failed to prove practical confiscation because it did not demonstrate that the property has been deprived of all reasonable use and value under the regulations. See *Garlasco* v. *Zoning Board of Appeals*, supra, 101 Conn. App. 462 (property owner failed to meet his "burden to present evidence to the board regarding the issues of reasonable use and the valuation of the property"). The defendant presented no evidence of the property's unfitness for any permitted use in the development district, the property's value since 2003, or any efforts to market, sell, or develop the property since 2003. The defendant's evidence of practical confiscation consisted of an appraiser's report and a letter from a local attorney. Although these documents describe the history of the development district, the previous owner's attempts to market the property, and the market conditions for several of the permitted uses, this evidence is insufficient to establish that the property has *no* reasonable use or value under the regulations.

The defendant's evidence, first, does not indicate that the property is unfit for any permitted use because of

a "peculiar characteristic" of the property. *Dolan* v. *Zoning Board of Appeals*, 156 Conn. 426, 429, 242 A.2d 713 (1968). On the contrary, the appraiser's report opines that "the [property's] location is relatively good with convenient access to the interstate highway system . . . . In addition, the [property] has no significant physical characteristics that would preclude development. . . . [T]he majority of the parcel is physically suitable for development." The report notes that the property is "irregularly shaped . . . both open and wooded and evidences a rolling topography although the site predominantly slopes downward . . . ." The attorney's letter provides that the property "has a different lot configuration and topographic features" than the property owned by the state in the development district. Although these physical features are described, the defendant does not explain why they would allow the property to be used as a used car dealership, but not as a conference center hotel, executive office building, research and development site, medical center, college or university, or distribution facility, all of which are permitted in the development district without a variance. See Meriden Zoning Regs., § 213-26.2 (C) (1) (a) (1) through (6) (2008). The defendant also makes no distinction between its property and the other zoned properties in the development district, one of which has been successfully marketed and developed as a medical center.

Further, the defendant's evidence of the unfavorable market conditions in Meriden for two of the permitted uses—namely, executive offices and research and development—is insufficient to establish that the property has no reasonable use or value. The appraiser's report provides that "the market for large corporate headquarter sites in Connecticut is [nonexistent]" and that most interest in "research-design and bio-tech uses" has been confined to areas near Yale University.

The attorney's letter provides: "It is my experience that there is no demand for these [campus like] types of developments. This is evidenced by the existence of multiple undeveloped or underdeveloped sites and office buildings with vacancies along the [Interstate 91 and Interstate 691] corridor. Corporate offices are much smaller now. More and more employees are able to work from home or off-site. Support services are often provided by off-site personnel." Neither document squarely addresses or negates the property's potential use as a hotel or conference center, medical center, college or university, or distribution facility. See Meriden Zoning Regs., § 213-26.2 (C) (1) (a) (1) through (6) (2008). Thus, even if we accept the proposition that the property cannot reasonably be used for executive offices or research and development, the defendant still falls short of establishing that the property has lost *all* reasonable use and value under the regulations.

The defendant also provided no specific evidence of the value of the property, other than its purchase price of more than one million dollars in 2003. The appraiser's report notes only that the property sold for a "relatively low sale price" in 2003 at $23,583 per acre, and that "[t]his unit rate is clearly below the unit rates that can be expected for commercial/industrial sites in the [Meriden and Wallingford] corridor along [Interstate 91]." The report concludes that the property is at a "competitive disadvantage" and that "price/value is a function of supply and demand. . . . [T]he demand for the [property] is limited to [nonexistent] . . . the use restrictions in the [development district] . . . dramatically reduce the market value of the [property]." The attorney's letter provides that the "limited uses permitted in the [development district] make the parcel less competitive and . . . there is essentially no demand for the permitted uses." Neither document, however, opines as to any change in the property's specific value

since the defendant's more than one million dollar purchase price in 2003.

Lastly, the defendant provided no information on its efforts to market, sell, or develop the property for any permitted use, and merely speculates on the previous owner's efforts to do so between 1986 and 2003. The appraiser's report provides that "[t]he [property] had an extensive marketing period with limited to no interest in the real estate [market] for numerous years." Similarly, the attorney's letter notes that the previous owner "marketed the . . . undeveloped parcel for [twenty] years but was unable to find a buyer with a plan that complied with the [development district's] zoning regulations." There is, however, no discussion of the defendant's efforts to market, sell, or develop the property since 2003. Nor is there any information provided on the previous owner's attempts to market, sell, or develop the property with any specificity.

On the basis of this record, the board could not reasonably have concluded that the regulations had "greatly decrease[d] or practically destroy[ed] [the property's] value for *any* of the uses to which it could reasonably be put . . . ." (Emphasis added.) *Dolan* v. *Zoning Board of Appeals*, supra, 156 Conn. 431. Giving due deference to the judicial standard of review of board decisions, we cannot say that the record supports a conclusion that the defendant's property has been practically confiscated. See *Green Falls Associates, LLC* v. *Zoning Board of Appeals*, supra, 138 Conn. App. 492; see also *Sydoriak* v. *Zoning Board of Appeals*, 90 Conn. App. 649, 658, 879 A.2d 494 (2005) ("a court cannot take the view in every case that the discretion exercised by the local zoning authority must not be disturbed, for if it did the right of appeal would be empty" [internal quotation marks omitted]). The defendant's property actually has more potential uses allowed than the properties in *Rural Water Co.* and

Grillo, which could only be used to supply water and as a side yard, respectively. See *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 296–97; *Grillo* v. *Zoning Board of Appeals*, supra, 206 Conn. 372–73. Additionally, unlike the soil problems in *Pike* and the large single-family homes in *Culinary Institute of America, Inc.*, and *Libby*, nothing unique to the defendant's property prevents it from having any reasonable use or value under the regulations. See *Culinary Institute of America, Inc.* v. *Board of Zoning Appeals*, supra, 143 Conn. 262; *Libby* v. *Board of Zoning Appeals*, supra, 143 Conn. 52–53; *Pike* v. *Zoning Board of Appeals*, supra, 31 Conn. App. 276.

We also disagree with the defendant's hardship argument. Zoning, by definition, restricts land use, and "variance[s] must be reserved for unusual or exceptional circumstances." *Kelly* v. *Zoning Board of Appeals*, supra, 21 Conn. App. 598. "Disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation . . . on the ground of . . . [unusual] hardship." (Internal quotation marks omitted.) *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 561, 916 A.2d 5 (2007). "It is not a proper function of a zoning board of appeals to vary the application of zoning regulations merely because the regulations hinder landowners and entrepreneurs from putting their property to a more profitable use." *Dolan* v. *Zoning Board of Appeals*, supra, 156 Conn. 430–31. The defendant cannot simply point to the zoning regulation *itself* in arguing that it suffers from an unusual hardship. See General Statutes § 8-6 (a) (3). Any grievances that the defendant has with the zoning plan should be directed toward the zoning commission that creates the plan; not the board when seeking a variance.[14] See *Ward* v.

[14] The city's mayor, Michael S. Rohde, expressed his concern that the granting of the defendant's variance would result in a zoning change, stating, "[w]hat troubles me the most is that this proposal is seeking a variance for

Zoning Board of Appeals, supra, 153 Conn. 145 ("[a]rguments concerning the general unsuitability of a neighborhood to the zoning classification in which it has been placed are properly addressed to the promulgators of the ordinance and not to those who have been empowered to grant variances"); *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 723–25 (describing "fundamental distinction between the legislative function of the zoning commission . . . and the administrative and quasi-judicial functions of the zoning board of appeals," in noting that "[i]f the requirements of the [zone] are particularly oppressive to the many . . . properties therein, the proper forum for redress is the town zoning commission" [internal quotation marks omitted]).

The defendant also contends that the Appellate Court improperly required evidence of diminution in the property's value since 2003 in proving its practical confiscation claim and, in doing so, created a categorical rule that all practical confiscation cases must contain such evidence, contrary to our precedent. We disagree with this reading of the Appellate Court's decision. The Appellate Court did not conclude that the defendant failed to prove practical confiscation based *solely* on

what really amounts to a zoning change. It is within the purview of the [c]ity [c]ouncil to make those types of decisions . . . [the variance] would amount to spot zoning, which I vehemently oppose." Anderson also noted in a memorandum to the board that "[z]oning districts are established by the policy board [of the] [c]ity [c]ouncil and therefore [a zoning] appeals board . . . should not be usurping the policy board's dictate by granting unfounded variances. . . . A [v]ariance is not the process to determine the proper use of a parcel of land." Indeed, as this court has previously stated, "[a variance] should not be used to accomplish what is in effect a substantial change in the uses permitted in a [particular zoning district]. That is a matter for the consideration of the zoning commission. . . . The power to repeal, modify or amend a zoning ordinance rests in the municipal body which had the power to adopt the ordinance, and not in the zoning board of appeals." (Citation omitted; internal quotation marks omitted.) *Kaeser* v. *Zoning Board of Appeals*, 218 Conn. 438, 446, 589 A.2d 1229 (1991).

the lack of evidence of the property's value since 2003. See *Caruso* v. *Zoning Board of Appeals*, supra, 150 Conn. App. 840. Rather, the Appellate Court also noted that the defendant presented no evidence "that it was unable to sell the property or unable to develop the property for any of the uses permitted in [the development district] . . . ." Id. Additionally, the Appellate Court did not declare that *all* practical confiscation cases must contain evidence of the property's diminution in value. See id., 838–40. The Appellate Court simply held that without such evidence *in this case*, with no evidence that the property could not reasonably be used as permitted in the development district, there was "no reliable evidence on which to form the conclusion that application of the . . . regulations had destroyed the value of the property." Id., 838.

Moreover, previous cases finding practical confiscation in the absence of evidence of the property's diminished value are distinguishable. In those cases, the property owners demonstrated that the property could not reasonably be used in any of the ways permitted under the regulation, rendering its lack of value obvious. See, e.g., *Libby* v. *Board of Zoning Appeals*, supra, 143 Conn. 48–49 (large single-family home could no longer be sold or marketed as single-family home; only evidence of value was original purchase price of $23,000); *Pike* v. *Zoning Board of Appeals*, supra, 31 Conn. App. 271 (soil problems prevented any use of lot without variance; only evidence of value was original purchase price of $1000). Without such evidence, as in the present case, this court has declined to find practical confiscation without a showing that the regulation "greatly decrease[d] or practically destroy[ed]" the property's monetary value. *Dolan* v. *Zoning Board of Appeals*, supra, 156 Conn. 431; see id. (restaurant could still reasonably be operated on property without variance allowing liquor license); id. ("There is nothing in the

record . . . to indicate the terms and conditions [the owner] was proposing for the sale or rental of his property and what diminishing effect [the] regulation has had on the value of the property. Without this information the board could not have found that the regulation's effect on the property was confiscatory or arbitrary."); see also *Garlasco* v. *Zoning Board of Appeals*, supra, 101 Conn. App. 461 (lot retained value as side yard and absence of evidence of property's value, other than neighbor's offer to purchase lot for $60,000, was "fatal" to practical confiscation claim). We conclude, therefore, that the Appellate Court properly determined that, without evidence that the property could not reasonably be used as contemplated in the development district, the defendant's lack of evidence of the property's diminution in value required the defeat of its practical confiscation claim. Accordingly, the Appellate Court properly reversed the judgment of the trial court and remanded the case with direction to sustain the plaintiffs' appeal.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

WHEELABRATOR BRIDGEPORT, L.P. *v.* CITY OF BRIDGEPORT

WHEELABRATOR BRIDGEPORT, L.P., ET AL. *v.* CITY OF BRIDGEPORT
(SC 19288)

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

Syllabus

The named plaintiff, W Co., the operator of a waste to energy facility located on certain real property in the city of Bridgeport, filed two consolidated appeals from the defendant city's tax assessments, claiming, inter alia, that the city had overvalued the real property, as well as personal property located on the property. The Connecticut Resources Recovery

Authority owned the land on which the facility was located, which was leased to W Co. Moreover, the facility was leased to W Co., and W Co. assumed responsibility for paying all municipal property taxes assessed in connection with the land and the facility. In the first appeal, which was brought in 2009 by W Co. only and was based on the valuation of the property on the city's 2007 and 2008 grand lists, the trial court granted the city's motion to dismiss the appeal for lack of standing and rendered judgment thereon. The trial court concluded that W Co. could not bring an appeal pursuant to the statute (§ 12-117a) authorizing an appeal by an entity aggrieved by the action of a board of assessment appeals, or pursuant to the statute (§ 12-119) providing remedies for properties that are wrongfully assessed, because W Co., as a lessee, was not the owner of the subject property and failed to plead or establish the requirements of those statutes with respect to lessees. The trial court also concluded that the statute (§ 22a-270) authorizing the assessment of taxes on the lessee of property owned by the Connecticut Resources Recovery Authority did not provide an alternative avenue for appeal as that statute required compliance with §§ 12-117a and 12-119. With respect to the second appeal, which was brought in 2011 by W Co. and certain other plaintiffs, and was based on the valuation of the property on the city's 2010 grand list, the trial court sustained the appeal with respect to the city's valuation of the real property and assigned a new value to that property but denied the appeal with respect to the valuation of W Co.'s personal property and rendered judgment thereon. W Co. thereafter appealed from the judgments in both appeals, and the city cross appealed from the judgment in the second appeal. *Held*:

1. The trial court improperly granted the city's motion to dismiss the first appeal for lack of standing, and, therefore, the case was remanded with direction to deny the motion to dismiss and for further proceedings in W Co.'s first appeal: § 22a-270 (b), which provides that a lessee of property owned by the Connecticut Resources Recovery Authority shall be liable for property taxes assessed pursuant to that statute and shall have the right to appeal the amount it is assessed, clearly and unambiguously conferred standing on W Co. to appeal from the city's property tax assessment, that statute having treated a lessee as an owner of property for purposes of appeal; moreover, contrary to the city's claim, there was no requirement that W Co. plead and establish the identity of the lessor of the property when W Co. was indisputably the lessee, and the fact that W Co. was a lessee rather than the owner of the personal property that was subject to the assessment did not deprive W Co. of standing to appeal from that portion of the assessment relating to personal property, § 22a-270 (b) expressly having provided that a lessee has the right to appeal from an assessment against both real and personal property.
2. The trial court improperly rejected the discounted cash flow approach to valuing the property as a matter of law in determining the value of

the property and improperly determined the value of the property in the second appeal: because the trial court strongly suggested that problems with the discounted cash flow approach itself, rather than the specific calculations of the experts, resulted in disparate valuations between each party's experts, suggested that the going concern approach, which it equated with the discounted cash flow approach, was inherently improper and fundamentally incompatible with a property valuation for assessment purposes, cited another jurisdiction's disapproval of that approach, and never explained why such an approach was inappropriate despite the testimony of the parties' experts that it was the most appropriate method for valuing the property, this court concluded that the trial court rejected the discounted cash flow approach to valuation as a matter of law; furthermore, the court's rejection of that approach as a matter of law was improper when both parties' expert witnesses, whom the trial court characterized as experienced and knowledgable, testified that the discounted cash flow approach was the best method for valuing the subject property, and, therefore, the case was remanded for a new trial at which the trial court may exercise its discretion to determine the credibility of the expert witnesses regarding the appropriate valuation method, as well as the credibility of their specific calculations; moreover, to the extent that the city did not challenge on appeal the trial court's determination that the subject property was overvalued on the city's 2010 grand list, this court upheld the trial court's conclusion that W Co. had been subjected to an unlawful tax as a result of that overvaluation on the 2010 grand list.

3. This court declined to determine whether the trial court's valuation of the property based on the appraisal of the city's expert included the assessed value of W Co.'s personal property and, if so, whether that valuation effectively permitted the city to impose a double tax on the value of the personal property, this court having remanded the case for a new trial at which the trial court was directed to determine whether the experts' appraisals included the value of the personal property and to order the city to allocate the taxes on the real and personal property accordingly; moreover, this court could not conclude that the trial court's finding that the valuation of W Co.'s personal property on the 2010 grand list was not excessive was clearly erroneous, and this court affirmed that portion of the judgment in the second appeal denying W Co.'s appeal from the valuation of its personal property on the 2010 grand list.

4. The trial court improperly excluded evidence, in the second appeal, of the city's wrongful conduct in valuing the subject property, such conduct having been a proper consideration in a property tax appeal pursuant to §§ 12-117a and 12-119 for purposes of determining whether W Co. was entitled to interest on overpayments to the city; on remand, W Co. is entitled to present evidence that the city's overvaluation of the property was the result of wrongful conduct, including that it fabricated its valuation of the property, that there were alleged irregularities in the

procedure that the city normally follows for valuing commercial properties with respect to its valuation of the subject property, and that it improperly denied W Co.'s claim for an exemption for pollution control equipment, wrongfully had subjected the facility's personal property to double taxation, wrongfully imposed an interest penalty, and wrongfully punished W Co. for declining to produce an appraiser's report at an administrative hearing.

5. The city could not prevail on its claim on cross appeal that the trial court improperly denied its motion to dismiss W Co.'s second appeal on the ground that W Co.'s refusal to provide the city's board of assessment appeals with a copy of a certain draft appraisal at an administrative hearing was the effective equivalent of failing to appear before the board, that such failure to appear prevented the board from sustaining W Co.'s appeal pursuant to the statute (§ 12-113) providing that a board of assessment appeals shall not reduce the valuation or assessment of property on the grand list belonging to any person who does not appear at a hearing before the board, that W Co. in turn could not have been aggrieved by the board's decision, and that the trial court therefore lacked jurisdiction over W Co.'s appeal from the board's decision; even if W Co.'s refusal to provide the board with the draft appraisal was the effective equivalent of a failure to appear, that failure would be relevant only with respect to the merits of the trial court's decision sustaining W Co.'s appeal and would not deprive the trial court of jurisdiction to hear the appeal.

6. The city could not prevail on its claim on cross appeal that the trial court improperly admitted the appraisal testimony of W Co.'s expert witnesses on the ground that they were not licensed in this state as real estate appraisers: a person who otherwise is qualified as an expert witness to testify regarding the value of real property based on specialized knowledge that is beyond the ken of the ordinary juror is not disqualified to testify merely because he is not a licensed real estate appraiser in this state, and testifying regarding the value of property does not constitute engaging in the real estate appraisal business for purposes of the statutory scheme ([Rev. to 2011] § 20-500 et seq.) governing the licensure of real estate appraisers, or otherwise violate that statutory scheme; moreover, barring a person who is qualified to assist the finder of fact in a judicial proceeding in its determination of the true and actual value of real property from so assisting the finder of fact merely because he is not licensed would not advance either the truth-finding function of the judicial process or the consumer protection purpose of the statutory licensing scheme.

7. Contrary to the city's claim on cross appeal, the trial court did not abuse its discretion in deducting developer's profit of 15 percent from its reproduction cost approach calculations in determining the value of the property; however, on remand, the city was not precluded from presenting, and the trial court was not precluded from crediting, evi-

dence that the property's historical cost, on which the reproduction cost approach was based, did not include developer's profit.

(*Two justices concurring separately in one opinion*)

Argued September 17, 2015—officially released February 2, 2016

Procedural History

Two appeals from the tax assessments of certain property on which a waste to energy facility operated by the named plaintiff is located, brought to the Superior Court in the judicial district of Fairfield, and transferred to the judicial district of New Britain, where the cases were consolidated and tried to the court, *Hon. Arnold W. Aronson*, judge trial referee, who, in the first case, granted the defendant's motion to dismiss and, exercising the powers of the Superior Court, rendered judgment thereon in favor of the defendant, and, in the second case, rendered partial judgment for the plaintiffs; thereafter, the plaintiff in the first case and the plaintiffs in the second case appealed, and the defendant cross appealed in the second case. *Reversed and further proceedings in the first case*; *affirmed in part and reversed in part and new trial in the second case.*

John B. Daukas, pro hac vice, with whom were *Barry C. Hawkins* and *Michael K. Murray*, for the appellants-appellees (plaintiffs).

Elliott B. Pollack, with whom was *Tiffany K. Spinella*, for the appellee-appellant (defendant).

Opinion

ZARELLA, J. The named plaintiff, Wheelabrator Bridgeport, L.P. (Wheelabrator), operates a waste to energy facility (facility) located on property in the city of Bridgeport (property).[1] In 2009, Wheelabrator appealed from the tax assessment of the defendant, the city of Bridgeport (city), pursuant to General Statutes

[1] All references to the property throughout this opinion are to both the land on which the facility is located and the facility itself.

§§ 12-117a, 12-119 and 22a-270, claiming that the city had overvalued the property, as well as personal property located on the property, on the city's 2007 and 2008 grand lists for purposes of assessing property taxes. In 2011, Wheelabrator, the United States Bank National Association, as corporate owner trustee of the facility, James E. Mogavero, as individual owner trustee of the facility, and Waste To Energy I, LLC (Waste To Energy),[2] as equitable owner of the facility, filed a second appeal from the city's tax assessment, alleging that the city had overvalued the property on the 2010 grand list. Thereafter, the two appeals were consolidated for purposes of trial. The city moved to dismiss both appeals for lack of standing, and the trial court granted the motion to dismiss the first appeal but denied the motion to dismiss the second appeal. The trial court then rendered partial judgment in favor of Wheelabrator in the second appeal and reduced the valuation of the property on the 2010 grand list. Wheelabrator filed the present appeal[3] from the judgments of the trial court, claiming, among other things, that the trial court improperly (1) granted the city's motion to dismiss the first appeal, (2) improperly valued the property in the second appeal, and (3) failed to consider evidence of the city's wrongful conduct in the second appeal. The city cross appealed, claiming that, in the second appeal, the trial court improperly (1) denied its motion to dismiss, (2) admitted the appraisal testimony of Wheelabrator's two expert witnesses, and (3) excluded developer's profit from its valuation of the property based on the cost to

[2] The complaint in the second appeal refers to Waste To Energy I, LLC. Elsewhere in the record, this entity is referred to as Waste Energy I, LLC. For consistency, we refer to this entity as Waste To Energy.

In the interest of simplicity, we refer to Wheelabrator, the United States Bank National Association, Mogavero and Waste To Energy collectively as Wheelabrator.

[3] Wheelabrator appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

construct the facility. We conclude that the trial court improperly dismissed the first appeal. We also agree with Wheelabrator's two claims regarding the second appeal and reject the city's claims on cross appeal. Accordingly, we reverse the judgment of the trial court dismissing the first appeal, reverse the trial court's valuation of the property in the second appeal, and remand for further proceedings in the first appeal and a new trial in the second appeal.

The record reveals the following procedural history and facts, some of which were found by the trial court and some of which are undisputed. The facility was built in the 1980s as a collaboration between the Connecticut Resources Recovery Authority (CRRA) and Wheelabrator. The facility burns municipal solid waste to generate electricity, which Wheelabrator sells to United Illuminating Company. In addition to income derived from the sale of electricity, Wheelabrator receives tipping fees from municipalities in exchange for receiving municipal solid waste.

In order to take advantage of certain tax and bond opportunities that would not have been available if the facility had been owned by a private entity, CRRA took nominal title to the facility and leased it back to Wheelabrator. Pursuant to § 22a-270 (a),[4] the property was

[4] General Statutes § 22a-270 provides in relevant part: "(a) The exercise of the powers granted by this chapter constitute the performance of an essential governmental function and the authority shall not be required to pay any taxes or assessments upon or in respect of a project, or any property or moneys of the authority, levied by any municipality or political subdivision or special district having taxing powers of the state, nor shall the authority be required to pay state taxes of any kind, and the authority, its projects, property and money and any bonds and notes issued under the provisions of this chapter, their transfer and the income therefrom, including revenues derived from the sale thereof, shall at all times be free from taxation of every kind by the state except for estate or succession taxes and by the municipalities and all other political subdivisions or special districts having taxing powers of the state; provided nothing herein shall prevent the authority from entering into agreements to make payments in lieu of taxes with respect to property acquired by it or by any person leasing a project from

exempt from municipal property taxes until January 1, 2009. The property became taxable on that date pursuant to § 22a-270 (b). On the city's 2007 grand list, the city listed the fair market value of the property as $365,624,993 and the value of Wheelabrator's personal property as $17,253,570. These amounts reflected the value of the real and personal property as of October 1, 2003, the date of the last citywide property valuation.

The city conducted a citywide revaluation on October 1, 2008. As the result of this revaluation, the city listed

the authority or operating or managing a project on behalf of the authority and neither the authority nor its projects, properties, money or bonds and notes shall be obligated, liable or subject to lien of any kind for the enforcement, collection or payment thereof. . . .

"(b) Notwithstanding the provisions of subsection (a) of this section, real and personal property owned by the authority may be assessed and taxed against a lessee pursuant to chapter 203 by the municipality in which such property is located if such property is leased as of July 1, 2007, to a lessee or operator by the authority pursuant to an initial site lease entered into between the authority and a lessee on or before December 31, 1985. This subsection shall not apply to property which is: (1) The security for any bonds issued by the authority and outstanding on July 1, 2007, until the indebtedness evidenced by such bonds has been paid in full, (2) leased by the authority pursuant to a lease in effect on January 1, 2007, until after the expiration of the lease term in effect on said date, whether by execution of a new lease, by amendment of the lease or by renewal or extension of the term of such lease pursuant to an option stated therein if such amendment is entered into or such option is exercised after said date, or (3) the subject of an agreement for payments in lieu of taxes between the municipality and the authority or its lessee during any municipal fiscal year covered by such agreement. The lessee shall be liable for taxes assessed pursuant to this subsection and shall have the right to appeal the amount it is assessed in the tax year such property first becomes taxable hereunder in the same manner as a purchaser of formerly tax-exempt property under section 12-81a, with the same effect as if a conveyance to a nonexempt purchaser had been placed on the land records on the date the property first ceases to be exempt pursuant to this section. The assessor and collector of the municipality shall proceed with respect to such property in the same manner as is provided in said section 12-81a with respect to adding the property to the grand list, giving notice of the assessment to the lessee and billing the taxes due thereon to the lessee."

Although § 22a-270 was the subject of technical changes in 2010; see Public Acts 2010, No. 10-32, § 87; those changes have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

the value of the property on the 2008 grand list as $401,624,570 and the value of Wheelabrator's personal property as $10,559,534. Wheelabrator appealed from the 2007 and 2008 valuations to the Board of Assessment Appeals of the City of Bridgeport (board), claiming that the valuations were excessive.[5] The board denied the appeal. Wheelabrator then appealed from this denial to the trial court pursuant to §§ 12-117a,[6] 12-

[5] The trial court ultimately determined that Wheelabrator's appeal from the city's valuations on the 2007 and 2008 grand lists encompassed all valuations up to the date of trial because the 2008 valuation would apply to succeeding years until the property was revalued. Accordingly, the appeal also encompassed the valuation on the city's 2009 grand list even though the complaint did not refer to that valuation.

[6] General Statutes § 12-117a provides in relevant part: "Any person, including any lessee of real property whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom, with respect to the assessment list for the assessment year commencing October 1, 1989, October 1, 1990, October 1, 1991, October 1, 1992, October 1, 1993, October 1, 1994, or October 1, 1995, and with respect to the assessment list for assessment years thereafter, to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court. . . . The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable, and, if the application appears to have been made without probable cause, may tax double or triple costs, as the case appears to demand; and, upon all such applications, costs may be taxed at the discretion of the court. If the assessment made by the board of tax review or board of assessment appeals, as the case may be, is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes, together with interest and any costs awarded by the court, or, at the applicant's option, shall be granted a tax credit for such overpayment, interest and any costs awarded by the court. Upon motion, said court shall, in event of such overpayment, enter judgment in favor of such applicant and against such city or town for the whole amount of such overpayment, less any lien recording fees incurred under sections 7-34a and 12-176, together with interest and any costs awarded by the court. The amount to which the assessment is so reduced shall be the assessed value of such property on the grand lists for succeeding years until the tax assessor finds that the value of the applicant's property has increased or decreased."

Although § 12-117a was the subject of an amendment in 2013; see Public Acts 2013, No. 13-276, § 5; that amendment has no bearing on the merits of

119[7] and 22a-270 (b). In its complaint, Wheelabrator alleged that, as of December 31, 2008, Waste To Energy was the owner of the property and that Wheelabrator was a lessee that was responsible for paying all property taxes.

Thereafter, the city filed a motion to dismiss the appeal for lack of subject matter jurisdiction on the ground that Wheelabrator lacked standing. Specifically, the city contended, among other things, that Wheelabrator had alleged that Waste To Energy was the owner of the property that Wheelabrator leased when, in fact, CRRA was the owner of the land. Accordingly, the city argued, Wheelabrator "does not have a legally cognizable interest in the subject property from Waste [To Energy]" for purposes of §§ 12-117a and 12-119. See General Statutes § 12-117a ("any lessee of real property whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease

this appeal. In the interest of simplicity, we refer to the current revision of § 12-117a.

[7] General Statutes § 12-119 provides: "When it is claimed that a tax has been laid on property not taxable in the town or city in whose tax list such property was set, or that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof or any lessee thereof whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, prior to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. Such application may be made within one year from the date as of which the property was last evaluated for purposes of taxation and shall be served and returned in the same manner as is required in the case of a summons in a civil action, and the pendency of such application shall not suspend action upon the tax against the applicant. In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court. If such assessment is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes in accordance with the judgment of said court."

to pay real property taxes" has right to appeal from board's ruling); General Statutes § 12-119 ("any lessee [of the property] whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes" has right to appeal from board's ruling). In addition, the city claimed that Wheelabrator lacked standing because a lessee of personal property cannot file an appeal pursuant to §§ 12-117a and 12-119. Wheelabrator filed an opposition to the motion, in which it claimed that, as of January 3, 2009, CRRA held record title to the land on which the facility was located, CRRA leased the land to Wheelabrator, which subleased it to the United States Bank National Association and Mogavero, the owner trustees, who, in turn, subleased it back to Wheelabrator. In addition, Wheelabrator alleged that the United States Bank National Association and Mogavero, as owner trustees, had record title to the facility and, on behalf of Waste To Energy, which was the trust beneficiary and equitable owner of the facility, leased the facility to Wheelabrator. Wheelabrator also claimed that its standing to appeal pursuant to § 22a-270 did not depend in any way on the nature of Waste To Energy's interest in the land. Rather, that statute was intended to allow lessees such as Wheelabrator to appeal from the city's tax assessments. Finally, Wheelabrator contended that it had standing under §§ 12-117a and 12-119 because it was a lessee of real property whose lease had been recorded in the land records and who was required to pay property taxes, and the statutes were not limited to appeals from real property assessments. The trial court concluded that the issue of Wheelabrator's standing involved factual questions that would be better addressed at the time of trial and denied the city's motion to dismiss.

On its 2010 grand list, the city again listed the value of the real property as $401,624,570, but it reassessed

the value of Wheelabrator's personal property at $56,873,060. Wheelabrator appealed from this valuation to the board. At a hearing in this second appeal, the chairman of the board asked Wheelabrator if it had an appraisal report for the property. Wheelabrator had prepared a draft appraisal report for use in the first appeal, but, because the report was not yet subject to disclosure in that litigation under the trial court's discovery schedule, and because Wheelabrator believed that the report was privileged and confidential attorney work product, Wheelabrator declined to produce it. The board ultimately denied the second appeal, and Wheelabrator appealed from the board's denial to the trial court pursuant to §§ 12-117a, 12-119 and 22a-270 (b). The trial court consolidated the two appeals for trial.

At the trial of the consolidated appeals, the city contended that the second appeal should be dismissed for lack of standing because (1) Wheelabrator failed to establish either that CRRA owned the land and that Wheelabrator was its lessee or that the United States Bank National Association and Mogavero, the owner trustees, owned the facility and that Wheelabrator was their lessee, (2) a lessee of personal property is not authorized to appeal pursuant to §§ 12-117a and 12-119, and (3) Wheelabrator failed to exhaust its administrative remedies because it had refused to provide the draft appraisal report to the board at the hearing on the assessment relating to the 2010 grand list. After trial, the trial court granted the city's motion to dismiss the first appeal on the ground that CRRA, not Waste To Energy, was the owner of the property, and, therefore, Wheelabrator's complaint, "alleging that [Waste To Energy] was the owner and lessor of the subject property, failed to comply with §§ 12-117a and 12-119 [which allow] only an owner of property or a lessee of the owner who has agreed to pay the property tax and

whose lease or notice of lease has been recorded [in] the city's land records to appeal from an assessor's valuation."[8] The court further concluded that § 22a-270 did not provide "an alternative path for taking a tax appeal in order to avoid the restrictions contained in §§ 12-117a and 12-119" because § 22a-270 "requires the lessee to comply with chapter 203 of the General Statutes . . . which incorporates §§ 12-117a and 12-119 . . . ." The court implicitly denied the city's motion to dismiss the second appeal.[9]

Turning to Wheelabrator's claim in the second appeal that the city had overvalued the property on the 2010 grand list, the trial court concluded that the proper appraisal method was the reproduction cost approach. The court further concluded that, under that approach, the value of the property for purposes of the 2010 grand list and subsequent years was $314,017,430. In addition, the court found that Wheelabrator had presented no evidence that the city had improperly valued Wheela-

[8] The trial court found that CRRA owned the land and leased it to Wheelabrator and that the lease from CRRA to Wheelabrator, Wheelabrator's sublease to the United States Bank National Association and Mogavero, and their sublease back to Wheelabrator had been recorded in the land records. The court apparently concluded, however, that, because Wheelabrator had named Waste To Energy as the owner of the property in the complaint, and because no lease naming Waste To Energy as the owner and Wheelabrator as the lessee had been recorded in the land records, Wheelabrator had failed to plead or to establish that the requirements of §§ 12-117a and 12-119 had been satisfied.

[9] The trial court did not expressly address in its memorandum of decision the issue of Wheelabrator's standing to bring the second appeal. After Wheelabrator filed its appeal to this court from the judgments of the trial court, and the city filed its cross appeal, the city filed a motion for articulation in which it requested, among other things, that the trial court articulate the reason for its denial of the city's motion to dismiss the second appeal. The trial court sustained Wheelabrator's objection to that motion. The city then filed a motion for review with this court in which it requested that this court order an articulation on several issues. This court granted the motion for review in part but denied the motion to the extent that it requested articulation of the trial court's reasons for denying the motion to dismiss the second appeal.

brator's personal property at $56,873,060 on the 2010 grand list. The court also noted that "the value of the facility under the cost approach does not include personal property since the cost valuation is not based [on] the valuation of a going concern." Thus, the trial court concluded that the city could impose a separate tax on the personal property. This appeal and cross appeal followed. We address each of the parties' claims in turn. Additional facts and procedural history will be set forth as necessary.

I

We first address Wheelabrator's claim that the trial court improperly granted the city's motion to dismiss the first appeal. We agree with Wheelabrator.

The following facts and procedural history are relevant to our resolution of this issue. As we indicated, the trial court concluded that Wheelabrator lacked standing to bring the first appeal because it alleged in its complaint that Waste To Energy owned the property as of December 31, 2008, and Wheelabrator was its lessee with responsibility to pay all property taxes when, in fact, CRRA was the owner of the land. Accordingly, the trial court concluded that Wheelabrator lacked standing to appeal pursuant to §§ 12-117a and 12-119 because it had failed to plead or to establish that the requirements of those statutes relating to lessees of property had been met. The court further concluded that § 22a-270 (b) did not provide an independent route for Wheelabrator to establish standing because that statute required Wheelabrator to comply with chapter 203 of the General Statutes, including the requirements of §§ 12-117a and 12-119 relating to lessees. Wheelabrator contends, to the contrary, that § 22a-270 (b), standing alone, confers standing on it to appeal from the city's tax assessment. In addition, Wheelabrator contends that, because it was CRRA's lessee, because

its leases with CRRA were recorded in the land records, and because it was required under the terms of its leases to pay all property taxes, it had independent standing to appeal pursuant to §§ 12-117a and 12-119.

We begin our analysis with the standard of review. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . 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." (Internal quotation marks omitted.) *Burton* v. *Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 550, 23 A.3d 1176 (2011).

Because it is dispositive, we first address Wheelabrator's claim that it had standing to appeal pursuant to § 22a-270 (b). That statute provides in relevant part: "Notwithstanding the provisions of subsection (a) of this section, real and personal property owned by the authority may be assessed and taxed against a lessee pursuant to chapter 203 by the municipality in which such property is located if such property is leased as of July 1, 2007, to a lessee or operator by the authority pursuant to an initial site lease entered into between the authority and a lessee on or before December 31, 1985. . . . The lessee shall be liable for taxes assessed pursuant to this subsection and shall have the right to appeal the amount it is assessed in the tax year such property first becomes taxable hereunder in the same manner as a purchaser of formerly tax-exempt property under section 12-81a,[10] with the same effect as if a conveyance to a nonexempt purchaser had been placed on the land records on the date the property first ceases

[10] General Statutes § 12-81a (d) provides in relevant part: "The purchaser [of formerly tax-exempt property] may appeal the doings of the assessor to the board of assessment appeals and the Superior Court as otherwise provided in this chapter . . . ."

to be exempt pursuant to this section. . . .'' (Footnote added.) General Statutes § 22a-270 (b).

We conclude that this language clearly and unambiguously confers standing on Wheelabrator to appeal from a property tax assessment. First, the city does not dispute that Wheelabrator is a ''lessee'' as that term is used in § 22a-270 (b). Rather, the city's primary argument is that, contrary to the allegation in Wheelabrator's complaint in the first appeal, Waste To Energy never was the record titleholder or record *lessor* of the property. Nothing in the language of § 22a-270 (b), however, suggests that an entity that indisputably is a ''lessee'' under the statute cannot appeal from a tax assessment unless it pleads and establishes the identity of the lessor of the property. To the contrary, the statute provides that a ''lessee'' has a right to appeal ''in the same manner as a purchaser of formerly tax-exempt property under section 12-81a, with the same effect as if a conveyance to a nonexempt purchaser had been placed on the land records on the date the property first ceases to be exempt pursuant to this section.'' General Statutes § 22a-270 (b). Thus, for purposes of an appeal pursuant to § 22a-270 (b), a lessee is deemed to be the owner of the subject property, and property owners clearly have standing to appeal from property tax assessments. Accordingly, we cannot perceive why an entity that is admitted to be a lessee for purposes of § 22a-270 (b) should be required to plead or prove any additional element to establish standing to appeal from a property tax assessment pursuant to that statute.[11]

[11] It is clear, therefore, that § 22a-270 (b) does not incorporate the requirements of §§ 12-117a and 12-119 relating to lessees of property. If the legislature did not intend that an entity that is a lessee for purposes of § 22a-270 (b) would be deemed to be an owner of the subject property for purposes of appealing from a tax assessment pursuant to §§ 12-117a and 12-119, we cannot fathom under what circumstances or in what sense it could have intended to authorize a lessee ''to appeal the amount it is assessed . . . in the same manner as a purchaser of formerly tax-exempt property . . . .'' General Statutes § 22a-270 (b).

We also reject the city's claim that a lessee of *personal* property does not have standing to appeal from the tax assessment of that property pursuant to § 22a-270 (b). Section 22a-270 (b) expressly provides that "real and personal property owned by the authority may be assessed and taxed against a lessee" and that the lessee "shall have the right to appeal the amount it is assessed . . . in the same manner as a purchaser of formerly tax-exempt property under section 12-81a . . . ."[12] Thus, for purposes of an appeal from a tax assessment on personal property pursuant to § 22a-270 (b), the lessee of the property is deemed to be its owner. Accordingly, we conclude that Wheelabrator had standing to bring the first appeal pursuant to § 22a-270 (b), and, therefore, the trial court improperly granted the city's motion to dismiss that appeal.[13]

II

We next address Wheelabrator's claim that the trial court improperly determined the value of the property in the second appeal. Specifically, Wheelabrator contends that the trial court improperly rejected the discounted cash flow approach to valuing the property as a matter of law. We agree with Wheelabrator.

The record reveals the following additional facts and procedural history that are relevant to our resolution

[12] We note that General Statutes § 12-81 includes tax exemptions for personal property. See, e.g., General Statutes § 12-81 (12) (exempting "[p]ersonal property within the state owned by, or held in trust for, a Connecticut religious organization").

[13] Because we conclude that Wheelabrator had standing to appeal pursuant to § 22a-270 (b), we need not address the issue of whether it has independent standing to appeal pursuant to §§ 12-117a and 12-119 as a "lessee of real property whose lease has been recorded as provided in section 47-19 and who is bound under the terms of [the] lease to pay real property taxes . . . ." General Statutes § 12-117a; see also General Statutes § 12-119 (referring to "any lessee thereof whose lease has been recorded as provided in section 47-19 and who is bound under the terms of [the] lease to pay real property taxes").

of this claim. At trial, one of Wheelabrator's expert witnesses, Alexander L. Hazen, testified that there are three primary methods of appraising property, namely, "the cost approach, [the] income approach, and [the] sales comparison approach, also known as the market data approach." When asked what was the most appropriate approach for waste energy facilities, Hazen responded that "[t]he primary reliance would be on the income approach to value." Hazen explained that a purchaser's "willingness to pay more or less for a facility is going to be based on the income flow that he anticipates into the future." Hazen also explained that, in applying the income approach to the appraisal of the property at issue in the present case, he had reviewed Wheelabrator's financial information and had projected income streams from sales of electricity and tipping fees for the useful life of the facility. Hazen then converted the value of that future income stream to present value to arrive at the value of the facility, a methodology that is known as the discounted cash flow approach. Hazen concluded that, under this approach, the fair market value of the property as of October 1, 2008, was $199,300,000.

Although Hazen and Joseph Kettell, another expert who testified for Wheelabrator, believed that the discounted cash flow approach was the best approach for appraising the property, they also made calculations pursuant to the replacement cost approach. Hazen testified that they applied this approach "as a check against other approaches to make sure that you're not way off in left field someplace." Hazen and Kettell opined that the replacement cost of the facility as of the revaluation date of October 1, 2008, was $211,300,000. Reconciling this value with the $199,300,000 value based on the discounted cash flow approach, Wheelabrator's experts ultimately concluded that, as of October 1, 2008, the fair market value of the property was $201,700,000.

Excluding tax exempt pollution control equipment valued at $10,857,310, the taxable value was $190,842,690.

The city's expert witness, Mark Pomykacz, also testified that he had relied primarily on the income approach to appraising the property and that he had relied on the cost approach only "[i]n a secondary fashion." Pomykacz testified on cross-examination that he had relied primarily on the income approach because that "is the method that the market participants put the most weight on." Similarly, in his written opinion, he stated that "in a deregulated market, the income approach should be utilized and given the greatest weight among the three approaches to value for electric generation facilities," and that "the income approach provides the strongest indication of market value for the [f]acility, as of the valuation dates." He explained that there are two main income approaches, namely, direct capitalization[14] and the discounted cash flow analysis, and that he had used both of them to determine the value of the property. Pomykacz concluded that, as of October 1, 2008, the value of the property under the direct capitalization approach was $398,456,411 and its value under the discounted cash flow approach was $376,184,993, rounded down to $376,180,000.

Pomykacz also testified, however, that the cost approach to property appraisal is "especially informative" for special purpose properties and highly engineered facilities, such as the subject property. He testified that there are two distinct cost approaches, namely, the replacement cost approach and the repro-

[14] In his written appraisal report, Pomykacz explained that, under the direct capitalization approach, "[o]ne year's income expectancy [is] capitalized at a market derived capitalization rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment."

duction cost approach.[15] He further testified that he had been able to find market data that allowed him to apply both cost approaches to the subject property "meaningfully and reliably" but that "these conclusions were given less weight than the income approach conclusions." Pomykacz concluded that, as of October 1, 2008, the value of the property under the reproduction cost approach was $362,027,000 and the value under the replacement cost approach was $402,753,000. After reconciling the various approaches, giving special weight to the discounted cash flow approach and subtracting the value of exempt pollution control equipment and nontaxable and tax exempt property, Pomykacz ultimately concluded that the taxable value of the property as of October 1, 2008, was $357,500,000.

The trial court ultimately concluded that "the reproduction cost approach is the only credible approach to use in this case in order to arrive at a [fair market value] of the subject property as of October 1, 2008." Although the court acknowledged that both Wheelabrator's experts and Pomykacz had testified that the discounted cash flow approach was an appropriate method to value the property, the court concluded that this approach "lack[ed] credibility" because, among other reasons, (1) "if the [discounted cash flow]/going concern income approach[16] process were credible, then two experi-

[15] Pomykacz explained that, under the reproduction cost approach, an appraiser determines the cost to construct "an exact replica of the facility as it exists with all its quirkiness . . . ." Under the replacement cost approach, the appraiser estimates the cost to build a replacement that would have the "same functionality but . . . a different design."

[16] The trial court appears to have used the phrases "discounted cash flow approach" and "going concern income approach" interchangeably. For example, the court referred to the "[discounted cash flow]/going concern income approach" and concluded that the discounted cash flow approach lacked credibility in part because the experts had "employed the going concern approach rather than directly valuing the real and personal property . . . ." Although the concepts are not identical, they are related. See *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 95–96 n.9, 61 A.3d 461 (2013) (explaining going concern approach to valuing real estate). Specifically, the

enced and knowledgable appraisers who are given the same basic facts and who use the same income approach would not be over $200,000,000 apart in their valuation of the subject property";[17] (footnote added); (2) "[t]he appraisers employed the going concern approach rather than directly valuing the real and personal property [that] are the subject of the [two] appeals,"[18] and (3) the appraisers' respective valuations of the nontaxable intangible assets were far apart.[19] In

discounted cash flow approach is one method of valuing a going concern. See footnote 23 of this opinion.

[17] As we indicated, Wheelabrator's experts' appraised value of the property based on the discounted cash flow approach was $199,300,000, and Pomykacz' appraised value was $376,180,000, a difference of $176,880,000. It is unclear why the trial court found that the difference between their appraisals was greater than $200,000,000.

[18] The trial court explained that, in its view, the problem with the use of the discounted cash flow approach for this particular property was, as Pomykacz explained in his appraisal report, that "[t]raditionally, at commercial properties, such as offices, apartments, malls . . . income is prescribed by leases or the market potential to be leased. There is no such rental market for power generation plants and [waste to energy] facilities. Thus, we were not able to find income that was strictly attributable to the taxable real and personal property, or just the taxable real property. Similar market conditions exist at many properties where the business activities are intertwined with the personal and real property. . . . Appraisers in all of these cases will find it difficult or impossible to find adequate data on the income to the business that is strictly attributable to the real property or the real and personal property." (Internal quotation marks omitted.) We also note that, during trial, the trial court indicated that the use of the income approach to the valuation of the property was "troubling to the court . . . ." The court appeared to suggest that its concern was that it was difficult to distinguish the value of the *business*, which was not subject to property taxes, from the value of the real property, which was. The court noted that an appeal from its decision in another case was pending in this court; see *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 61 A.3d 461 (2013); and that the decision in that case "would be a big help to the [trial] court in how the court looks at [the issue of] the use of the income approach . . . ." See footnote 25 of this opinion.

[19] Kettell concluded that the only nontaxable, intangible asset was working capital valued at $2,300,000, whereas Pomykacz concluded that the value of the nontaxable, intangible property—which included computer software, operational and procedural manuals, work force in place and working capital accounts—was $15,498,000.

addition, the trial court took note of the court's observation in *Tamburelli Properties Assn.* v. *Cresskill*, 15 N.J. Tax 629 (1996), aff'd, 308 N.J. Super. 326, 705 A.2d 1270 (App. Div. 1998), that "the courts have not always discussed the discounted cash flow analysis . . . as a method for arriving at true market value for real estate in the most positive terms. . . . The [discounted cash flow] method, as applied to tax valuation proceedings, is an amalgam of interdependent, attenuated assumptions of limited probative value. Whatever may be its utility in other contexts, its use in [this context] can only be described as an exercise in financial haruspication."[20] (Internal quotation marks omitted.) Id., 643.

After rejecting the other valuation approaches for various reasons,[21] the trial court concluded that "[t]he reproduction cost approach has credibility for purposes of valuing the subject." The trial court then used Pomykacz' historical cost figure of $241,949,000, which excluded developer's profit of 15 percent that Pomykacz had included in his calculations, multiplied this figure by Pomykacz' "trend factor" of 2.08 percent, and applied Pomykacz' 38 percent depreciation factor to arrive at a value of $312,017,430. Because the reproduction cost approach did not include the value of the land, the court then added the stipulated land value of $2,000,000, for a total taxable value of $314,017,430 as of

[20] An haruspex is "a diviner in ancient Rome basing his predictions on inspection of the entrails of sacrificial animals . . . ." Webster's Collegiate Dictionary (11th Ed. 2003); see also The Free Dictionary, available at http://www.thefreedictionary.com/haruspication (last visited January 15, 2016) (defining haruspication as "a form of divination from lightning and other natural phenomena, but especially from inspection of the entrails of animal sacrifices").

[21] Specifically, the trial court rejected the direct capitalization approach because "both appraisers considered [it] to have little merit." The court rejected the replacement cost approach because "the valuation of the subject facility should not be that of a newly constructed modern facility [that] did not exist as of October 1, 2008."

October 1, 2008.[22] Accordingly, the trial court concluded that, to the extent that the second appeal challenged the city's valuation of the real property on the 2010 grand list as $401,624,570, the appeal was sustained. Because Wheelabrator had presented no credible evidence that the city had improperly determined that the value of its personal property was $56,873,060, however, the trial court denied Wheelabrator's appeal from that valuation. The court rendered judgment in the second appeal for Wheelabrator accordingly.

After Wheelabrator filed the present appeal from the judgments of the trial court, this court ordered the trial court to articulate whether it had rejected the discounted cash flow approach as a method for valuing the subject property as a matter of law, or because it found the testimony of the parties' experts not credible with respect to that approach. The trial court stated that it "did not reject the [discounted cash flow] approach as a method for valuing the subject property as a matter of law" but had "rejected the testimony of the parties' experts because it found this testimony not to be credible with respect to this approach."

Wheelabrator claims on appeal that, notwithstanding the trial court's contention to the contrary in its articulation, the court improperly rejected the discounted cash flow approach to valuing the property as a matter of law. We agree.

Resolving the issue of whether the trial court improperly rejected the discounted cash flow approach to valuing the property as a matter of law requires us to answer two questions. First, we must determine whether the trial court, in fact, rejected the approach as a matter of law. See, e.g., *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 102, 61 A.3d 461 (2013) ("the starting

[22] The trial court used October 1, 2008, as the date of valuation because that was the date of the last citywide revaluation.

point in any tax appeal taken from the Superior Court . . . is a determination as to whether the trial court reached its decision through [1] the exercise of its discretion in crediting evidence and expert witness testimony, or [2] as a matter of law"). Second, if we conclude that the trial court reached its determination as a matter of law, we must decide whether that determination was proper. The first question requires us to interpret the judgment of the trial court, which, itself, is a question of law. See *Ottiano* v. *Shetucket Plumbing Supply Co.*, 61 Conn. App. 648, 651–52, 767 A.2d 128 (2001). "As an issue of law, [t]he interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment . . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Citations omitted; internal quotation marks omitted.) Id., 652.

We conclude for the following reasons that the trial court rejected the discounted cash flow approach[23] to

[23] As we indicated, the trial court used the phrase "going concern" and "discounted cash flow" more or less interchangeably in its memorandum of decision. See footnote 16 of this opinion. The income approach is one specific approach to valuing going concerns; see *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 95–96 n.9; and, as the experts in the present case explained, the discounted cash flow approach is one specific form of the income approach. The general tenor of the trial court's memorandum of decision in the present case suggests that the court was troubled generally by the *income approach* to valuing the property, not by the specific *dis-*

the valuation of the property as a matter of law. First, the court strongly suggested that it believed that problems with the use of *the approach itself*, rather than flaws in the experts' specific calculations, were responsible for the disparate valuations. Indeed, the court characterized both Kettell and Pomykacz as "two experienced and knowledgable appraisers . . . ." Second, and more to the point, the court's statement that the appraisers had employed a "going concern approach rather than directly valuing the real and personal property" clearly suggests that the court believed that a going concern approach, which the court believed was synonymous with a discounted cash flow approach, was inherently improper and fundamentally incompatible with a property valuation for tax assessment purposes, at least for a property, such as a waste to energy facility, that had no rental market. See footnote 18 of this opinion. Third, the court noted with approval another court's disparagement of the discounted cash flow method as haruspication. See text accompanying footnote 20 of this opinion. Fourth, the trial court never explained why it concluded that the testimony of both Kettell and Pomykacz that the discounted cash flow approach was the best approach to the property valuation at issue *in the present case* was not credible. In other words, the court never explained what it was about the property that led the court to conclude that it was particularly unsuited to valuation under the discounted cash flow approach, despite the testimony by the parties' expert witnesses that it was the most appropriate method for valuing this property.[24] Cf. *Redding Life Care, LLC* v.

counted cash flow approach, per se. See footnote 18 of this opinion. Nevertheless, because the trial court referred repeatedly to the discounted cash flow approach in its memorandum of decision, we use that terminology.

[24] Although the trial court relied on Pomykacz' written report for the proposition that it was difficult to apply the income approach to value real estate that does not have a rental market; see footnote 18 of this opinion; the court did not explain why it rejected Pomykacz' statement, in the very next paragraph of his report, that, after using the income approach to determine the overall business value for the property, he had been able to

Redding, supra, 308 Conn. 103 (concluding that trial court had not rejected going concern approach as method for valuation as matter of law when "the trial court's disagreement with the plaintiff's valuation turned on the flaws in [the appraiser's] calculations and formula, not on the method itself"). In the absence of any such explanation, we can conclude only that the court determined that the approach was inappropriate in the present case because it believed that it is generally an inappropriate method for valuing property for tax assessment purposes, at least when the property does not have a rental market. Finally, it is significant that, during trial, the trial court had expressed doubts about the general propriety of employing the discounted cash flow approach to valuing property for property tax assessment purposes. See footnote 18 of this opinion. The court's reference at that time to the pending appeal from its decision in *Redding Life Care, LLC*, supports the conclusion that the court was not concerned with specific flaws in the appraisers' calculations but with the method itself.[25]

employ "various appropriate appraisal procedures to discover the value of the taxable real and personal property at the facility. . . . [He had] estimated the value of the nontaxable items and deducted them from the overall business value. Again, this is a standard practice in the valuation of power plants and for waste to energy power plants specifically, and [the] procedures [he employed] are credible."

[25] In *Redding Life Care, LLC*, the trial court, *Hon. Arnold W. Aronson*, judge trial referee, denied the plaintiff's appeal from the defendant's property tax assessment. See *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 93. On appeal to this court, the plaintiff claimed that Judge Aronson improperly had determined that the "going concern income capitalization approach . . . is not recognized or permitted under Connecticut law and thus may not be used to determine the fair market value of real estate . . . ." Id., 94. We concluded, as a matter of law, that "[t]here may be cases in which it is proper to value real estate by first valuing the going concern associated with the property, based on an income capitalization approach, and other cases in which it is not." Id., 96 n.9. We further concluded that Judge Aronson had not rejected the approach as a matter of law but had rejected "the formula and calculations on which [the plaintiff's appraiser] relied to arrive at the valuation of the intangible business." Id., 103. We ultimately affirmed the judgment in that case. Id., 115. In the present case, Judge Aronson

We are mindful that the trial court stated in its articulation that it had found the testimony of the parties' experts "not to be credible with respect to this approach." It is clear to us, however, that the trial court rejected the credibility of their testimony that the discounted cash flow approach was a proper method for valuing the property for tax assessment purposes, not that it had rejected the credibility of their actual calculations pursuant to that approach. To be sure, the trial court in its memorandum of decision did criticize several of Kettell's specific calculations. For the reasons that we have explained, however, we cannot conclude that those perceived flaws formed the basis of the trial court's rejection of the discounted cash flow approach. Indeed, although the trial court found that some of Pomykacz' calculations under the reproduction cost approach lacked credibility, the court ultimately based its valuation on that approach. We conclude, therefore, that the trial court rejected the discounted cash flow approach to valuation for property tax assessment purposes—at least as applied to properties that do not have a rental market—as a matter of law.[26]

referred to our decision in *Redding Life Care, LLC*, in his memorandum of decision, but he never acknowledged this court's statement that the going concern approach may be an appropriate method for valuing property for property tax assessment purposes.

[26] The concurrence states that our conclusion constitutes "a significant departure from the considerable discretion that our case law has long afforded to trial courts with respect to electing the proper appraisal method [to use] in the factual determination of property valuation." We have no quarrel with the proposition, however, that the trial court has broad discretion to choose the proper appraisal method for valuing a particular property, and nothing in this opinion is to the contrary. Indeed, as the concurrence acknowledges, we certainly have not concluded that the trial court was *required* to use the discounted cash flow approach. We have concluded only that the trial court improperly determined that it could not apply the discounted cash flow approach to properties that do not have a rental market *as a matter of law*.

The concurrence contends, to the contrary, that the trial court concluded only that the discounted cash flow approach " 'lacks credibility' " for this particular property. Although the concurrence cites several reasons that the trial court gave for rejecting the specific calculations of the appraisers, the

concurrence has not provided any explanation for the trial court's conclusion that the *approach itself* was inappropriate for this specific property. As we have indicated, the only explanation that we can discern is that the trial court believed that the discounted cash flow approach is inappropriate, as a matter of law, for properties that do not have a rental market. Indeed, one of the reasons that the trial court gave for its rejection of the approach on which the concurrence relies is that the appraisers' estimates pursuant to the discounted cash flow approach were not "a [direct] valuation of the real and personal property [that] are the subject of [the two] appeals . . . ." (Internal quotation marks omitted.) In other words, the trial court concluded that "direct" valuation is the *only* appropriate appraisal method for properties *of this type*. The concurrence also notes that the trial court criticized several of Kettell's specific calculations pursuant to the discounted cash flow approach. As we have indicated, however, even if the trial court had legitimate concerns about certain specific calculations, those concerns were peripheral to the trial court's central conclusion that the approach itself was categorically inappropriate—indeed, that it amounted to nothing more than "haruspication"—for this type of property. Put another way, even if we were to assume that the concurrence is correct that any one of these specific concerns standing alone *could have* provided sufficient reason for the trial court to reject Kettell's calculations, a careful reading of the trial court's memorandum of decision leads us to conclude that these concerns did not provide the *actual* basis for the court's rejection of the discounted cash flow approach. At the very least, it is impossible for us to determine at this juncture whether any of the trial court's specific concerns with Kettell's discounted cash flow calculations, standing alone or in combination, would have led the trial court to adopt the reproduction cost approach if it had not categorically rejected the discounted cash flow approach. To the extent that the concurrence contends that this question is answered by the trial court's articulation, in which the court stated that it "did not reject the [discounted cash flow] approach as a method for valuing the subject property as a matter of law," for the reasons stated in this opinion, we find the concurrence's interpretation of this statement to be inconsistent with the reasoning of the trial court's original memorandum of decision, and we must presume that the trial court may not change the basis for its original decision in an articulation. See *Standish* v. *Standish*, 40 Conn. App. 298, 301, 670 A.2d 1330 (1996) ("[a] motion for articulation is not an opportunity for a trial court to substitute a new decision . . . [for] a prior decision" [internal quotation marks omitted]). We emphasize that we are not concluding that the trial court in fact changed the basis for its decision in the articulation. Rather, we are concluding that the concurrence's *interpretation* of the articulation, namely, that the trial court accepted the general validity of the discounted cash flow approach as applied to the valuation of this type of property but concluded that it was not supported by the evidence in this case, would be inconsistent with the clear meaning of the trial court's original decision. Under our interpretation of the articulation as indicating that the trial court did not believe the experts' testimony that the discounted cash flow approach was appropriate for this type of property, the articulation and the original decision are consistent.

We next consider whether this determination was proper. "[W]hen a tax appeal . . . raises a claim that challenges the propriety of a particular appraisal method in light of a generally applicable rule of law, our review of the trial court's determination whether to apply the rule is plenary." (Internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 101.

In *Redding Life Care, LLC*, we concluded that "[t]here may be cases in which it is proper to value real estate by first valuing the going concern associated with the property, based on an income capitalization approach, and other cases in which it is not." Id., 96 n.9. Although we did not directly address the issues of whether the specific *discounted cash flow* approach to valuing a going concern could be employed for property tax assessment purposes in an appropriate case or whether the general income approach may be employed to appraise property that does not have a rental market, we can perceive no reason why those approaches should be categorically barred. Indeed, in the present case, expert witnesses for both sides, whom the trial court characterized as "experienced and knowledgable," testified that the income approach, and, more specifically, the discounted cash flow approach, was the *best* method for valuing the property, because that is the method that market participants would use to determine the price that they would pay for the property. We conclude, therefore, that the trial court improperly rejected the discounted cash flow approach to valuing the property for tax assessment purposes as a matter of law.

Wheelabrator contends that, if we find that the trial court improperly rejected the discounted cash flow approach to the valuation of the property for tax assessment purposes as a matter of law, this court should

adopt the value that Wheelabrator's expert witnesses placed on the property, or, alternatively, we should remand the case to the trial court and direct that court to apply the discounted cash flow approach to the valuation of the property. We conclude that neither of these remedies is appropriate. Specifically, we cannot adopt the valuation of Wheelabrator's experts because doing so would require us to find facts and make credibility determinations, which are not within the province of an appellate court. Similarly, because we have concluded only that the trial court improperly determined that the discounted cash flow approach *cannot be* employed in the present case as a matter of law, not that it *must be* employed as a matter of law, it would be inappropriate for us to direct the trial court to apply the discounted cash flow approach on remand.[27] Accordingly, we conclude that the case must be remanded to the trial court for a new trial at which the court may exercise its discretion to determine the credibility of the expert witnesses regarding the appropriate valuation method, as well as the credibility of their specific calculations. We note, however, that the city does not challenge on appeal the trial court's determination that the property was overvalued on the 2010 grand list. See *Sibley* v. *Middlefield*, 143 Conn. 100, 105, 120 A.2d 77 (1956) ("The court performs a double function on an appeal from a board of tax review. First, it must determine the judicial question [of] whether the appellant has been aggrieved by such action on the part of the board as will result in the payment of an unjust and, therefore, a practically illegal tax. [Second], if that question is answered in the affirmative, the court must proceed to exercise its broad discretionary power to grant relief.").

[27] We are mindful, however, that the expert witnesses for *both sides* in the present case testified that the discounted cash flow approach was the best method for valuing the property. If the experts present the same testimony on remand, and the trial court disagrees with that testimony, it should explain why it believes that another approach is preferable.

Accordingly, although we conclude that the trial court improperly valued the property, to the extent that the trial court concluded that Wheelabrator was subjected to an unlawful tax as a result of the valuation on the 2010 grand list, we uphold that conclusion and affirm that portion of the judgment of the trial court in the second appeal.

III

We next address Wheelabrator's claim that the trial court's valuation of the real and personal property on appeal effectively permitted the city to impose a double tax on the value of the personal property.[28] Specifically, Wheelabrator contends that the trial court incorrectly determined that Pomykacz' appraisal pursuant to the reproduction cost approach—on which the trial court had based its valuation—did not include the value of the personal property and, therefore, that the city could impose a separate tax on the assessed value of the personal property. We conclude that, in light of our remand for a new trial, there is no need for this court to decide whether the trial court's valuation based on Pomykacz' appraisal included the personal property, but the trial court on remand must determine whether the experts' appraisals of the property include the value of the personal property and allocate the taxes on the real and personal property accordingly.

The following facts and procedural history are relevant to our resolution of this claim. At trial, Wheelabrator contended that, because the personal property and the real property were subject to the same tax rate, it could combine the two types of property into a single asset for appraisal purposes. It further contended that, if the court disagreed with this contention, the court

[28] We address Wheelabrator's claim that the city had unlawfully imposed a double tax on the value of the personal property on the 2010 grand list in part IV of this opinion.

could subtract its experts' valuation of the personal property at $54,546,583 from the total combined value of $201,700,000 to reach a real property value of $147,153,417.

Pomykacz testified that he believed that the total value of Wheelabrator's taxable property as of October 1, 2008, was $357,500,000 and that he was not asked to value the real and personal property separately. In addition, he stated in his written report that "[t]he overall value . . . considering the three general appraisal approaches [i.e., the cost approach, income approach and comparable sales approach] includes real property, personal property, intangibles, and taxable and nontaxable property." Although it appears that Pomykacz deducted the value of working capital and business intangibles from the overall value to determine the total taxable value of the property in his written report, it does not appear that he deducted the value of personal property.

The trial court concluded that Pomykacz' valuation pursuant to the reproduction cost approach did not include the value of personal property because "the cost valuation is not based [on] the valuation of a going concern." The court further concluded that Wheelabrator had not presented any evidence that would undermine the city's valuation of the personal property at $56,873,060 on the 2010 grand list. Accordingly, the court concluded that the city could impose a separate tax on the personal property based on that value and rejected Wheelabrator's appeal from that valuation.

Whether the city's valuation of the real property on the 2010 grand list included the value of the personal property is a question of fact subject to review for clear error. See, e.g., *Newbury Commons Ltd. Partnership* v. *Stamford*, 226 Conn. 92, 103, 626 A.2d 1292 (1993) ("[w]hether a property has been overvalued for tax assessment purposes is a question of fact for the trier").

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *State* v. *Maurice M.*, 303 Conn. 18, 51, 31 A.3d 1063 (2011).

We cannot conclude that the trial court's finding in the present case that the valuation of the personal property on the 2010 grand list at $56,873,060 was not excessive was clearly erroneous. Indeed, Wheelabrator does not seriously contend that it was. The fact that the city properly valued the personal property on the 2010 grand list does not mean, however, that Pomykacz' appraisal of the property pursuant to the reproduction cost approach did not include the value of that personal property, and the city has pointed to no evidence that would support the trial court's finding to that effect. Nevertheless, because we have concluded that this case must be remanded to the trial court for a new trial on the value of the property, there is no need for us to decide whether the trial court's finding that Pomykacz' appraisal pursuant to the reproduction cost approach did not include the value of personal property was clearly erroneous.[29] Rather, we conclude that the court

[29] The concurrence concludes that the trial court's conclusion that Pomykacz' calculations did not include personal property was clearly erroneous. It further concludes that a new trial is required at which the trial court should determine whether the appraisal includes the value of the personal property. It is unclear to us why the concurrence, having determined that the trial court properly exercised its discretion to reject the discounted cash flow approach and to value the property pursuant to the reproduction cost approach, and having reached the " 'definite and firm conviction' that the trial court committed a mistake" when it concluded that Pomykacz' calculations, on which it based its own valuation, did not include personal property, believes that a remand is necessary. Unless the concurrence has other, unstated concerns about the trial court's calculations, it would appear that the concurrence simply could deduct the undisputed value of the personal property from the trial court's valuation to determine the taxable value of the property.

on remand must carefully consider whether the appraisers' valuations pursuant to the various approaches include the value of personal property, and, if it finds that they do, the court either should deduct the value of the personal property from the overall value and order the city to tax the real and personal property separately, or should limit the city to taxing the overall value of the property.

IV

Because it is likely to arise on remand, we next address Wheelabrator's claim that the trial court improperly excluded evidence of the city's wrongful conduct and discounted evidence of wrongful conduct that Wheelabrator did present. Wheelabrator contends that the trial court should have considered evidence that the city wrongfully (1) fabricated its valuation of the property, (2) assessed taxes on tax exempt pollution control equipment, (3) imposed an interest penalty, (4) imposed a double tax on personal property, and (5) punished Wheelabrator for refusing to produce its experts' appraisal report at the hearing before the board in the administrative appeal from the assessment on the 2010 grand list. We conclude that, on remand, the trial court may properly consider evidence that the city engaged in wrongdoing for the purpose of determining whether Wheelabrator is entitled to interest on overpayments to the city.

The following additional facts are relevant to our resolution of this issue. In support of Wheelabrator's claim that the city fabricated its valuation of the property, Wheelabrator's plant manager, Vincent P. Langone, Jr., testified at trial that, after the legislature enacted § 22a-270 (b) in 2007; see Public Acts 2007, No. 07-255, § 3; he met with city officials to discuss Wheelabrator's potential property tax liability. John M. Fabrizi, the then mayor of Bridgeport, initially indicated that he believed

that the figure would be between $10 and $13 million. At a later meeting, the city's comptroller, Michael Feeney, told Langone that he could not provide a precise figure because the city's fiscal budgets were not yet established but that he believed that the annual property tax would be in the range of $7 to $10 million. Langone told Feeney that, on the basis of third-party appraisals that Wheelabrator had obtained, he believed that annual property taxes would be less than $5 million.

Wheelabrator also attempted to present evidence that, when the city revalued the property in 2008, the city's tax assessor, William O'Brien, was aware that CRRA had obtained an appraisal that put the value of the property at $225 million. The trial court sustained the city's objection to the admission of the appraisal on relevance grounds, but it allowed O'Brien to testify as to whether he was aware of the appraisal at the time of the revaluation. O'Brien testified that he did not know whether he was aware of the appraisal.

In addition, Wheelabrator attempted to present evidence regarding the city's normal procedure for valuing commercial property for tax assessment purposes. That evidence would have shown that the city had hired an appraiser, Vision Government Solutions, Inc. (Vision), to value the city's taxable properties for purposes of the 2008 revaluation. The city provided Vision with field cards for each property. At that point, a Vision employee would go into the field, inspect the property and make any necessary changes on the card. Normally, the various values shown on the card will add up to the total appraised value. The city objected to this evidence on the ground that it was irrelevant with respect to how the revaluation was conducted and contended that the sole issue was whether Wheelabrator could establish that the fair market value of the property was less than the city's valuation. Wheelabrator contended that it was entitled to put on evidence that the city had wrongfully

failed to assess the property based on its "true and present value." The trial court sustained the city's objections, stating that "[t]he assessor is really not on trial. This whole issue that the court sees is the question of what's the fair market value of the subject property on the date of valuation." Although the trial court allowed Wheelabrator to submit evidence that the numbers on the field card for the subject property for the 2008 revaluation did not add up to the total appraised parcel value of $401,624,570,[30] it sustained the city's objection to the admission of evidence showing that the city had told Vision that it would handle the valuation of the property and that the reason the figures on the field card for the property did not add up was because someone had overridden the computer system that generated the various amounts shown on the field cards. Wheelabrator contends that all of this evidence was relevant to show that the city fabricated the $401,624,570 valuation so that it could charge Wheelabrator $13 million per year in taxes and thereby cover its annual budget deficit.

In support of its claim that the city improperly had denied Wheelabrator's claim for an exemption for pollution control equipment valued at $10,559,534, Wheelabrator presented evidence that, in October, 2008, it filed a form seeking a tax exemption for certain pollution control equipment. The city denied the exemption and taxed Wheelabrator for the equipment for two years. Although the city ultimately acknowledged that the pollution control equipment was not taxable, it refused to refund the taxes that it already had collected.

[30] The field card for the property for the 2008 revaluation listed an "Appraised [Building] Value (Card)" of $6,062,840, an "Appraised XF (B) Value [Building]" of $126,360, an "Appraised OB (L) Value [Building]" of $172,320, and an "Appraised Land Value [Building]" of $1,254,000. The total appraised parcel value was $401,624,570. The appraisal report of Wheelabrator's expert witnesses showed that this value was five to ten times the assessed fair market value of Connecticut's five other waste to energy facilities and five times the value that the city had assigned to another electric generating plant located in Bridgeport on the 2008 grand list.

In support of its claim that the city wrongfully had subjected the facility's personal property to double taxation on the 2010 grand list, Wheelabrator presented evidence that it had sent a letter to the city on October 30, 2009, stating that the value of the personal property should be deducted from the $401,624,570 property value shown on the assessor's field card. In response, the city continued to value the real property at $401,624,570 on the 2009 grand list and imposed a separate tax on the personal property listed in Wheelabrator's declaration, which it valued at $55,333,667. On the 2010 grand list, the city valued the real property at $401,624,670 and valued the personal property at $56,873,060.

In support of its claim that the city wrongfully had imposed an interest penalty, Wheelabrator presented evidence that the city sent the first property tax bill to CRRA on January 1, 2009. After Wheelabrator requested a copy of the bill, the city sent it a copy on February 4, 2009. Although Wheelabrator paid the bill within thirty days, as permitted under General Statutes § 12-81a (e),[31] the city imposed a late fee.

In support of its claim that the city wrongfully had punished Wheelabrator for declining to produce its appraiser's report at the hearing before the board in Wheelabrator's administrative appeal from the assessment based on the 2010 grand list,[32] Wheelabrator presented evidence that it declined to produce the report at that hearing because it believed that it was privileged

[31] General Statutes § 12-81a (e) provides in relevant part: "[Taxes] shall be due and payable . . . not sooner than thirty days after the date such bill is mailed or handed to the purchaser . . . ."

[32] The city contends that this claim is subject to a separate legal proceeding. Even if that is the case, however, that does not necessarily mean that this evidence was irrelevant to Wheelabrator's general claim in the present case that it is entitled to interest on amounts that it overpaid because the city engaged in a pattern of wrongdoing.

work product. On April 26, 2011, the city sent a letter to Wheelabrator stating that, "[i]n accordance with [General Statutes §] 12-111 . . . and your failure to cooperate with the [b]oard by not giving us a copy of the appraisal you had done, you are hereby notified that [the] new assessment on the 2010 [g]rand [l]ist has been changed [from $281,137,210] to $282,229,170."[33] Approximately two weeks later, the city sent Wheelabrator a second, similar letter directing it to disregard the first letter and indicating that the assessment was now $282,453,910. On July 5, 2011, Wheelabrator received a property tax bill showing that the assessed value of the property was now $285,278,449 and that the total tax due for 2011 was $11,308,437.72. In December, 2011, Wheelabrator received another bill showing that the assessed value of the property had been reduced to the original amount of $281,137,210, but the total tax due for 2011 was still $11,308,437.72.

We begin our analysis of Wheelabrator's claim with the standard of review. Whether the wrongfulness of the city's conduct is a proper consideration in a property tax appeal pursuant to §§ 12-117a and 12-119 is a matter of statutory interpretation over which our review is plenary. See, e.g., *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, 269 Conn. 120, 129, 848 A.2d 451 (2004). "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id.; see also General Statutes § 1-2z.

[33] The assessed value of property for tax purposes in Bridgeport is 70 percent of the true and actual value.

Pursuant to § 12-117a, a trial court "shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable, and, if the application appears to have been made without probable cause, may tax double or triple costs, as the case appears to demand; and, upon all such applications, costs may be taxed at the discretion of the court." In addition, the court "shall, in event of [finding] overpayment, enter judgment in favor of [the] applicant and against [the] city . . . together with interest and any costs awarded by the court." General Statutes § 12-117a. Pursuant to § 12-119, when the trial court determines that a property tax "laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property,"[34] the court "shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court."

In addition to relying on these statutes, Wheelabrator contends that, as a general rule, the trial court should award interest to a plaintiff when the defendant has wrongfully withheld money. Cf. *Loomis Institute* v. *Windsor*, 234 Conn. 169, 181, 661 A.2d 1001 (1995) ("[w]e have construed [General Statutes § 37-3a] to make the allowance of interest depend [on] whether the detention of money is or is not wrongful under the circumstances" [internal quotation marks omitted]);

[34] General Statutes § 12-62 (b) (2) provides: "When conducting a revaluation, an assessor shall use generally accepted mass appraisal methods which may include, but need not be limited to, the market sales comparison approach to value, the cost approach to value and the income approach to value. Prior to the completion of each revaluation, the assessor shall conduct a field review. Except in a town that has a single assessor, the members of the board of assessors shall approve, by majority vote, all valuations established for a revaluation."

see also *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 52, 74 A.3d 1212 (2013) ("the wrongful detention standard of § 37-3a is satisfied by proof of the underlying legal claim, a requirement that is met once the plaintiff obtains a judgment in his favor on that claim"). Accordingly, Wheelabrator argues, the trial court improperly excluded and failed to consider evidence of the city's wrongdoing on the ground that the only issue before the court was the fair market value of the property, not whether the city had wrongfully arrived at its valuation or charged Wheelabrator for improper amounts. Specifically, Wheelabrator contends that the city's wrongdoing was relevant because, if wrongdoing had been found, it could have justified an award of interest and costs.

We agree with Wheelabrator that the issue of the city's wrongdoing is a proper consideration in a property tax appeal pursuant to §§ 12-117a and 12-119. In *Loomis Institute* v. *Windsor*, supra, 234 Conn. 169, this court held that an award of statutory interest pursuant to § 37-3a[35] in a tax appeal pursuant to § 12-119 was "primarily an equitable determination and a matter lying within the discretion of the trial court." Id., 181. In support of our conclusion that the trial court in that case had not abused its discretion when it denied an award of interest, we observed that there was "no evidence that the town acted maliciously or in bad faith toward the taxpayer." Id. Thus, we implicitly recognized that malicious or bad faith conduct could support an award of interest.

In *Sears, Roebuck & Co.* v. *Board of Tax Review*, 241 Conn. 749, 766, 699 A.2d 81 (1997), this court held that, in a property tax appeal pursuant to § 12-117a, the trial

[35] General Statutes § 37-3a (a) provides in relevant part: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . ."

court has discretion to award interest pursuant to § 37-3a, which establishes the maximum interest rate that the trial court may award. We stated that "[a] trial court acting pursuant to § 12-117a has broad discretion to award interest up to [the] maximum rate" and that, "[i]n exercising this equitable authority, a trial court may consider all relevant information . . . ." Id. We can perceive no reason why the city's wrongdoing should not be a consideration in making this determination.[36] Indeed, we have held that the detention of money may be deemed wrongful for purposes of awarding interest pursuant to § 37-3a even if the liable party had a good faith basis for nonpayment. See *Sosin* v. *Sosin*, 300 Conn. 205, 229, 14 A.3d 307 (2011). Thus, when a defendant's conduct was in bad faith, as Wheelabrator contends, an award of interest may be justified. Accordingly, we conclude that, on remand, Wheelabrator should be entitled to present evidence that the city's overvaluation of the property was the result of wrongdoing. We emphasize, however, that we express no opinion as to the admissibility of the specific evidence on this issue that the trial court excluded at the first trial, which may be inadmissible on relevancy or other grounds, or as to the relevance of the specific admitted evidence that, according to Wheelabrator, supported a finding of wrongdoing. We conclude only that evidence of wrongdoing is not irrelevant as a matter of law as to the issue of an award of interest.

[36] It is well established that, unlike appeals pursuant to § 12-117a, appeals pursuant to § 12-119 "must [involve] allegations beyond the mere claim that the assessor overvalued the property. [The] plaintiff . . . must satisfy the trier that [a] far more exacting test has been met: either there was misfeasance or nonfeasance by the taxing authorities, or the assessment was arbitrary or so excessive or discriminatory as in itself to show a disregard of duty on their part." (Internal quotation marks omitted.) *Wilson* v. *Kelley*, 224 Conn. 110, 119, 617 A.2d 433 (1992). It does not follow from the fact that a plaintiff is *required* to establish some degree of wrongdoing to bring a claim pursuant to § 12-119, however, that wrongdoing is *irrelevant* to claims brought pursuant to § 12-117a.

V

We next address the city's claim on cross appeal that the trial court improperly denied its motion to dismiss the second appeal because Wheelabrator declined to provide the board with its draft appraisal at the April 4, 2011 hearing before the board on Wheelabrator's administrative appeal. The city notes that, pursuant to General Statutes § 12-113,[37] "[a] board of assessment appeals shall not reduce the valuation or assessment of property on the grand list belonging to any person who does not appear at a hearing before the board of assessment appeals, either in person or by such person's attorney or agent, and offer or consent to be sworn before it and answer all questions touching such person's taxable property situated in the town." The city contends that Wheelabrator's refusal to comply with the board's request for a copy of the draft appraisal was the effective equivalent of failing to appear before the board and to answer its questions. Accordingly, the city argues, it could not sustain Wheelabrator's appeal and reduce the valuation of the property, and, therefore, Wheelabrator could not be aggrieved by the board's decision. Because Wheelabrator was not aggrieved, the city further argues, the trial court lacked jurisdiction over Wheelabrator's appeal from that decision. We disagree.

The following facts and procedural history are relevant to our resolution of this claim. The board con-

[37] General Statutes § 12-113 provides: "The board of assessment appeals may reduce the assessment of any person as reflected on the grand list by reducing the valuation, number, quantity or amount of any item of estate therein, or by deleting any item which ought not to be retained in it, provided any such reduction or deletion shall be recorded in the minutes of the meeting of said board. The board of assessment appeals shall not reduce the valuation or assessment of property on the grand list belonging to any person who does not appear at a hearing before the board of assessment appeals, either in person or by such person's attorney or agent, and offer or consent to be sworn before it and answer all questions touching such person's taxable property situated in the town."

ducted a hearing on Wheelabrator's appeal from the city's valuation of the property on the 2010 grand list on April 4, 2011. At the beginning of the hearing, the chairman of the board, Richard DeParle, asked Wheelabrator's attorney to "furnish [it] . . . with all documentation which you believe supports your position that the real and personal property [at issue] . . . should be valued at the market value you state in your appeal. You can also furnish testimony to supplement this documentation." Wheelabrator's attorney indicated that, among other documentation, he had a sworn affidavit from Robert H. Pedersen, Wheelabrator's regional comptroller, regarding the total value of the property. He also indicated that Pedersen, who was present, would be willing to testify as to his opinion of the value of the property and to answer the board's questions. DeParle then asked whether Wheelabrator's attorney ever had had the property appraised. When counsel indicated that he had obtained a draft appraisal of the property for use in the first appeal, DeParle asked whether he was prepared to provide the board a copy of the appraisal. Counsel responded that the appraisal report was subject to a discovery order in the pending first appeal, and that Wheelabrator did not want to produce it because it contained confidential information and it had not yet entered into a confidentiality agreement with the city. DeParle then stated that, "[w]ithout an outside appraisal done for us, there's not a lot more we can do with it," and concluded the hearing.

We begin with the standard of review. As we previously indicated, "[i]f a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . 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." (Internal quotation marks omitted.) *Burton* v. *Dominion Nuclear Connecticut, Inc.*, supra, 300 Conn. 550.

This court previously has rejected a claim that was identical to the city's claim in all relevant respects. In *Morris* v. *New Haven*, 77 Conn. 108, 58 A. 748 (1904), the plaintiff brought an action against the defendant, claiming that its assessment of her property was illegal. The defendant demurred to the plaintiff's claim on the ground that, after the plaintiff appealed to the "board of relief," she had failed to appear before that board as required by the predecessor to § 12-113, and the trial court sustained the demurrer. Id., 109. On appeal, this court held that, "[w]aiving the question as to what effect a failure to pursue an appeal before the board of relief may have [on] the relief [that] the Superior Court may properly grant, the mere failure to appear cannot . . . deprive the applicant of her right to be heard [on] the claimed illegality of this assessment. The appeal presented to the board of relief primarily a question of law, viz. does the statute directing the assessors, when a taxpayer refuses to return a list to them as required by law, to make out a list for him and to add to that list an amount equal to [10 percent] of their valuation, authorize them to make such an addition to the list of the applicant under the circumstances of this case? [On] that question the applicant is entitled to a decision of the Superior Court, after the action of the board of relief has made the alleged[ly] illegal assessment binding [on] her, and it is immaterial, as affecting this right, what reason may have induced the board to take the action it did." Id. But cf. *Wilcox* v. *Madison*, 103 Conn. 149, 156, 130 A. 84 (1925) (board of relief properly declined to consider reducing valuation of plaintiff's property when plaintiff failed to appear before board and to answer its questions, and trial court's conclusion that board of assessors had properly considered value

of property as house lots in determining its value for tax purposes was supported by evidence).[38] Thus, in the present case, even if we were to agree with the city that Wheelabrator's refusal to provide the board with a copy of its draft appraisal report was the effective equivalent of a failure to appear before the board and to answer its questions—an issue on which we express no opinion—under *Morris* and *Wilcox*, that failure would go, at most, to the merits of the trial court's decision sustaining Wheelabrator's appeal and would not deprive the trial court of jurisdiction to hear the appeal.[39] Accordingly, we reject this claim.

VI

Because it is likely to arise on remand, we next address the city's claim on cross appeal that the trial

[38] This court in *Wilcox* stated that "[t]he conclusion of the [trial] court that the applicant *has not been aggrieved* by any action of the board of relief was legally and logically drawn from the subordinate facts." (Emphasis added.) *Wilcox* v. *Madison*, supra, 103 Conn. 156. It is clear to us, however, that, by using this language, the court was merely stating that the trial court properly had found that the action of the board of relief was not unlawful, not that the trial court lacked jurisdiction over the plaintiff's claim. See *Sibley* v. *Middlefield*, supra, 143 Conn. 105 ("The court performs a double function on an appeal from a board of tax review. First, it must determine the judicial question [of] whether the appellant has been aggrieved by such action on the part of the board *as will result in the payment of an unjust and, therefore, a practically illegal tax*. [Second], if that question is answered in the affirmative, the court must proceed to exercise its broad discretionary power to grant relief." [Emphasis added.]).

[39] Because the issues of whether the trial court in a tax appeal pursuant to §§ 12-117a and 12-119 is bound by the decision of a board of assessment appeals when the property owner has failed to appear before the board and to answer its questions and, if so, whether the trial court in the present case was bound by the board's decision because Wheelabrator refused to produce the draft appraisal report were not raised or briefed in this appeal, we express no opinions on those issues. We note, however, that "we have stated on numerous occasions [that], in a § 12-117a appeal, the trial court tries the matter de novo. . . . In a de novo proceeding, the trier of fact makes an independent determination of the matters on which the appeal was taken without regard for the action or decision of the lower tribunal." (Citation omitted.) *Konover* v. *West Hartford*, 242 Conn. 727, 741, 699 A.2d 158 (1997).

court improperly admitted the appraisal testimony of Wheelabrator's expert witnesses on the ground that they were not licensed real estate appraisers in this state. We disagree.

The following additional facts and procedural history are relevant to our resolution of this issue. Before trial, the city filed two motions in limine to preclude the admission of Kettell's and Hazen's testimony and any appraisal report prepared by them. The city contended that Kettell and Hazen, by preparing an appraisal report for the property, had violated General Statutes (Rev. to 2011) §§ 20-501 (a)[40] and 20-523,[41] and any opinion

[40] General Statutes (Rev. to 2011) § 20-501 (a) provides: "No person shall act as a real estate appraiser or provisional appraiser or engage in the real estate appraisal business without the appropriate certification, license, limited license or provisional license issued by the [Connecticut Real Estate Appraisal] [C]ommission, unless exempted by the provisions of sections 20-500 to 20-528, inclusive."

Hereinafter, all references to § 20-501 are to the 2011 revision unless otherwise noted.

[41] General Statutes (Rev. to 2011) § 20-523 provides: "(a) Any person who engages in the real estate appraisal business without obtaining a certification, license, limited license or provisional license, as the case may be, as provided in sections 20-500 to 20-528, inclusive, shall be fined not more than one thousand dollars or imprisoned not more than six months or both, and shall be ineligible to obtain a certification, license, limited license or provisional license for one year from the date of conviction of such offense, except the [Connecticut Real Estate Appraisal] [C]ommission, in its discretion, may grant a certification, license, limited license or provisional license, as the case may be, to such person within such one-year period upon application and after a hearing on such application.

"(b) No person who is not certified, licensed, limited licensed or provisionally licensed, as appropriate, by the commission as a real estate appraiser shall represent himself or herself as being so certified, licensed, limited licensed or provisionally licensed or use in connection with such person's name or place of business the term 'real estate appraiser', 'real estate appraisal', 'certified appraiser', 'certified appraisal', 'residential appraiser', 'residential appraisal', 'limited licensed appraiser', 'provisional appraiser' or 'provisional appraisal' or any words, letters, abbreviations or insignia indicating or implying that such person is a certified, licensed, limited licensed or provisionally licensed, as appropriate, real estate appraiser in this state. Any person who violates the provisions of this subsection shall be fined not more than one thousand dollars or imprisoned not more than six months, or both."

testimony about the value of the property at trial also would violate those statutes. The trial court apparently did not rule on those motions. After trial, the city filed a motion to strike Kettell's and Hazen's testimony and their report for the same reasons. The trial court concluded that, as long as Hazen and Kettell qualified as experts in the appraisal of real estate, no other qualification to testify in court was required. Accordingly, it denied the city's motion to strike. The city now challenges that ruling.

We begin our analysis with the standard of review. "The trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opinions. . . . The court's decision is not to be disturbed unless [its] discretion has been abused or the error is clear and involves a misconception of the law. . . . Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Citations omitted; internal quotation marks omitted.) *State* v. *Kemp*, 199 Conn. 473, 476, 507 A.2d 1387 (1986), overruled in part on other grounds by *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012).

The Appellate Court repeatedly has rejected the claim that the city has raised. One of the relevant cases, *Taylor* v. *King*, 121 Conn. App. 105, 109, 994 A.2d 330 (2010), involved a construction contract dispute between the plaintiff homeowner and the defendant contractor. The plaintiff indicated that he intended to call a realtor as an expert witness to testify about the value that his residence would have had if it had been properly con-

Hereinafter, all references to § 20-523 are to the 2011 revision unless otherwise noted.

structed and the value that it had as it was actually constructed. Id., 118–19. The defendant moved to preclude the realtor's testimony on the ground that he was not a licensed real estate appraiser. See id. The trial court denied the motion. Id., 119. On appeal, the Appellate Court concluded that the fact that the realtor was prohibited from engaging in real estate appraisal pursuant to General Statutes (Rev. to 2007) § 20-501 did not mean that he was precluded "from testifying as to his opinion of the diminution in value of the plaintiff's property, where the trial court found that the witness' education, training and experience qualified him to testify as an expert . . . ." (Internal quotation marks omitted.) Id., 120. The court further concluded that testifying as to the value of property did not constitute " 'engaging in the real estate appraisal business' " for purposes of General Statutes (Rev. to 2007) § 20-500 (5).[42] Id.; see also *Hutchinson* v. *Andover*, 49 Conn. App. 781, 788–89, 715 A.2d 831 (1998) (General Statutes [Rev. to 1997] § 20-501 did not preclude witness from testifying as to his opinion of value of property when trial court had determined that he was qualified as expert);[43] *Conway* v. *American Excavating, Inc.*, 41 Conn. App. 437, 448–49, 676 A.2d 881 (1996) ("[e]xcept in malpractice cases, it is not essential that an expert witness possess any particular credential, such as a license, in order to be qualified to testify, so long as his education or experi-

[42] General Statutes (Rev. to 2007) § 20-500 (5) provides: " 'Engaging in the real estate appraisal business' means the act or process of estimating the value of real estate for a fee or other valuable consideration."

General Statutes (Rev. to 2007) § 20-500 (5) is now codified at General Statutes § 20-500 (11).

[43] The city contends that *Taylor* and *Hutchinson* are distinguishable because in neither case did the expert witness claim to be a real estate appraiser. We are not persuaded. If a person who does not claim to be a real estate appraiser may testify as an expert witness regarding the value of real estate, we cannot perceive why a person who claims to have special skills and knowledge in the appraisal of real estate should be barred from testifying merely because the person is not licensed.

ence indicate[s] that he has knowledge on a relevant subject significantly greater than that of persons lacking such education or experience''); *Lance* v. *Luzerne County Manufacturers Assn.*, 366 Pa. 398, 403, 77 A.2d 386 (1951) (''[A]n expert is one who qualifies as such by reason of special knowledge and experience, and it is quite obvious that an individual may possess knowledge and experience of a special nature whether or not he is authorized to practice in his special field by virtue of any restriction or licensing requirement imposed by law. The inquiry by the trial judge . . . as to qualifications, therefore, should be whether . . . the witness possesses the special knowledge and experience. As a result of this inquiry, usually conducted as examination and cross-examination by the respective counsel, the . . . trial judge may reach the conclusion that the witness does not possess the requisite qualifications entitling him to be classed as an expert, but the test must be as to the alleged expert's possession of knowledge and experience and not of a piece of paper [that] authorizes him to practice a profession.'' [Internal quotation marks omitted.]).

We agree that a person who otherwise would be qualified as an expert witness to testify regarding the value of real property is not disqualified merely because the person is not a licensed real estate appraiser in this state. As we have explained, whether a person is qualified to testify as an expert witness in a judicial proceeding turns on whether the person has special skills and knowledge that will shed light on an issue that is beyond the ken of the ordinary juror or trial judge. See *State* v. *Kemp*, supra, 199 Conn. 476. The trial court is presumed to have the skills and experience to make this determination, as with any other expert witness, with the assistance of the parties in an adversarial process. See *Blanchard* v. *Bridgeport*, 190 Conn. 798, 808, 463 A.2d 553 (1983) (''[t]he qualifications of

an expert presents a preliminary question for the trial judge"). Moreover, once the trial court has made that determination, the expert witness will be required to testify under oath to ensure that he or she testifies truthfully.

In contrast to the evidentiary and procedural rules governing expert testimony, the purpose of the statutory scheme governing the licensure of real estate appraisers is to protect members of the general public—who do not have the skills and experience of a trial judge to assess a person's competence to determine the value of real estate, and who do not have access to the tools of discovery and cross-examination under oath to assist them in making that assessment or in assessing the person's honesty—by requiring persons who wish to engage in the business of real estate appraisal first to establish their competence and honesty. See General Statutes (Rev. to 2011) § 20-509 (a) ("[c]ertifications, licenses, limited licenses and provisional licenses under sections 20-500 to 20-528, inclusive, shall be granted only to persons who bear a good reputation for honesty, truthfulness and fair dealing and who are competent to transact the business of a real estate appraiser in such manner as to safeguard the interests of the public"); General Statutes (Rev. to 2011) § 20-510 ("[i]n order to determine the competency of any applicant for a real estate appraiser's certification or license, the [Connecticut Real Estate Appraisal] [C]ommission shall, and, in the case of an applicant for a provisional license, may subject such applicant to personal written examination as to the applicant's competency to act as a real estate appraiser"). In our view, nothing would be gained by barring a person who is qualified to assist the finder of fact in a judicial proceeding in its determination of the true and actual value of real property from doing so merely because the person is not licensed. Doing so would advance neither the

truth-finding function of the judicial process nor the consumer protection purpose of the statutory licensing scheme.

The city claims, however, that a person who does not have a license to appraise real estate cannot testify in court as an expert witness as to the valuation of real property because such conduct would subject the person to fines and imprisonment pursuant to § 20-523. We disagree. We see no evidence that the legislature had any intention of interfering with the judicial fact-finding function by authorizing the prosecution of such conduct, which, as we have explained, would in no way undermine the primary purpose of the statutory licensing scheme—to protect members of the public from unscrupulous and incompetent real estate appraisers. We further note that an interpretation of § 20-523 that would allow the prosecution of a person who has assisted the fact finder in judicial proceedings by testifying as an expert witness as to the value of real property would raise serious constitutional questions under the separation of powers doctrine.[44] See *State* v. *Clemente*, 166 Conn. 501, 514, 353 A.2d 723 (1974) ("courts have an inherent power, independent of statutory authorization, to prescribe rules to regulate their proceedings and [to] facilitate the administration of justice as they deem necessary"); see also *State* v. *Cook*, 287 Conn. 237, 245, 947 A.2d 307 ("[i]t is well established that this court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities" [internal quotation marks omitted]), cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). Accordingly, we agree with the Appellate Court that, for purposes of General Statutes (Rev. to 2011) § 20-500 et seq., testi-

[44] We also note that, although the city has acknowledged that there are cases in which persons who are not licensed to appraise real estate have testified as expert witnesses regarding the value of real property, it has referred to no case in which the state has prosecuted such persons.

fying in court regarding the value of real property does not constitute "engaging in the real estate appraisal business" for purposes of the statutory scheme. (Internal quotation marks omitted.) *Taylor* v. *King*, supra, 121 Conn. App. 120, quoting General Statutes (Rev. to 2007) § 20-500 (5). Rather, such conduct constitutes the provision of forensic services by an expert witness. We therefore reject this claim.

VII

Finally, because it may arise on remand, we address the city's claim that the trial court abused its discretion when it excluded developer's profit from its reproduction cost calculations in determining the value of the property. We disagree.

The following facts and procedural history are relevant to our resolution of this claim. In his appraisal report, Pomykacz explained that he was "provided with a copy of [an] [a]mendment . . . to the Solid Waste Disposal Agreement dated May 1, 1988. On page 7 of the [a]mendment, it can be seen that the aggregate historical cost basis of the [f]acility is $241,949,000. We then added 15 percent of the historical cost basis for developer's profit. Developer's profit is the profit that a developer expects to earn from the development of the project. Even a developer/owner who intends to continue to own and manage the property after construction has an expectation of some profit on the development of the property; otherwise [the] owner would simply purchase an existing property instead of going through the effort and risk of building a new one."

The trial court concluded that "Pomykacz' inclusion of a developer's profit of 15 [percent] of the historical cost lacks credibility. It is logical to assume that when the original facility was constructed, all costs, including a developer's profit, would have been included in the historical costs." Accordingly, the trial court excluded

the 15 percent developer's profit from its calculation of the value of the property using Pomykacz' reproduction cost approach.

The trial court's valuation of a property in a property tax appeal is subject to review for abuse of discretion. See, e.g., *Davis* v. *Westport*, 61 Conn. App. 834, 842, 767 A.2d 1237 (2001) (once trial court has found that taxpayer is aggrieved, court has "broad discretionary power to grant appropriate relief"). Although the city has cited authority for the proposition that developer's profit is a proper element of cost when valuing real property, it has cited no evidence that would support a finding that the property's historical cost of $241,949,000, on which Pomykacz based his reproduction cost figures, did not include developer's profit. Thus, although the city contends that the trial court improperly *assumed* that the figure included developer's profit, the trial court reasonably could have concluded, on the basis of the record before it, that Pomykacz simply had assumed that it did not. Accordingly, we conclude that the trial court did not abuse its discretion when it deducted developer's profit of 15 percent from its reproduction cost approach calculations. We emphasize, however, that the city is not precluded from presenting evidence on remand that the historical cost did not include developer's profit, and the court is not precluded from crediting that evidence.

The judgment in the first appeal filed in 2009 is reversed and the case is remanded with direction to deny the city's motion to dismiss and for further proceedings in connection with that appeal; the portion of the judgment in the second appeal filed in 2011 sustaining that appeal on the ground that Wheelabrator was subject to an unlawful tax is affirmed; the portion of the judgment in the second appeal denying the appeal from the valuation of the personal property is affirmed; the portion of the judgment in the second appeal

assigning a new valuation to the property is reversed, and the case is remanded for a new trial in the second appeal with respect to that valuation.

In this opinion ROGERS, C. J., and PALMER, EVELEIGH and VERTEFEUILLE, Js., concurred.

ROBINSON, J., with whom ESPINOSA, J., joins, concurring. I agree with the result and most of the reasoning in the majority's opinion, which reverses the judgment of the trial court dismissing the 2009 tax appeal filed by the named plaintiff, Wheelabrator Bridgeport, L.P. (Wheelabrator),[1] and a portion of the trial court's judgment assigning a new valuation in Wheelabrator's 2011 tax appeal, both of which challenge the assessment of its real property by the defendant, the city of Bridgeport (city). I respectfully disagree, however, with part II of the majority's opinion, which, in considering the valuation of Wheelabrator's property on the city's grand lists of 2010 and the years following, concludes that the trial court improperly "rejected the discounted cash flow [income] approach to valuation for property tax assessment purposes—at least as applied to properties that do not have a rental market—as a matter of law."[2]

[1] Consistent with the majority opinion, all references to Wheelabrator within this opinion include the other plaintiffs in the present case, namely, United States Bank National Association, James E. Mogavero, and Waste To Energy I, LLC. See footnote 2 of the majority opinion.

[2] By way of background, I note that discounted cash flow "is an accepted method for determining the present value of real property" under the income capitalization approach to valuation. (Internal quotation marks omitted.) *Heather Lyn Ltd. Partnership* v. *Griswold*, 38 Conn. App. 158, 162, 659 A.2d 740 (1995); see also *Newbury Commons Ltd. Partnership* v. *Stamford*, 226 Conn. 92, 100, 626 A.2d 1292 (1993); Appraisal Institute, The Appraisal of Real Estate (10th Ed. 1992) pp. 420–21; Dictionary of Real Estate Appraisal (1984) p. 94. " 'The income capitalization approach to value consists of methods, techniques, and mathematical procedures that an appraiser uses to analyze a property's capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and convert these benefits into an indication of present value.' Appraisal Institute, [supra] p. 409." *Heather Lyn Ltd. Partnership* v. *Griswold*, supra, 162–63.

Guided largely by this court's recent decision in *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 61 A.3d 461 (2013), I read the trial court's memorandum of decision as a proper exercise of its discretion to consider and reject the discounted cash flow method in the present case, before applying the reproduction cost approach to valuing Wheelabrator's real property. In my view, the majority's conclusion to the contrary is a significant departure from the considerable discretion that our case law has long afforded to trial courts with respect to electing the proper appraisal method by which to engage in the factual determination of property valuation. I do, however, agree with Wheelabrator's claim that the trial court's valuation of Wheelabrator's real property under the reproduction cost approach was clearly erroneous because it appears not to have accounted for the value of Wheelabrator's personal property. See footnote 13 of this concurring opinion. Accordingly, I concur in the decision of the majority to reverse in part the judgments of the trial court and order a new trial with respect to the valuation of Wheelabrator's real property.

I

I agree with the background facts and procedural history set forth in the majority opinion. I part company from the majority, however, with respect to its decision to engage in plenary review of the trial court's decision not to utilize the discounted cash flow income approach to valuation in this case. "[W]hen a tax appeal . . . raises a claim that challenges the propriety of a particular appraisal method in light of a generally applicable rule of law, our review of the trial court's determination whether to apply the rule is plenary."[3] (Internal quota-

[3] Although not dispositive to my analysis, I respectfully disagree with the majority's reliance on principles governing the interpretation of judgments as written instruments. See, e.g., *Ottiano* v. *Shetucket Plumbing Supply Co.*, 61 Conn. App. 648, 652, 767 A.2d 128 (2001). In my view, these principles are inapplicable because this is not a case wherein we are trying to determine

tion marks omitted.) *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 101; see also, e.g., *Sheridan* v. *Killingly*, 278 Conn. 252, 260, 897 A.2d 90 (2006) (applying plenary review to trial court's unequivocal determination that "as a generally applicable rule of law, the value of a leasehold interest cannot be attributed to the lessor when valuing the lessor's property interest for assessment purposes"). When, however, "the trial court rejects a method of appraisal because it determined that the appraiser's calculations were incorrect *or based on a flawed formula in that case, or because it determined that an appraisal method was inappropriate for the particular piece of property*, that decision is reviewed under the abuse of discretion standard. . . . Only when the trial court rejects a method of appraisal as a matter of law will we exercise plenary review." (Citation omitted; emphasis altered.) *Redding Life Care, LLC* v. *Redding*, supra, 102.

I respectfully disagree with the majority's conclusion to apply plenary review, insofar as it agrees with Wheelabrator's claim that the trial court improperly rejected the discounted cash flow income approach as a matter of law, in the process dismissing the views of "both [parties'] litigation appraisers [that] it was the most appropriate method to value the property at issue." In my view, this conclusion conflicts with our recent decision in *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 87, which squarely controls our determination of the scope of the discounted cash flow issues

whether a trial court properly enforced or implemented the terms of a previously rendered court order. See, e.g., *Sosin* v. *Sosin*, 300 Conn. 205, 217–20, 14 A.3d 307 (2011) (whether trial court's order was improper modification of prior judgment of dissolution); *State* v. *Denya*, 294 Conn. 516, 531–34, 986 A.2d 260 (2010) (whether trial court's probation order gave Office of Adult Probation discretion to discontinue electronic monitoring of defendant). In my view, what matters, as in any direct appeal challenging the decision of a lower court, is the nature of the ruling under review, not the subjective intent of the tribunal.

resolved in the trial court's memorandum of decision. In *Redding Life Care, LLC*, we rejected the claim of a continuing care facility that the trial court had improperly concluded that the going concern income capitalization[4] approach applied by its appraiser "is not recognized or permitted under Connecticut law and thus may not be used to determine the fair market value of real estate and whether the plaintiff is aggrieved under [General Statutes] § 12-117a." Id., 94. We concluded that the plaintiff's claim could be resolved on the basis of an articulation issued in that case "alone,"

[4] In contrast to an income capitalization approach that "values property on the basis of the property's income producing potential," the "going concern approach, by comparison, is not a method of valuing real estate, but a method of valuing a going concern, which may include real estate as one of its components. . . . [T]he value of a going concern is comprised of (1) real property, (2) tangible personal property (furniture, fixtures, equipment and inventory), and (3) intangible personal property, which includes residual intangibles. . . . Simply put, the calculation necessarily involve[s] an allocation among the component parts of real property and tangible and intangible [personal property]. . . . Included in the residual intangible category is capitalized economic profit, or business enterprise value, which is defined as the present worth of an entrepreneur's economic (pure) profit expectation. . . . In determining the value of a going concern, an acceptable method of calculation is to apply an income capitalization approach to the income stream of the business. . . . In the income capitalization approach [for valuing a going concern], because the capitalized income stream will most likely reflect income to [the going concern], all components of net operating income not attributable to the real estate must be removed. The difficulty of these assignments does not relieve the appraiser of the responsibility to treat the tangible and intangible [personal] property. Not to do so produces either use value or the value of [the going concern]; neither is the market value of the fee simple estate in real property. . . . Thus, although both real property and going concerns can be valued on the basis of their income producing potential, the method for doing so, and the resulting valuations, are not equivalent. Specifically, when a going concern is valued under the income approach, that value pertains to the market value of the total assets of the business, of which real property is but one component. In order to determine the value of the real estate associated with that going concern, the values of the other components of the total assets of the business must be subtracted from the overall value." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 95–96 n.9, citing Appraisal Institute, The Appraisal of Real Estate (12th Ed. 2001) pp. 641–44.

in which "the trial court stated that it had rejected [the appraiser's] testimony because it found him not to be credible, and *not* because his use of the going concern approach as a method for the valuation of real property was improper as a matter of law." (Emphasis added.) Id., 102–103. We also observed that the memorandum of decision "illustrate[s] that the trial court rejected the formula and calculations on which [the plaintiff's appraiser] relied to arrive at the valuation of the intangible business. In other words, the trial court's disagreement with the plaintiff's valuation turned on the flaws in [the appraiser's] calculations and formula, not on the method itself. For example, the trial court concluded that [the appraiser's] valuation omitted or distorted several essential aspects of [the care facility's] value as a going concern."[5] Id., 103. We concluded, therefore, that "the trial court did not summarily dismiss the method as a matter of law." Id., 104.

As this court did in *Redding Life Care, LLC*, my analysis of the record in the present case[6] begins with

[5] In particular, we noted that the trial court "specifically questioned the percentage by which [the appraiser] depreciated [the care facility's] furniture, fixtures and equipment, the simplistic formula [he] used to calculate business value, and [his] failure to recognize [the care facility's] state of operation when it first opened. The trial court also rejected [the appraiser's] unsupported valuation of intangibles. Any one of these flaws would have constituted sufficient grounds for the trial court to have rejected [the appraiser's] appraisal method as unpersuasive. Simply put, the trial court rejected [the appraiser's] appraisal as not credible because it was premised on formulas and calculations that failed to value [the care facility] accurately." (Footnote omitted.) *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 103–104.

[6] To this end, I disagree with Wheelabrator's reliance on numerous decisions in other tax appeals demonstrating that the trial court in the present case, *Hon. Arnold W. Aronson*, judge trial referee, "has repeatedly and consistently rejected the [discounted cash flow] income approach as a method of valuing real estate," including when "both [parties'] litigation appraisers testified it was the most appropriate method to value the property at issue." See, e.g., *Dominion Nuclear* v. *Waterford*, Superior Court, judicial district of New London, Docket No. CV-03-0566126-S (November 8, 2007) (valuation of nuclear power plant). Because we are solely concerned with

the trial court's May 7, 2014 articulation, which expressly stated that the court "did *not* reject the [discounted cash flow] approach as a method for valuing the subject property *as a matter of law*. The trial court rejected the testimony of the parties' experts because it found this testimony not to be credible with respect to this approach."[7] (Emphasis added.) As in *Redding Life Care, LLC*, this articulation "alone" disposes of Wheelabrator's claim that the trial court improperly rejected the discounted cash flow income approach as a matter of law. *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 103. Nevertheless, like the majority and this court in *Redding Life Care, LLC*, I go on to review the trial court's memorandum of decision in this case to determine whether it is consistent with the articulation. See id., 103–104. My review of the trial court's comprehensive analysis therein reveals absolutely nothing stating that discounted cash flow is not an approach acknowledged under existing case or statutory law for valuing real property like that of Wheelabrator, or holding accordingly as a matter of first impression.[8] Indeed, the trial court's analysis is a thor-

the trial court's decision in *the present* case, I decline Wheelabrator's invitation to use these other decisions as, in essence, habit evidence of some kind of generalized antipathy, harbored by the trial court, toward the discounted cash flow approach.

[7] The trial court issued this articulation in response to an order from this court granting in part the city's motion for review of the trial court's denial of the city's motion for an articulation on this point. See Practice Book §§ 66-5 and 66-7.

[8] I acknowledge that, in footnote 22 of its memorandum of decision, the trial court quoted a New Jersey Tax Court case for the colorfully stated proposition that "the courts have not always discussed the discounted cash flow analysis . . . as a method for arriving at true market value for real estate in the most positive terms," and had described the discounted cash flow "method, as applied to tax valuation proceedings, [as] an amalgam of interdependent, attenuated assumptions of limited probative value. *Whatever may be its utility in other contexts, its use in this case can only be described as an exercise in financial haruspication.*" (Emphasis added; internal quotation marks omitted.) *Tamburelli Properties Assn.* v. *Cresskill*, 15 N.J. Tax 629, 643 (1996), aff'd, 308 N.J. Super. 326, 705 A.2d 1270 (App. Div. 1998), citing *University Plaza Realty Corp.* v. *Hackensack*, 12 N.J. Tax

ough consideration of the opinions of the parties' appraisers, Joseph Kettell, for Wheelabrator, and Mark Pomykacz, for the city. The trial court noted that both appraisers "relied primarily on the [discounted cash flow] income approach [because] the subject facility is a special purpose type property in which there is no market from which to develop comparables." After reviewing their reports and testimony, however, the trial court became "convince[d] . . . that . . . the reproduction cost approach is the only credible approach to use in this case in order to arrive at a [fair market value] of the subject property" because "[i]t takes the facility as it existed on October 1, 2008."[9] The trial court then determined that the value of the property under that approach was $314,017,430. See also part II of this concurring opinion.

In electing to use the reproduction cost approach, the trial court acknowledged that both appraisers had relied "primarily" on the discounted cash flow approach because they recognized that the property's unique and specialized use rendered it "difficult to adapt the classic

354, 368 (1992), aff'd, 264 N.J. Super. 353, 624 A.2d 1000 (App. Div. 1993). I do not view these quotations from trial level courts in a sister state as warranting a conclusion that the trial court in the present case rejected the discounted cash flow method as a matter of law. Instead, I view this footnote as nothing more than a tangent that must be considered in the context of the trial court's thorough analysis of the reports and testimony of the appraisers *in the present case*. Indeed, had the trial court intended to bar the use of discounted cash flow as a matter of law, it surely would not have cited *Tamburelli Properties Assn.*, which went on to state that "the reservations of the court in using the [discounted cash flow] method in prior cases are not warranted in this instance. [The trial court's] decision in *University Plaza Realty Corp.* was based on specific facts and circumstances that do not exist here." *Tamburelli Properties Assn.* v. *Cresskill*, supra, 643.

[9] The trial court rejected the use of the replacement cost approach because it deemed the reproduction cost approach to be more reflective of the property as it actually existed on the valuation date, rather than "that of a newly constructed modern facility which did not exist" and that reflects a "purchaser's potential future use," rather than "the current use of the subject property . . . ."

concept of market value" for income producing property, namely, market rent. The trial court rejected both appraisers' opinions, concluding that the "process used in the [discounted cash flow] income approach lacks credibility" for multiple reasons that it discussed at great length, including: (1) "two experienced and knowledgable appraisers who are given the same basic facts and who use the same income approach would not be over [$2 million] apart in their valuation of the subject property"; (2) Kettell's opinion, using a thirty year holding period and fifty year life expectancy of the facility, lacked credibility insofar as it called for large plant maintenance and capital expenditures right up to the point of the property becoming worthless at the end of that period in 2038; (3) the estimate was not a "[direct]" valuation of "the real and personal property which are the subject of these [tax] appeals"; (4) Kettell's approach utilized C corporation income tax considerations that appeared inapplicable to the appraisal of real estate generally, and to the property specifically, which is owned by a limited partnership; and (5) Kettell deducted only $2.3 million in "working capital" from the intangible items that are part of Wheelabrator's overall business value, despite the fact that "[w]orking capital, as recognized by both appraisers, represents only a portion of the intangibles of a going concern," while Pomykacz found nearly $15.5 million in intangibles, including working capital, its workforce, its computer software, and its operational manuals. Ultimately, the trial court found that, "although [both appraisers] used the [discounted cash flow] income approach as their primary method to arrive at the value of [Wheelabrator's] real and personal property, their contrasting conclusions leave a lot to the imagination." In my view, this detailed analysis, grounded in the record of this case, demonstrates that the trial court properly exercised its considerable discretion to consider, but not

utilize, the discounted cash flow approach, rather than to reject its use outright as a matter of law.

I, therefore, respectfully disagree with the majority's conclusion that this determination by the trial court amounts to an improper failure to *consider* discounted cash flow—as a matter of law or otherwise—that provides a basis for reversal. In holding that the trial court rejected the discounted cash flow method as a matter of law, the majority focuses on aspects of the trial court's decision positing that "problems with the use of the approach itself" caused it to lack credibility, rather than the implementation of the approach by expert witnesses whom the trial court acknowledged to be "experienced and knowledgable . . . ." (Emphasis omitted.) This, however, is a distinction without a difference when it comes to reviewing the trial court's decision not to utilize the discounted cash flow method of property valuation, insofar as that determination was squarely grounded in the trial court's assessment of the evidence in this case. The trial court's obligation here was to consider the evidence introduced by the parties through their expert appraisers, including their proffered approaches to property valuation, and make a reasoned determination about which approach to apply given the facts of this case. See *Gebrian* v. *Bristol Redevelopment Agency*, 171 Conn. 565, 571, 370 A.2d 1055 (1976) ("[t]he value placed on the land by the court is a matter of fact and cannot be changed on appeal unless it is clear that the court failed to weigh an element of value which properly should have been considered"); *Aetna Life Ins. Co.* v. *Middletown*, 77 Conn. App. 21, 33, 822 A.2d 330 (The court noted that General Statutes § 12-63b "only requires . . . that the court give consideration to the enumerated methods to the extent applicable with respect to [rental income real] property. It does not mandate that a particular method must be utilized or otherwise serve to limit the court's discretion

to choose the method that it believes will result in the fairest approximation of the subject property's value." [Emphasis omitted.]), cert. denied, 265 Conn. 901, 829 A.2d 419 (2003); *Grossomanides* v. *Wethersfield*, 33 Conn. App. 511, 513–16, 636 A.2d 867 (1994) (reversing decision of trial court because it improperly deemed report of plaintiff's appraiser to be "irrelevant" insofar as "there is no difference between the definition of 'lease fee title' as used in the report and defined therein and the definition of a fee simple estate," and that its decision to "[discount] the testimony of the plaintiff's appraiser [was] for the same improper reason it deemed his appraisal report irrelevant"). Although the discounted cash flow income approach is a recognized method for the valuation of real property in appropriate cases; see footnote 2 of this concurring opinion; neither Wheelabrator nor the majority cites any authority rendering its use mandatory with respect to properties like that of Wheelabrator. Indeed, the majority's own instructions for remand specifically emphasize that the trial court is not required to use the discounted cash flow approach at the new trial. Thus, I respectfully disagree with the majority's conclusion that the trial court's decision not to employ the discounted cash flow approach by itself warrants a new trial.

More globally, the majority's decision to reverse the judgment of the trial court, despite its detailed consideration and rejection of the discounted cash flow approach on the record of this case, appears to undermine our state's long established body of case law providing that, in "actions requiring . . . a valuation of property, the trial court is charged with the duty of making an independent valuation of the property involved. . . . [*N*]*o one method of valuation is controlling and . . . the* [*court*] *may select the one most appropriate in the case before* [*it*]. . . . *Moreover, a variety of factors may be considered by the trial court*

in assessing the value of such property. . . . [*T*]*he trier arrives at his own conclusions by weighing the opinions of the appraisers, the claims of the parties, and his own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation. . . .* The trial court has broad discretion in reaching such conclusion, and [its] determination is reviewable only if [it] misapplies or gives an improper effect to any test or consideration which it was [its] duty to regard."[10] (Emphasis added; internal quotation marks omitted.) *Sheridan* v. *Killingly*, supra, 278 Conn. 259. Further, the trial court has the discretion to accept or reject the experts' testimony in this regard in whole or in part. See, e.g., *First Bethel Associates* v. *Bethel*, 231 Conn. 731, 741, 651 A.2d 1279 (1995); *Stamford Apartments Co.* v. *Stamford*, 203 Conn. 586, 593–94, 525 A.2d 1327 (1987). Put differently, "[t]he trial court has the right to accept so much of the testimony of the experts and the recognized appraisal methods which they employed as [it] finds applicable . . . ." *Greenfield Development Co. of Fairfield* v. *Wood*, 172 Conn. 446, 451, 374 A.2d 1084 (1977). Ultimately, "[o]n appeal, the scope of our review is limited because it is a question of fact for the trier as to whether the method used for valuation appears in reason and logic to accomplish a just result." *First Bethel Associates* v. *Bethel*, supra, 738.

Thus, I view the trial court's election not to apply the discounted cash flow approach as a matter firmly within its discretion, which has long been settled to extend to its choice of the method of valuing the property unless cabined by a "generally applicable rule of law . . . ." *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 776, 946 A.2d 215 (2008); accord *Sheridan*

[10] For early statements of this venerable rule, see, for example, *Moss* v. *New Haven Redevelopment Agency*, 146 Conn. 421, 425–26, 151 A.2d 693 (1959), and *Appeal of Cohen*, 117 Conn. 75, 85–86, 166 A. 747 (1933).

v. *Killingly*, supra, 278 Conn. 260 (The court applied plenary review because, "contrary to the plaintiff's claim, the trial court did not simply conclude that a comparable sales approach to valuing the leasehold interest for purposes of assessing that value against the plaintiff was inappropriate for this particular property. Rather, the court stated unequivocally that, as a generally applicable rule of law, the value of a leasehold interest cannot be attributed to the lessor when valuing the lessor's property interest for assessment purposes."). For example, in *Stamford Apartments Co.* v. *Stamford*, supra, 203 Conn. 593–94, this court rejected a claim that the trial court improperly found that "the comparable sales method of evaluation, offered by the defendant's appraiser, was inappropriate" because "the trial court had the right to accept so much of the testimony of the experts and the recognized appraisal methods which they employed as [it] finds applicable" and it "specifically found that the most appropriate method of valuation was the capitalization of actual net income method, and explained why it rejected the testimony of the defendant's appraiser." (Emphasis omitted; internal quotation marks omitted.)

Similarly, in *Schnier* v. *Ives*, 162 Conn. 171, 177, 293 A.2d 1 (1972), this court rejected the Highway Commissioner's claim that a state referee had adopted an improper method of valuing a property by refusing to consider the price at which the plaintiff had purchased it six months prior to the taking as "the best evidence of its value on the day of taking and in completely disregarding and overlooking the significance of this sale which preceded the condemnation date by six months." This court observed that, although the referee had properly admitted the recent purchase price into evidence, "[h]e did not, however, employ it in any method used by him to determine valuation. He was not required to do this, since the trier arrives at his

own conclusion as to the value of land by weighing the opinion of the appraisers, the claims of the parties in the light of all the circumstances in evidence bearing on value and his own general knowledge of the elements going to establish value . . . ."[11] Id., 177–78. In my view, the majority's decision to reverse the decision of the trial court on the ground that it declined to apply the discounted cash flow income approach—despite giving ample reasons grounded in the record of the present case for that decision—is a major sea change in our state's case law affording our trial courts the discretion to select the appropriate valuation method when making the intensely factual determination of a property's value.

II

The trial court's discretion in property valuation matters is, however, not absolute. Although I conclude that the trial court did not abuse its discretion in declining to apply the discounted cash flow approach in valuing

[11] Other examples of the trial court's discretion in this regard abound. See, e.g., *Aetna Life Ins. Co.* v. *Middletown*, supra, 77 Conn. App. 33–34 (concluding that trial court properly gave "serious consideration" to "several methods" of rental property valuation enumerated in General Statutes § 12-63b, before choosing "the cost approach as the best method for valuing the subject property" and noting that trial court "gave ample consideration to the replacement cost approach but, ultimately, given the particular circumstances presented . . . chose to adopt reproduction cost as the fairest and most accurate method of determining the subject property's value under the cost approach"); see also *Greenfield Development Co. of Fairfield* v. *Wood*, supra, 172 Conn. 450–51 (trial court did not abuse discretion by valuing entire property at its highest and best use, rather than following appraisal that broke land into differently valued parcels based on their "degrees of wetness, elevation and terrain"); *Connecticut Printers, Inc.* v. *Redevelopment Agency*, 159 Conn. 407, 413–14, 270 A.2d 549 (1970) (rejecting property owner's claims that trial court improperly rejected "appropriate" reproduction cost approach for valuing its building "because of a failure to understand the method" and that trial court "was required, as a matter of law, to apply the reproduction less depreciation method of valuation to property devoted to a special commercial use," given his own expert's testimony that " 'the income approach is the reflection of the value of the property' ").

Wheelabrator's property, I still must consider whether the record factually supports the trial court's valuation of Wheelabrator's property under the reproduction cost approach that it adopted. See footnote 13 of this concurring opinion. "Valuation is a matter of fact to be determined by the trier's independent judgment." (Internal quotation marks omitted.) *Abington, LLC* v. *Avon*, 101 Conn. App. 709, 715, 922 A.2d 1148 (2007). In a "tax appeal taken from the trial court to the Appellate Court or to this court, the question of overvaluation usually is a factual one subject to the clearly erroneous standard of review . . . . Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Additionally, [i]t is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 100–101.

Having reviewed the record, I agree with Wheelabrator's claim that the trial court improperly included Wheelabrator's personal property in its valuation of

the real property. As stated previously, the trial court elected to apply the reproduction cost approach to value Wheelabrator's property, and followed many of the calculations utilized by Pomykacz, the city's appraiser, to arrive at that valuation. Specifically, in crediting the reproduction cost value calculated by Pomykacz, the trial court accepted the historical costs of construction of $241,949,000, declined to credit his proffered developer's profit of 15 percent, and applied his suggested trend factor of 2.08 percent in accordance with the Handy-Whitman index[12] to arrive at a "reproduction cost new" valuation of $503,253,920. The trial court then decreased that value by 38 percent for depreciation in accordance with Pomykacz' estimation to arrive at a present value, as of October 1, 2008, of $312,017,430, and added back the stipulated land value of $2 million to arrive at a total real property value of $314,017,430. The trial court stated in a footnote that this value did not "include personal property since the cost valuation is not based upon the valuation of a going concern."

Notwithstanding this footnote in the memorandum of decision, I am left with a "definite and firm conviction" that the trial court committed a mistake in its reproduction cost calculations. See *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 101. As the trial court stated in its memorandum of decision, with respect to the 2011 tax appeal, it is undisputed that the value of Wheelabrator's personal property was $56,873,060.

[12] Pomykacz' report states that the Handy-Whitman trend index is "[t]he most commonly accepted and widely acknowledged trend index within the electric utility industry" for estimation of the reproduction cost new. The Handy-Whitman index provides "index numbers for various construction, material, and labor costs of building, electric utility, and gas utility construction for six different regions in the [United States] from 1912 to present," accounting for factors such as changes in material costs and the value of the dollar. These indices are applied "[to trend] forward the original historical cost to calculate the [r]eproduction [c]ost [n]ew . . . ."

Although the cost approach, as described in Pomykacz' report, requires an adjustment for the value of personal property, his report does not indicate where that adjustment was made, and the trial court's memorandum of decision follows suit, insofar as the sole basis stated by the trial court for discounting Pomykacz' reproduction cost value was the exclusion of a developer's profit. Indeed, consistent with his report, Pomykacz testified that his overall valuation of the entire property of $357,500,000 did not distinguish between real and personal property. This failure to account for more than $56 million in personal property, in accordance with Pomykacz' own stated approach, leads me to conclude that the trial court's calculation of the real property's value was clearly erroneous. Accordingly, I agree with the majority that a new trial is required, at which the trial court "must determine whether the experts' appraisals of the property include the value of the personal property and allocate the taxes on the real and personal property accordingly."[13]

I, therefore, concur in the judgment.

STATE OF CONNECTICUT *v.* RUBEN ROMAN
(SC 19474)

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

Syllabus

The defendant, after a jury found him guilty of the crimes of murder, assault in the first degree, criminal possession of a pistol and risk of injury to a child, had informed the trial court at his sentencing hearing of potential juror misconduct and sought a continuance to allow him to present evidence of the alleged misconduct. The trial court denied the continu-

[13] I note that, in part III of its opinion, the majority acknowledges, but need not decide this issue given that it ordered a new trial in accordance with part II of its opinion. I further note that I agree with the majority's thoughtful resolution of the issues in parts IV, VI, and VII of its opinion with respect to guidance for issues that may arise on remand.

ance without conducting an inquiry into the defendant's allegations and rendered judgment of guilty in accordance with the verdict. On appeal to the Appellate Court, the defendant claimed, among other things, that the trial court abused its discretion in failing to conduct an inquiry into his allegations of juror misconduct. The Appellate Court affirmed the trial court's judgment, and the defendant appealed to this court, which reversed in part the judgment of the Appellate Court and remanded the case with instruction to the trial court to conduct an inquiry into the juror misconduct allegations. Following a ten year delay in scheduling the inquiry, the trial court conducted a hearing into the allegations of juror misconduct. The defendant presented the testimony of E that she overheard several conversations while riding on a public bus that she thought may have involved a juror discussing the defendant's case at approximately the time of the trial. E mentioned these conversations to her boyfriend, R, who was friends with the defendant. R thereafter informed the defendant of this information. The entire regular jury from the defendant's original criminal trial and the two surviving alternate jurors also testified at the hearing. All of the regular jurors testified that they did not discuss any aspects of the trial outside of the courtroom and that they did not use the public bus system during the trial or at any other time. The defendant also elicited testimony from M, one of the alternate jurors, that he exchanged comments and nonverbal communications with P, another alternate juror, during the trial, including rolling his eyes and exchanging skeptical glances with P. The trial court denied the defendant's request for a new trial, finding that the evidence did not support the defendant's allegations of juror misconduct. The court concluded that there was nothing to indicate that the conversations that E overheard referenced any information relayed by deliberating jurors as opposed to information that could have been obtained from media coverage, that the credible and cumulative testimony of all the regular jurors established that none of them participated in juror misconduct, and that neither M nor P discussed the substance of the case prior to their dismissal before jury deliberations began. On appeal to this court, the defendant claimed that the trial court erroneously concluded that there was no evidence to support a finding of juror misconduct and that, pursuant to the four factors set forth in *Barker* v. *Wingo* (407 U.S. 514), the delay in scheduling the postremand hearing violated his right to due process and a fair trial. *Held*:

1. There was no merit to the defendant's claim that prejudicial juror misconduct tainted his right to a fair trial, this court having concluded that the trial court did not abuse its discretion in denying the defendant's request for a new trial on the basis of E's testimony or the exchanges between the two alternate jurors: the only conclusion that could be definitively drawn from E's testimony was that she overheard the defendant's name in another person's conversation on a public bus, that testimony did not conclusively establish that a juror was on the bus or that a juror

related any information about the trial to a passenger, and there was nothing to indicate that the passengers' information did not come from a benign source, such as media coverage of the trial; furthermore, the verbal and nonverbal communications of M and P did not constitute juror misconduct because neither M nor P discussed the substance of the case prior to their dismissal before deliberations began, and there was no evidence to support the defendant's claim that the actions of those alternate jurors influenced the regular jurors while deliberating, the only regular juror who was directly questioned at the hearing about the actions of other jurors having testified that he was unaware of any such conduct occurring in the jury box.

2. The ten year delay in scheduling the postremand inquiry did not adversely affect the defendant's ability to present fully his juror misconduct claims and therefore did not infringe his due process rights: although the length of the delay was unusually long and warranted consideration of the remaining *Barker* factors, this court noted that much of the delay was susceptible to reasonable explanation, the defendant's failure to assert his right to a hearing exacerbated the delay and weighed heavily against his claim, and the defendant was not prejudiced by the delay because although the criminal trial judge had died, the trial judge who presided over the postremand hearing was able to observe and hear firsthand the testimony of all the jurors and witnesses from the criminal trial and, most importantly, the defendant was able to call the witnesses crucial to his juror misconduct claim, all of whom testified credibly and without any serious lapses in memory.

Argued October 16, 2015—officially released February 9, 2016

Procedural History

Substitute information charging the defendant with one count each of the crimes of murder, assault in the first degree, criminal possession of a pistol and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Wollenberg*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Foti* and *Flynn*, *Js.*, with *Shea*, *J.*, dissenting in part, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court, which reversed in part the Appellate Court's judgment and remanded the case with direction to remand the case to the trial court for further proceedings; thereafter, the court, *Dewey*, *J.*, conducted an inquiry into the

issue of juror misconduct and denied the defendant's request to vacate the judgment of conviction and to declare a mistrial, and the defendant appealed to this court. *Affirmed.*

Ilana R. N. Ofgang, assigned counsel, for the appellant (defendant).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robin D. Krawczyk*, senior assistant state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. This direct appeal, following an inquiry into allegations of juror misconduct, comes to us almost sixteen years after the defendant, Ruben Roman, was convicted of murder in violation of General Statutes (Rev. to 1997) § 53a-54a, assault in the first degree in violation of General Statutes § 53a-59 (a) (1), criminal possession of a pistol in violation of General Statutes (Rev. to 1997) § 53a-217c (a) (1), and risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21. The defendant claims that the trial court improperly rejected his claim of alleged juror misconduct and his related claim that the unusually extended delay in scheduling a postremand inquiry into the alleged misconduct violated his constitutional right to due process and a fair trial. In the defendant's first appeal to this court, we reversed in part the judgment of the Appellate Court, which had rejected the defendant's claim that the trial court abused its discretion in failing to conduct an inquiry into the defendant's juror misconduct allegations. *State* v. *Roman*, 262 Conn. 718, 729, 817 A.2d 100 (2003). We remanded the case with instruction to the trial court to conduct an inquiry into the defendant's claim. Id. In 2013—following a decade long delay—the trial court held the mandated inquiry, found no evidence of juror misconduct, and denied the defen-

dant's request to vacate his conviction and for a mistrial. We conclude that the trial court properly found no evidence of juror misconduct and the delay on remand did not violate the defendant's right to due process. Accordingly, we affirm the judgment of the trial court.

The following facts are relevant to the defendant's claims before this court. On the evening of December 24, 1997, the defendant and his girlfriend, Maria Torres-Arroyo, hosted a holiday gathering at their home in East Hartford. Id., 721. Throughout the night, the defendant consumed cocaine and a number of alcoholic beverages. Id. At approximately 3 a.m. on December 25, 1997, the defendant returned home after driving several family members back to their respective residences. Id. Upon entering the house, the defendant encountered Torres-Arroyo sitting at a table with her brother-in-law from a prior marriage, Israel Arroyo, and her minor son and her nephew. Id. The defendant and Torres-Arroyo began to have a heated argument that rapidly escalated and culminated in the defendant firing a .45 caliber semiautomatic pistol at both Torres-Arroyo and Arroyo. Id. Although Torres-Arroyo survived, Arroyo subsequently died from his wounds while being transported to the hospital. Id.

On January 19, 2000, the jury found the defendant guilty of all charges. Id. Judge Wollenberg held a sentencing hearing on March 13, 2000. Id. At the sentencing hearing, the defendant informed the court of a potential instance of juror misconduct, but did not provide any evidence as he had been unable to reach an attorney he had recently retained who allegedly had evidence of the misconduct. Id., 722–23. The defendant sought a continuance to allow him to present evidence of the alleged misconduct, but the court denied the continuance without conducting an inquiry into the defendant's allegations and rendered judgment of guilty in accordance with the verdict. Id. The defendant appealed to

the Appellate Court, which affirmed the trial court's decision; *State* v. *Roman*, 67 Conn. App. 194, 197, 786 A.2d 1147 (2001); and then appealed to this court, which reversed in part the judgment of the Appellate Court and remanded the case to the Appellate Court with direction to remand the case to the trial court with direction to conduct an inquiry into the defendant's juror misconduct claim. *State* v. *Roman*, supra, 262 Conn. 720.

Following a ten year delay in scheduling the inquiry, the facts of which are relevant to the defendant's due process claim and are set forth in part II of this opinion, the defendant's postremand hearing before Judge Dewey began on February 6, 2013. At the hearing, the defendant presented the testimony of Mary Eason, who claimed to have overheard juror misconduct on a public bus and mentioned it to her boyfriend, Hiram Rodriguez. Additionally, the defendant was able to summon the entire jury from his original criminal trial, as well as two of the three alternate jurors, the third having died prior to the hearing.

At the hearing, the defendant presented evidence of two different allegations of juror misconduct, namely that (1) a juror had potentially discussed the case with members of the public, and (2) two alternate jurors exchanged communications during trial. The defendant's first and main allegation was grounded in Eason's testimony. Eason testified that on several days in 2000 between 6 a.m. and 6:30 a.m. she heard a group of individuals discussing the defendant's case on a public bus that travels from Hartford to East Hartford. Although Eason was not personally acquainted with the defendant, she recognized his name and the details of his case from conversations with Rodriguez, who was a friend of the defendant. Although Eason only heard snippets of the conversations, she testified that the participants mentioned that one of the jurors was speaking

with them, but it was Eason's belief that the juror was not on the bus.[1] After overhearing the conversations on the bus, Eason mentioned them to Rodriguez. Rodriguez then visited the defendant in jail prior to the sentencing hearing and informed him of Eason's observations. Apart from that, Eason did not recall much of what the passengers actually said.

All twelve regular jurors and two of the alternate jurors from the defendant's original criminal trial also testified at the hearing. All regular members of the jury testified that they did not discuss any aspects of the trial outside of the courtroom, nor did they use the public bus system during the trial or at any other time. One juror, N.M.,[2] testified that she knew some people who used public transportation, but none who would have been on the same bus as Eason. One of the alternate jurors, P.M., testified that although he had several coworkers that used public buses, he never discussed any aspects of the trial with them nor did he think they would have been on Eason's bus. The other alternate juror, M.M., testified that several of the employees at his company used the public bus system, but stated that he never discussed the defendant's case with any of his employees. M.M. acknowledged that he did discuss the case with his wife during the trial, but testified that his wife would have had no opportunities to mention these discussions with any of M.M.'s employees or anyone else that rode the bus.

The defendant's second allegation of juror misconduct was that two of the alternate jurors communicated

[1] As Judge Dewey later observed, members of the jury could not have been on the bus, as they would have been reporting to the courthouse in Hartford at approximately the time of Eason's observations, not taking a bus in the opposite direction.

[2] We refer to the jurors by their first and last initials in order to protect their privacy interests. See *State* v. *Gonzalez*, 315 Conn. 564, 569 n.3, 109 A.3d 453 (2015).

with each other during the trial. M.M. testified that he exchanged "little comments" as well as nonverbal communications with P.M.—who sat next to him in the jury box—during the course of the defendant's trial. M.M. testified that prior to his and P.M.'s dismissal as alternates, he would roll his eyes and exchange looks with P.M. whenever the defense presented a line of argument he did not find compelling. The exchanges only passed between M.M. and P.M. and did not involve any other members of the jury. One of the regular jurors, D.C., testified that while seated in the jury box he was unaware of any exchanges occurring between other jurors.

In May, 2013, both parties submitted briefs to the trial court based on the evidence adduced at the hearing. In his brief, the defendant argued for a new trial on the basis of the alleged juror misconduct. In her September 13, 2013 memorandum of decision, Judge Dewey denied the defendant's request for a new trial. Judge Dewey found that the evidence did not support the defendant's allegations, as there was nothing to indicate that the conversations that Eason overheard referenced any information relayed by deliberating jurors, as opposed to information obtained from media coverage. Judge Dewey also found that the credible and cumulative testimony of all the regular jurors established that none of them participated in any juror misconduct. Accordingly, Judge Dewey denied the defendant's request for a new trial.

Following Judge Dewey's denial of his request to vacate his conviction and for a mistrial, the defendant appealed directly to this court.[3] On appeal, the defendant raises similar arguments to those initially pre-

[3] We initially transferred the defendant's appeal to the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1, but later transferred the appeal back to this court on the motion of the state. See Practice Book § 65-2.

sented to Judge Dewey following the postremand hearing. First, the defendant argues that given Eason's testimony and the communications between alternate jurors P.M. and M.M., Judge Dewey erroneously concluded that there was no evidence to support a finding of juror misconduct. Second, the defendant argues that Judge Dewey incorrectly concluded that his right to a fair trial was not violated by the delay in scheduling the postremand hearing. In response, the state counters that the evidence introduced by the defendant at the postremand hearing failed to establish a violation of his right to a fair trial before a panel of impartial jurors. The state also argues that, despite the defendant's argument to the contrary, the scheduling delay did not violate the defendant's rights because it did not prevent him from fully presenting his juror misconduct claim. We agree with the state on both claims.

I

Under the constitution of Connecticut, article first, § 8, and the sixth amendment to the United States constitution, the right to a trial by jury "guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." (Internal quotation marks omitted.) *State* v. *Brown*, 235 Conn. 502, 523, 668 A.2d 1288 (1995). In cases where a defendant alleges juror bias or misconduct, the defendant may be entitled to a new trial if he can raise his allegations from "the realm of speculation to the realm of fact." (Internal quotation marks omitted.) *State* v. *Feliciano*, 256 Conn. 429, 449, 778 A.2d 812 (2001). In such cases, we ask "whether or not the [jury] misconduct has prejudiced the defendant to the extent that he has not received a fair trial." (Internal quotation marks omitted.) *State* v. *Rhodes*, 248 Conn. 39, 47, 726 A.2d 513 (1999). It is well settled that if "the trial court is directly implicated in juror misconduct, the state bears the burden of proving that misconduct was harmless error." (Internal quotation marks omit-

ted.) Id. If, however, the trial court is not at fault for the alleged juror misconduct, "we have repeatedly held that a defendant who offers proof of juror misconduct bears the burden of proving that actual prejudice resulted from the misconduct." (Internal quotation marks omitted.) Id.

Finally, when reviewing claims of juror misconduct on appeal we recognize that "the trial court has wide latitude in fashioning the proper response to allegations of juror [misconduct]. . . . We [therefore] have limited our role, on appeal, to a consideration of whether the trial court's review of alleged jur[or] misconduct can fairly be characterized as an abuse of its discretion." (Internal quotation marks omitted.) *State* v. *West*, 274 Conn. 605, 649, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005).

The defendant presents two alleged instances of juror misconduct as having violated his right to a fair trial. First, the defendant relies on Eason's testimony to demonstrate that one of the jurors allegedly communicated information about the trial to a third party. Second, the defendant argues that the comments and the eye rolling and glances exchanged between alternate jurors P.M. and M.M. constituted an impermissible communication between the alternate jurors and the twelve regular jurors. As the trial court is not at fault for either allegation of misconduct, the defendant bears the burden of demonstrating prejudice. *State* v. *Rhodes*, supra, 248 Conn. 47. We conclude, however, that the defendant has failed to carry his burden on both allegations of misconduct.

Although Eason testified that she heard a group of bus passengers mention the defendant's name and believed that they were discussing the defendant's case, she also testified that she only heard "bits and pieces" of the conversation. Importantly, Eason testified that the pas-

sengers were only discussing the court proceedings and specifically testified that they were *not* discussing the content of the jury deliberations. Thus, even though Eason testified that she overheard a passenger state that he or she was in contact with a juror, there is no evidence that the supposed juror leaked any information about the jury's deliberations.

Indeed, there is an utter lack of evidence suggesting that any of the jurors leaked any information—about the deliberations or otherwise—to an individual who used the same public transportation system as Eason. In her memorandum of decision, Judge Dewey found that all of the regular and alternate jurors testified credibly that they did not engage in any of the alleged conversations overheard by Eason, nor was there any evidence that any of the participants in the conversations on the bus received any information from any of the jurors, as opposed to media reports.[4] The defendant counters this fact with the argument that because regular juror N.M. and alternates M.M. and P.M. all testified that they knew individuals who used public transportation, they "had the opportunity" to relay information about the trial to individuals who could have been on the same bus as Eason. Although the jurors may have had the opportunity to converse with acquaintances that used the public bus system, N.M., M.M., and P.M. all testified that they had no such conversations.

Furthermore, it bears mentioning that the opportunity for a juror to commit misconduct is a far cry from a juror who actually does commit misconduct. Theoretically, every juror in every trial always has the potential to take some action that could prejudice the defendant's right to a fair trial. The vast majority of those called to

[4] Alternate juror M.M. did testify that he shared details about what was "going on" in the trial with his wife. The defendant, however, did not raise this communication as independent grounds for a mistrial at the postremand hearing, nor does he do so before this court.

jury service, however, approach their duty seriously and abide by their oaths as jurors. As one of our sister courts once wryly observed, for the opportunity for misconduct to be removed entirely, "the jury would have to be consigned to a dungeon to consider [its] verdict . . . ." *People* v. *Strause*, 290 Ill. 259, 281, 125 N.E. 339 (1919). Were we to accept the defendant's argument and hold that the mere opportunity for a juror to commit misconduct is comparable to actual misconduct and therefore warrants a new trial, "few trials would be constitutionally acceptable." (Internal quotation marks omitted.) *State* v. *Johnson*, 288 Conn. 236, 249, 951 A.2d 1257 (2008). We do not find the defendant's argument in this vein to be persuasive.

Accordingly, we conclude that it was not an abuse of discretion for Judge Dewey to deny the defendant's request for a new trial on the basis of Eason's testimony. Judge Dewey's finding of fact regarding Eason's testimony was that Eason overheard the defendant's name in another person's conversation. Indeed, this is the only conclusion that may be definitively drawn from Eason's testimony, which does not conclusively establish that a juror was on the bus or that a juror related any information about the trial to a passenger. As Judge Dewey noted, there is nothing to indicate that the passengers' information did not come from a benign source, such as media coverage. Given that the conversations occurred in the same time frame as when the verdict was announced and that the passengers were riding a bus in the town where the defendant committed his crimes, it is possible that the passengers' conversations were inspired by nothing more than local interest. As the defendant could not demonstrate juror misconduct based on Eason's testimony, Judge Dewey did not abuse her discretion in denying the defendant's request for a new trial on these grounds.

The defendant also argues that the "little comments" and the eye rolling and skeptical glances exchanged between alternates M.M. and P.M. influenced the regular jurors, and therefore constituted impermissible third-party communications that merited Judge Dewey granting his request for a new trial. Again, we conclude that the trial court did not abuse its discretion in denying the defendant a new trial on these grounds, as the defendant cannot show that the conduct of M.M. and P.M. tainted the regular jurors and thereby violated his right to a fair trial.

The defendant asserts that alternates P.M. and M.M. engaged in continuous commentary during the trial and opined on the defendant's guilt while sitting in the jury box next to the regular members of the jury. The testimony of both P.M. and M.M. at the postremand hearing presents a different picture. P.M. testified that during the trial he did not communicate with any other person about the proceedings. M.M. testified that although he exchanged comments with P.M. and rolled his eyes and gave "little looks" to P.M. while sitting at the end of the back row of the jury box, he and P.M. "weren't in conversation" about the substance of the case. M.M. testified that these exchanges only occurred between himself and P.M. and did not involve any members of the regular jury. The only regular juror that was directly asked about other jurors communicating, D.C., testified that he was unaware of such actions occurring in the jury box. Tellingly, it would appear that neither Judge Wollenberg nor defense counsel became aware of M.M.'s objectionable conduct over the course of the trial. See *United States* v. *Fazio*, 770 F.3d 160, 169 (2d Cir. 2014) (United States District Court judge dismissed juror for, among other things, rolling her eyes, smirking, and exchanging knowing glances with other jurors during trial).

We are unaware of any existing Connecticut precedent holding that actions akin to those in the present case constitute juror misconduct. Many of our prior decisions addressing juror misconduct involve claims of misconduct that occurred outside of the courtroom. See *State* v. *Johnson*, supra, 288 Conn. 254–55. In those cases that do address in-court conduct similar to that which occurred in the present case, we have not held that such conduct rose to the level of prejudicial juror misconduct. See *State* v. *Ross*, 230 Conn. 183, 227, 228, 646 A.2d 1318 (1994) (no misconduct where juror " 'smiled broadly' " at victim's father when verdict was announced), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); *Lachira* v. *Sutton & Sutton Esquires*, 143 Conn. App. 15, 24, 68 A.3d 1177 (no misconduct where juror allegedly " 'saluted' " defendant and turned to look at him when exiting courtroom), cert. denied, 310 Conn. 922, 77 A.3d 140 (2013). To be clear, there may be cases where a juror's courtroom actions rise to the level of misconduct and unfairly prejudice the defendant. The present case, however, is not one of those. Although we do not sanction the alternate jurors' indecorous courtroom conduct, we cannot conclude from the evidence presented that their side comments, eye rolling and shared glances amount to juror misconduct. P.M. and M.M. testified—and Judge Dewey found—that neither alternate juror discussed the substance of the case prior to their dismissal before deliberations began. Thus, there was no abuse of discretion in Judge Dewey's denial of the defendant's request for a new trial on these grounds.

Despite the testimony of D.C. to the contrary, and the fact that the trial court and the regular jurors seem to have been unaware of the alternate jurors' exchanges, the defendant argues that the rest of the jury must have seen their exchanges and were thereby negatively influenced. In support of this argument, the

defendant suggests that we should treat the alternate jurors as third parties[5] and presume both that the regular jurors witnessed the conduct and that the defendant was thereby prejudiced, requiring the state to rebut the presumption of prejudice.

In cases where there is contact between third parties and jurors regarding a matter before the jury, the burden shifts to the state "to establish that the contact was harmless." (Internal quotation marks omitted.) *State* v. *Berrios*, 320 Conn. 265, 294, 129 A.3d 696 (2016). We recognize, however, that "evidence, rather than speculation, is required to shift the burden of proof to the state." Id., 293. In the present case, the defendant's claim of third-party contact does not move beyond the realm of speculation and the defendant thereby retains a burden he cannot carry given the evidence in the record. Witness testimony at the postremand hearing simply does not support the defendant's theory that the other jurors were aware of the exchanges between M.M.

[5] The defendant posits that we should treat the alternate jurors as third parties during the time they were sitting in the jury box and still sworn in as jurors. To be sure, we do recognize a distinction between regular jurors and alternate jurors, particularly after the latter have been dismissed prior to deliberations. See *State* v. *Apodaca*, 303 Conn. 378, 387–89, 33 A.3d 224 (2012) (alternate juror cannot be recalled to serve as regular juror on same case following dismissal). To hold that alternate jurors are third parties during their jury service would create innumerable difficulties, as alternate jurors and regular jurors unavoidably come into contact with one another. As trial courts instruct all jurors not to discuss the case amongst each other prior to deliberation, and we presume that jurors follow the instruction of the trial court unless there is evidence to the contrary; *State* v. *Parrott*, 262 Conn. 276, 294, 811 A.2d 705 (2003); we do not believe that treating alternate jurors as third parties during trial would significantly further any interest in protecting the fair trial rights of defendants. To be clear, prejudice may arise if an alternate juror contacts a regular juror following the alternate's dismissal from service. There is, however, no such allegation in the present case. The Arizona decision that the defendant cites for the proposition that alternates should be treated as third parties is distinguishable on these very grounds. See *State* v. *Miller*, 178 Ariz. 555, 557, 875 P.2d 788 (1994) (dismissed alternate juror left note opining on defendant's guilt on windshield of regular juror's car).

and P.M. M.M. testified that the communications involved no other members of the jury. D.C., the only juror that was directly asked about the actions of other jurors, testified that he was entirely unaware of any such conduct.[6] As both P.M. and M.M. were dismissed from jury service prior to deliberations, there is no possibility that the alternate jurors' actions influenced the regular jurors while deliberating. Accordingly, we conclude that there was no abuse of discretion for Judge Dewey to have denied a new trial on these grounds.

In sum, we conclude that Judge Dewey did not abuse her discretion in denying the defendant's request for a new trial. Neither Eason's testimony nor P.M. and M.M.'s exchanges establish the existence of prejudicial juror misconduct that tainted the defendant's right to a fair trial. The defendant's juror misconduct claim is therefore meritless.

II

The defendant also argues that his constitutional rights to due process and a fair trial were violated by the ten year delay in scheduling the postremand inquiry and that Judge Dewey should have granted his request for a new trial on these grounds. Although we acknowledge that the delay in the present case is remarkable, we conclude that it did not adversely affect the defendant's ability to present his juror misconduct claim and therefore did not infringe the defendant's due process rights.

The following facts are relevant to the defendant's due process claim. After this court issued its decision in *Roman* in 2003, it appears that neither the parties nor the court took any action regarding the remand

[6] Defense counsel only questioned D.C. about the other jurors' acts despite having the opportunity at the postremand inquiry to ask the other jurors as well. To pass by this opportunity only to argue before this court that it is *possible* that the other jurors *may* have seen P.M. and M.M.'s actions strikes us as a somewhat disingenuous approach.

order until May 12, 2006, when the defendant's newly assigned counsel, Michael Georgetti, appeared before Judge Wollenberg. Georgetti explained to the court that he was having significant trouble in both contacting the attorney the defendant had privately retained prior to sentencing, Kay Wilson, and securing the cooperation of Eason. Georgetti asked Judge Wollenberg for a continuance for further time to contact Wilson and to secure Eason's appearance. Although Georgetti suggested two dates later that month on which to hold the hearing, Judge Wollenberg instead provided the parties with an open-ended continuance and instructed Georgetti and the prosecutor to contact him whenever they were ready. There was no discussion of specific dates or a timeline by which to proceed.

In the years following the 2006 appearance before Judge Wollenberg, Georgetti continued to face difficulties in locating both Wilson and Eason. Throughout 2009 and 2010, Georgetti spoke with the Hartford case flow coordinator several times about scheduling a status conference on the postremand hearing. Georgetti eventually managed to contact Wilson, although the information in her possession proved to be unhelpful in furthering the defendant's juror misconduct claim. Still unable to contact Eason and without any other sources of evidence, on March 10, 2010, Georgetti filed a motion to summon and examine the jury in order to question the individual jury members about potential misconduct during the defendant's trial. Judge Wollenberg then scheduled an in-chambers conference on the motion with the parties. Although Georgetti appeared at the meeting and was able to speak with Judge Wollenberg, the meeting produced no results, as a snowstorm prevented the prosecutor from reaching the courthouse. Georgetti subsequently attempted to reschedule the meeting, but was prevented from doing so due to Judge Wollenberg's illness and subsequent death.

In 2012, the presiding judge reassigned the defendant's case to Judge Dewey, who scheduled a hearing on November 20, 2012. At the hearing, Georgetti moved to withdraw from his representation of the defendant as he believed that he would likely be required to testify on the delay and his efforts to locate Eason. Indeed, at the 2013 evidentiary hearing on the defendant's juror misconduct claim, the defendant offered the testimony of Georgetti as well as Matthew Goetz and Marcie Hutt, criminal case flow coordinators for the judicial district of Hartford, to testify as to the delay in scheduling the hearing.

Goetz testified that he worked as a case flow coordinator in Hartford from 1998 to 2005, and his responsibilities included scheduling Judge Wollenberg's cases. At the time of Goetz' employment, the court's computer system did not track those cases that had been remanded for a hearing. To compensate for this, Goetz testified that of his own volition he kept daily lists of cases to be scheduled, but that he did not have any memory of ever scheduling a hearing after the remand order in *Roman*. In 2005, Goetz began a new position in the judicial branch and Hutt replaced him in the role of case flow coordinator. Hutt used the same list system as Goetz to keep track of scheduling hearings. Although Hutt could not remember if she was the one who scheduled the initial hearing date in 2006, she testified that had Judge Wollenberg given her a subsequent date on which to schedule the hearing, she would have scheduled a hearing accordingly. Ultimately, Hutt did not do so until 2012 when the presiding judge provided her with a date to schedule the hearing before Judge Dewey. Georgetti also offered testimony on the delay. He acknowledged that he could have taken more steps to prevent the delay, yet simultaneously stated that because the scheduling power rested solely in the court,

he felt there was not much more he could have done as defense counsel to get the hearing scheduled.

Defense counsel also questioned Eason on the effect of the delay on her testimony, given that Eason's testimony was at times vague and imprecise about what she actually overheard the other passengers discussing on the bus. Regardless, Eason stated that had she been required to testify at an earlier point in time, her testimony would not have been any different. Eason also testified that her resistance to being called as a witness was due to her wish to avoid involvement in legal proceedings and that she only appeared at the hearing because she was under subpoena.

In his posthearing brief to the trial court, the defendant argued that the delay in scheduling the hearing violated his right to due process and a fair trial and was sufficient grounds for a new trial. Judge Dewey noted that "[n]either the trial court nor counsel were particularly aggressive" in ensuring that a hearing was scheduled, and denied the defendant's request for a new trial on those grounds.

When a defendant alleges that his right to a speedy trial has been violated, this court balances, on a case-by-case basis, the factors identified by the United States Supreme Court in *Barker* v. *Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). *State* v. *DePastino*, 228 Conn. 552, 560, 638 A.2d 578 (1994). These factors include: "[1] [l]ength of delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant." *Barker* v. *Wingo*, supra, 530. We recognize that these factors "have no talismanic qualities" but rather "must be considered together with such other circumstances as may be relevant." Id., 533. We apply this same factual matrix to the defendant's claim that the delay in scheduling the postremand

inquiry into juror misconduct violated his right to due process.

The "triggering mechanism" for our consideration of the *Barker* factors is the length of the delay that the defendant has experienced. Id., 530. As the tolerable length of delay may vary greatly between cases, our inquiry into the length of the delay "is necessarily dependent upon the peculiar circumstances of the case." Id., 530–31. Following our 2003 remand order in *Roman*, the defendant did not receive an evidentiary hearing until a full decade later. A delay of such great length is astounding at first glance, and, indeed, the state concedes that the ten year delay in the present case warrants our consideration of the remaining *Barker* factors.

After determining that there is a delay that requires our consideration, we examine the reason for the delay. Recognizing that there are diverse arrays of circumstances that may contribute to a delay in any given case, we place different weights on different reasons for the delay. Id., 531. For example, deliberate actions by the state to "hamper the defense should be weighted heavily against the government." Id. Likewise, "neutral reason[s] such as negligence or overcrowded courts" are weighted less heavily, but still weigh against the state due to a defendant's lack of control over such circumstances. Id. Additionally, a "valid reason, such as a missing witness, should serve to justify appropriate delay." Id. Finally, our case law recognizes a distinction between delays that arise due to individual failures and those that arise due to systemic problems. *State* v. *DePastino*, supra, 228 Conn. 562. When a delay may be ascribed to an individual failure rather than an institutional failure, the defendant must show actual prejudice. Id.

Given the length of time that elapsed in the present case, the reasons for the delay are numerous and varied.

We find helpful the state's characterization of the ten year delay as having occurred in three stages: (1) the period between our 2003 remand order and Georgetti's initial 2006 appearance before Judge Wollenberg; (2) Georgetti's 2006 to 2010 quest to locate Eason and Wilson; and (3) the period between 2010 and 2013 when various individual blunders and unfortunate circumstances prevented scheduling the hearing.

In regard to the three years following our remand order in 2003, the record is devoid of any explanation that would indicate why the court did not schedule the defendant's hearing or why the parties did not request that the hearing be scheduled during this time. A turning point seems to have been in 2006, when Georgetti was appointed as the defendant's new counsel and Judge Wollenberg scheduled the first hearing pursuant to the remand order. It was at this hearing that Georgetti explained his difficulties in locating both Eason and Wilson and that Judge Wollenberg granted an open-ended continuance and instructed the parties to get in touch with him when they were ready to proceed. Significantly, the prosecutor indicated that the state was content with Georgetti receiving more time to locate the witnesses and did not attempt to hinder Georgetti in his efforts on the defendant's behalf. This stands in marked contrast to the facts in *Barker*, where the state deliberately delayed a defendant's trial for years in an attempt to first convict a codefendant. *Barker* v. *Wingo*, supra, 407 U.S. 516–19. In this regard at least, the delay in the present case does not weigh against the state. The majority of Georgetti's time between 2006 and 2010, was consumed by his attempts to find Wilson and to ensure Eason's cooperation. Generally, a delay that occurs due to the search for a missing witness is justified. Id., 531. Notably, however, the delay in the present case was catalyzed by the defendant's request for a continuance in order to gather more evi-

dence, rather than the state seeking more time while the defendant was ready and waiting to proceed. A delay that results from a defendant's own request for more time cannot later serve as the basis for a due process violation. See *State* v. *Bonner*, 290 Conn. 468, 486, 964 A.2d 73 (2009) (delay was due in part to defendant's own requested continuances to conduct further evidentiary investigations).

Finally, between 2010 and 2013, a series of events occurred that, by their very nature, make it difficult for us to assign fault to any particular party. First, case flow coordinator Hutt had difficulty finding a date which worked for Judge Wollenberg. As this matter was entirely out of the defendant's hands, any delay that resulted from it weighs against the state. The next delays, however, were the fault of no party. The 2010 meeting between the parties and Judge Wollenberg was cancelled only when a hazardous winter storm prevented the prosecutor from reaching the courthouse. Judge Wollenberg subsequently became ill, stopped hearing cases, and later died. As we cannot assign fault for the whims of the weather or the inevitability of human mortality, we conclude that any such delay that resulted from these circumstances is excusable. See *Barker* v. *Wingo*, supra, 407 U.S. 533–34 (delay caused by unexpected illness of case investigator was excusable).

The defendant attempts to cast the delay here as a widespread systemic failure akin to the institutional failures we condemned in *Gaines* v. *Manson*, 194 Conn. 510, 481 A.2d 1084 (1984). In that case, we determined that the failure of the state to provide a sufficient number of public defenders to indigent clients was a systemic failure that weighed heavily against the state and amounted to a deprivation of the petitioners' due process and equal protection rights. Id., 513–14, 527. There is no evidence, however, that would indicate that the

delay in scheduling the defendant's hearing was due to some inherent failure—rather than an isolated, individual failure—in the court system. The defendant cites to the practice of the courthouse case flow coordinators in making their own scheduling lists as evidence of an institutional failure. Not only is there nothing in the evidence to indicate that the system employed by Goetz and Hutt was anything more than an individual system used to manage their own job duties, there is also nothing that would indicate that their system was in any way responsible for the delay. Compare *State* v. *DePastino*, supra, 228 Conn. 561 (court reporter's failure to deliver transcript was individual, not systemic, failure).

Overall, nearly seven years of the delay is either unaccounted for or was consumed by Georgetti's attempt to locate Eason. The remaining three years were due to unforeseeable circumstances and Judge Wollenberg's trouble finding a date on which to meet with the parties. As such, we conclude that although much of the delay was susceptible to reasonable explanation, the trial court's delay in setting a concrete date should weigh against the state. We observe, however, that trial courts should not take too rigid a stance in scheduling when defendants request additional time or an extension to locate witnesses or to obtain potentially exculpatory evidence. Flexibility in scheduling can provide defense counsel with the time needed to more comprehensively protect defendants' rights to present a full defense.

We next examine the defendant's assertion of his right to a timely postremand inquiry. The defendant's assertion of the right "is entitled to strong evidentiary weight in determining whether the defendant [has] be[en] deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied [due process]." *Barker* v. *Wingo*, supra, 407 U.S. 531–32. Accordingly, we observe that it may be helpful to note to what extent, if any, a

defendant's failure to assert the right contributed to a delay. As Judge Dewey aptly noted in her memorandum of decision, neither the trial court nor counsel took a proactive approach to having the hearing scheduled.

As we have already observed, while the trial court did not take on an active role in managing the progress of the defendant's hearing, the defendant also did not himself take a particularly active approach in asserting his right to have the hearing scheduled and held. When considering the third *Barker* factor in the context of the present case, the record demonstrates that for three years following our remand order in *Roman*, the defendant took no action asserting his right to have a hearing scheduled. Although parties to a case have no individual control over the court calendar, a "wait and see" approach to scheduling is—as this case demonstrates—certainly unwise. Despite being represented by counsel, there is no evidence that the defendant ever contacted the court about scheduling the hearing during these first three years. The defendant's momentum in scheduling the hearing seems only to have accelerated upon Georgetti's appointment as the defendant's new attorney in 2006. Even then, another four years elapsed after the initial appearance before Judge Wollenberg before the defense filed its motion to summon the jury and asked for the hearing. Prior to that, the defendant filed no formal requests for a hearing. Georgetti apparently spoke informally with Judge Wollenberg about the hearing while at the courthouse on various occasions, but these conversations do not seem to have been formal requests by the defendant to schedule the hearing or indicate that he was ready to proceed. Although a missing witness may validly justify a delay, Eason's evasions alone cannot fully explain the defendant's approach to asserting his right to a hearing, especially because three years of the delay occurred prior to Georgetti's attempts to contact Eason and for four years afterward the defen-

dant filed nothing with the court asserting his right.[7] Thus, the defendant's failure to assert his right was also another reason for the delay itself. We conclude that the defendant's approach to asserting his right to the hearing weighs against him.

The final *Barker* factor concerns any prejudice that a defendant has experienced as a result of a delay. In considering prejudice, we recognize that "[i]f witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Barker* v. *Wingo*, supra, 407 U.S. 532.

Despite the ten year delay that the defendant in the present case experienced, he was able to fully and comprehensively present his arguments concerning juror misconduct at the 2013 hearing. Although one alternate juror died prior to the hearing, the testimony of alternate jurors P.M. and M.M. does not indicate that the deceased alternate was involved in the communications between them. Additionally, as the deceased alternate juror did not deliberate, he could not have affected the verdict during the jury's deliberations. Even though thirteen years had elapsed since his trial, the defendant was still able to summon every member of the original jury to testify. Furthermore, all of the recalled jurors and alternates testified credibly and displayed few lapses in memory on important points, which is perhaps explained by the strong impression that sitting on the jury of a murder trial likely had on the citizens called upon to be jurors. Although Eason's testimony contains some moments in which she was uncertain of particular

[7] It is undisputed that Eason was opposed to appearing as a witness, but we observe that the defendant's counsel at the 2013 hearing was able to secure Eason's appearance, under subpoena, in a matter of a few months.

details of the conversation that she overheard on the bus, Eason's own testimony establishes that these uncertainties were not due to the decay of time. When asked by defense counsel whether her testimony would have been the same if she had been called to testify earlier, Eason indicated that her testimony at the 2013 hearing was the same as it would have been at any prior point in time. Thus, Eason's testimony—crucial to the defendant's claim—was not altered by the delay and therefore did not prejudice the defendant.

The defendant argues that, given that Judge Wollenberg had presided over the defendant's original criminal trial and, but for his death, would likely have presided over the postremand hearing if it had been held without delay, he was "deprived of his constitutional right to due process." We are aware, however, of no authority that requires the original judge in a matter to preside over every future iteration of the original matter. Indeed, we have authority to the contrary, preventing trial judges from presiding again over a matter on which they were reversed on appeal. See General Statutes § 51-183c; Practice Book § 1-22 (a); *State* v. *AFSCME, Council 4, Local 1565*, 249 Conn. 474, 480, 732 A.2d 762 (1999). As Judge Dewey was able to observe and hear firsthand the testimony of all of the jurors and witnesses at the 2013 hearing, we cannot conclude that Judge Wollenberg's death was a factor that prejudiced the defendant. Overall, we conclude that the delay did not prejudice the defendant's ability to present his claim.

In balancing the *Barker* factors, we determine that the defendant's right to due process was not violated. Even though the delay in the present case was unusually long, it did not prevent the defendant from fully presenting his juror misconduct claim. Although the fact that Judge Wollenberg did not schedule a concrete date does weigh against the state, the defendant's own fail-

ure to assert his right to the hearing weighs heavily against his claim. Finally, and importantly, despite the delay, the defendant was able to call the witnesses crucial to his juror misconduct claim, all of whom testified credibly and without any serious lapses in memory. We therefore conclude that Judge Dewey properly rejected the defendant's claim that the delay violated his right to due process.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* MYCALL OBAS
(SC 19290)

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

Syllabus

Pursuant to statute (§ 54-251 [b]), the trial court may exempt any person convicted of sexual assault in the second degree from registering as a sex offender if the court finds that such person was under nineteen years of age at the time of the offense and that registration is not required for public safety.

The defendant, who had served seven years of probation after having been convicted on a guilty plea of the crime of sexual assault in the second degree in connection with an incident when he was eighteen years old and the victim was fifteen years old, filed a motion to modify probation, seeking, inter alia, to be exempted from continued registration as a sex offender pursuant to § 54-251 (b). The defendant had entered into a plea agreement with the state that included, inter alia, a special condition of probation requiring him to register as a sex offender for a period of ten years. After contested hearings on the defendant's motion to modify, the trial exempted the defendant from continued registration as a sex offender, finding that he was under nineteen years of age at the time of the offense and that registration was not required for public safety. The state subsequently appealed to the Appellate Court, claiming, inter alia, that applications for exemption under § 54-251 (b) must be made before the obligation to register has commenced and that the plea agreement in the present case divested the trial court of its authority to modify the conditions of the defendant's probation. The Appellate

Court affirmed the judgment of the trial court and the state, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court properly determined that the trial court had the authority to grant the defendant's application for an exemption, this court having concluded that the defendant retained the right to file an application for an exemption from registration under § 54-251 (b) after having been placed on the sex offender registry for seven years; the plain language of § 54-251 (b), which included the broad, permissive phrase "may exempt" without qualification by, nor limitation to, any particular temporal requirement, was construed to mean that a court may exercise its discretion to grant an exception once an individual, like the defendant here, has been convicted of sexual assault in the second degree regardless of whether the individual's obligation to register has commenced so long as the two criteria set forth in § 54-251 (b) have been satisfied.
2. The state could not prevail on its claim that the defendant was precluded from exercising his right to file an application for an exemption from registration pursuant to § 54-251 (b) because he had entered into a plea agreement with the state that unambiguously required him to register as a sex offender for a period of ten years; it was undisputed that the defendant did not explicitly waive his right to file an application for an exemption under the terms of the plea agreement, and construing the plea agreement in the defendant's favor, this court did not infer from the defendant's mere assent to register as a sex offender for the statutory minimum term of ten years pursuant to § 54-251 (a) that he forfeited his right to seek an exemption pursuant to § 54-251 (b).

Argued October 5, 2015—officially released February 9, 2016

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, sexual assault in the second degree and failure to appear in the first degree, brought to the Superior Court in the judicial district of Danbury, where the defendant was presented to the court, *Mintz*, *J.*, on a plea of guilty to the charge of sexual assault in the second degree; thereafter, the state entered a nolle prosequi as to the remaining charges, and the court, *Mintz*, *J.*, rendered judgment of guilty in accordance with the plea; subsequently, the court, *Blawie*, *J.*, granted in part the defendant's motion to modify probation and denied the state's request for permission to appeal, and the state appealed to the

Appellate Court, *DiPentima*, *C. J.*, and *Sheldon* and *Flynn*, *Js.*, which reversed the trial court's judgment only with respect to the denial of the state's request for permission to appeal and affirmed the judgment in all other respects, and the state, on the granting of certification, appealed to this court. *Affirmed.*

Leon F. Dalbec, *Jr.*, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Sean P. McGuinness*, assistant state's attorney, for the appellant (state).

Neal Cone, senior assistant public defender, with whom were *Rosemary Chapdelaine*, senior assistant public defender, and, on the brief, *Lauren Weisfeld*, public defender, for the appellee (defendant).

Opinion

EVELEIGH, J. The state appeals from the judgment of the Appellate Court affirming the decision of the trial court granting the application of the defendant, Mycall Obas, to be exempted from continued registration as a sex offender pursuant to General Statutes § 54-251 (b).[1]

[1] General Statutes § 54-251 provides in relevant part: "(a) Any person who has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor or a nonviolent sexual offense, and is released into the community . . . shall, within three days following such release or, if such person is in the custody of the Commissioner of Correction, at such time prior to release as the commissioner shall direct . . . register such person's name, identifying factors, criminal history record, residence address and electronic mail address, instant message address or other similar Internet communication identifier, if any, with the Commissioner of Emergency Services and Public Protection . . . and shall maintain such registration for ten years . . . .

"(b) Notwithstanding the provisions of subsection (a) of this section, the court may exempt any person who has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (1) of subsection (a) of section 53a-71 from the registration requirements of this section if the court finds that such person was under nineteen years of age at the time of the offense and that registration is not required for public safety. . . ."

Although § 54-251 has been amended by the legislature since the events underlying the present appeal; see, e.g., Public Acts 2015, No. 15-211, § 5;

On appeal, the state claims that the Appellate Court improperly concluded that the trial court had the authority to grant the defendant's application for an exemption from registration approximately seven years after he had commenced registration notwithstanding his plea agreement with the state.[2] We conclude that the Appellate Court properly determined that the trial court had the authority to grant the defendant's application for an exemption from registration and, accordingly, affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following undisputed facts and procedural history. "The defendant pleaded guilty to one count of sexual assault in the second degree [in violation of General Statutes § 53a-71 (a) (1)] on December 11, 2003. The plea stemmed from a 2002 incident when the defendant was eighteen years old and a high school senior. The victim was a fifteen year old student who attended the same school as the defendant. According to the prosecutor, the victim never complained that her sexual involvement with the defendant was not consensual.

"The defendant cooperated fully with the police investigation and agreed to testify [in a related criminal prosecution]. As part of the plea agreement struck between the defendant and the state, the defendant received a ten year sentence of imprisonment, suspended after the mandatory minimum nine months, followed by ten years of probation. The prosecutor

Public Acts 2011, No. 11-51, § 134; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] We granted the state's petition for certification to appeal limited to the following issue: "Did the Appellate Court err in finding that the exemption for registration as a sex offender under . . . § 54-251 could be granted, over the state's objection, where the defendant had registered for seven years but had agreed to register for ten years as a part of a plea agreement entered into with the state and accepted by the trial court?" *State* v. *Obas*, 311 Conn. 924, 924–25, 86 A.3d 470 (2014).

explained to the court: 'The conditions would be: to register as a sex offender, that's a ten year registration . . . . [The] sex offender evaluation and any treatment deemed necessary. No [unsupervised] contact with any individual . . . under [sixteen] and no contact, whatsoever, directly or indirectly with the victim.' There was no agreement between the defendant and the state that the defendant would never seek modification of the conditions of probation.

"Following the prosecutor's recitation of the underlying facts, plea agreement, and recommendation for a split sentence followed by probation with special conditions, the court canvassed the defendant.

" 'The Court: You've heard the agreed upon recommendation, which is ten years, execution suspended after nine months, which is a mandatory minimum, ten years of probation, standard issues—standard conditions of probation, special conditions of sex offender evaluation and treatment, as deemed necessary . . . . Registration under sex offender status for [ten] years, no contact with the victim and no unsupervised contact with anyone under . . . [sixteen] years of age. Do you understand that to be the agreed upon recommendation?

" 'The Defendant: Yes, Your Honor.'

"The court accepted the defendant's plea and imposed sentence in accordance with the agreed upon disposition. The defendant was ordered, '[i]n addition to the standard conditions of probation,' to register as a sex offender for a period of ten years, to undergo sex offender evaluation and treatment as deemed necessary, to have no unsupervised contact with anyone under [the] age [of] sixteen and to have no contact with the victim.

"Upon his release from custody in November, 2004, the defendant began reporting to the Office of Adult

Probation, registering as a sex offender and receiving sex offender treatment. He violated his probation in 2005 by failing to report a change of address following his parents' eviction from their home. For this violation, two additional years were added to his probation. Since the 2005 violation, the defendant has reported timely to his assigned probation officer, has continued to receive sex offender treatment, and has not engaged in any additional criminal activity. He earned a high school diploma, enrolled in community college and has maintained a full-time job.

"In 2011, the defendant filed a motion to modify the conditions of his probation. Specifically, the defendant asked that the term of his probation be reduced and that the order that he register as a sex offender be terminated. As a predicate for the hearing on the defendant's motion, the court ordered him to undergo an additional psychosexual evaluation. The evaluation concluded that the defendant presented a low risk of reoffending and that he 'would not be one whom the community should fear.' . . . Three separate probation status reports authored by the defendant's supervising officer in the sex offender unit lauded his rehabilitation and raised no objection to the defendant's requested modification.

"Following contested hearings on January 31, 2012, and April 20, 2012, the [trial] court . . . exempted the defendant from the continued obligation to register as a sex offender under § 54-251. Pursuant to § 54-251 (b), the court made findings that the defendant was under nineteen years of age at the time of the offense and that registration was not required for public safety. The court also modified the probation condition prohibiting unsupervised contact with anyone under age sixteen to allow such interactions but only to the extent approved by the Office of Adult Probation. In addition, the court allowed the defendant to travel to South Africa

as approved by the Office of Adult Probation. The court denied that part of the defendant's motion in which he sought to reduce his probation from twelve years to ten years." (Footnotes omitted.) *State* v. *Obas*, 147 Conn. App. 465, 468–71, 83 A.3d 674 (2014).

The state appealed from the judgment of the trial court to the Appellate Court.[3] Id., 471. The Appellate Court concluded as follows: (1) "§ 54-251 (b) permits a court to grant a criminal defendant's request to have an exemption from the registration requirements for sex offenders after the obligation to register has commenced where the registration is made a special condition of probation, and the court finds that the defendant's later rehabilitated status justifies modification"; id., 481; and (2) that the plea agreement in the present case did not divest "the trial court of its authority to modify or enlarge the conditions of the defendant's probation." Id., 484. This appeal followed.

On appeal, the state advances two claims in support of its position that the Appellate Court improperly affirmed the trial court's judgment granting the defendant's application for an exemption from continued registration as a sex offender. First, the state asserts that the Appellate Court improperly interpreted § 54-251 (b) as authorizing the trial court to exempt the defendant from the registration requirements of § 54-251 (a) approximately seven years after the defendant was initially required to register. In the alternative, the state asserts that, even if allowed by § 54-251 (b), the defendant in the present case was barred from filing an application for an exemption from registration pur-

[3] The trial court denied the state's request for permission to appeal, but the Appellate Court held under *State* v. *Peeler*, 271 Conn. 338, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005), that the "[trial] court's denial of the state's request for permission to appeal was improvident" and that appellate review of the state's claims was warranted. *State* v. *Obas*, supra, 147 Conn. App. 476.

suant to § 54-251 (b) because he had agreed to register as a sex offender for ten years in the plea agreement. We disagree and, accordingly, affirm the judgment of the Appellate Court.

I

The state first claims that the trial court did not have the authority under § 54-251 (b) to grant the defendant's application for an exemption from registration approximately seven years after the defendant had commenced registering as a sex offender. Specifically, the state claims that § 54-251 (b) does not permit a trial court to grant such an exemption once an individual's obligation to register has commenced.

This appeal requires us to construe the requirements of § 54-251 (b). Accordingly, "we are guided by the well established principle that [i]ssues of statutory construction raise questions of law, over which we exercise plenary review. . . . We are also guided by the plain meaning rule for statutory construction." (Citations omitted; internal quotation marks omitted.) *Cales* v. *Office of Victim Services*, 319 Conn. 697, 701, 127 A.3d 154 (2015); see also General Statutes § 1-2z.

In accordance with § 1-2z, we begin with the relevant statutory text. Section 54-251 (a) sets forth the sex offender registration requirements. Section 54-251 (b) provides the following exemption from these requirements: "Notwithstanding the provisions of subsection (a) of this section, the court may exempt any person who has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (1) of subsection (a) of section 53a-71 from the registration requirements of this section if the court finds that such person was under nineteen years of age at the time of the offense and that registration is not required for public safety." See footnote 1 of this opinion.

The term "exempt" is not defined in § 54-251, nor is it defined in General Statutes § 54-250, which sets forth the definitions of certain key terms in chapter 969 of the General Statutes, also known as Megan's Law. See *State* v. *Waterman*, 264 Conn. 484, 485–86, 825 A.2d 63 (2003). "In the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Efstathiadis* v. *Holder*, 317 Conn. 482, 488, 119 A.3d 522 (2015).

The term "exempt" is defined with substantial similarity in a number of dictionaries. Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) defines "exempt" as, inter alia, "to release or deliver from some liability or requirement to which others are subject . . . ." The Oxford English Dictionary (2d Ed. 1989) defines "exempt," in relevant part, as "[t]o grant to [a person] immunity or freedom *from* a liability to which others are subject . . . [such as the control of] laws, [or obedience to] an authority." (Emphasis in original.) Lastly, the American Heritage Dictionary (5th Ed. 2011) defines "exempt" as "[t]o free from an obligation, duty, or liability to which others are subject . . . ." These definitions of the word "exempt" indicate that the legislature intended for a court to be able to release an individual otherwise mandated to register as a sex offender from the registration requirements set forth in § 54-251 (a).

We further observe that the text of § 54-251 (b) indicates that there is a single threshold requirement that must be satisfied prior to an individual being eligible to file an application for an exemption from registration. Section 54-251 (b) applies if the person "has been convicted or found not guilty by reason of mental disease

or defect of a violation of" sexual assault in the second degree under § 53a-71 (a) (1). Only after this factual predicate has been satisfied does § 54-251 (b) confer upon the trial court the discretionary authority to release an individual from the obligation to comply with the registration requirements if, based on the facts and circumstances properly before it, the trial court finds that the individual was under nineteen years of age at the time of the offense and poses no risk to public safety. See *State* v. *Bletsch*, 281 Conn. 5, 18, 912 A.2d 992 (2007) (noting that "under the 'may exempt' language in § 54-251 [b], even when the two enumerated factors are satisfied in a given case, the court still may decline to grant the registry exemption"). Thus, the right to seek an exemption from registration is triggered by the entry of a judgment of conviction under § 53a-71 (a) (1). As a result, the usage of the terms "release" and "free" in the aforementioned definitions must indicate that a court maintains the authority to grant an exemption from registration once the individual has been convicted and has become bound to comply with the statutory registration requirements.

The broad, permissive language "may exempt" in § 54-251 (b) is neither qualified by, nor limited to, any particular temporal requirement for seeking an exemption from registration. If the legislature had intended to provide a temporal restriction on an individual's ability to file an application for an exemption from registration, we must assume that it would have said so expressly. "It is a well established principle of statutory interpretation that we cannot accomplish a result that is contrary to the intent of the legislature as expressed in the [statute's] plain language. . . . [A] court must construe a statute as written. . . . Courts may not by construction supply omissions. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but

in the meaning of what it did say." (Internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, 297 Conn. 66, 80–81, 3 A.3d 783 (2010). Accordingly, "[i]n the absence of any indication of the legislature's intent concerning this issue, we cannot engraft language onto the statute" for "[i]t is not the function of the courts to enhance or supplement a statute containing clearly expressed language." *Laliberte* v. *United Security, Inc.*, 261 Conn. 181, 186, 801 A.2d 783 (2002). The task of promulgating such a limitation lies with the legislature, not with the court. Therefore, it would be improper for this court to supply a temporal restriction that the legislature has not provided for in the statute.

Finally, we note that § 54-251 (a) imposes a continuing obligation upon an individual to report any changes in the information previously filed with the Commissioner of Emergency Services and Public Protection.[4] The fact that an individual is required to take additional steps after the initial registration stage supports our understanding that he or she may seek an exemption from these requirements after initial registration.

On the basis of an examination of the express statutory language, § 54-251 (b) plainly applies to the circumstances in the present case. Consistent with the plain language of the statute, we conclude that the broad phrase "may exempt" in § 54-251 (b) means that a court may exercise its discretion to grant an exemption from registration once an individual has been convicted of

[4] Section 54-251 (a) requires, inter alia, that registrants notify the Commissioner of Emergency Services and Public Protection, "without undue delay," of changes to their place of residence, e-mail address, instant message address, employment status, and enrollment status in certain educational institutions. Section 54-251 (a) further sets forth a routine address verification process using the following language: "During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Emergency Services and Public Protection."

sexual assault in the second degree in violation of § 53a-71 (a) (1), regardless of whether the individual's obligation to register pursuant to § 54-251 (a) has commenced, so long as the two criteria set forth in § 54-251 (b) are satisfied. Accordingly, the defendant in the present case retained his statutory right to file an application for an exemption from registration after having been placed on the sex offender registry for approximately seven years.

The state, however, contends that the plain language of § 54-251 (b) requires an individual to file an application for an exemption from registration before the individual is initially required to register as a sex offender pursuant to § 54-251 (a). Specifically, the state asserts that this court should strictly construe the statutory language because § 54-251 (b) is devoid of any language expressly authorizing a court to grant an exemption once the obligation to register has commenced and a court is not permitted to supply omissions in or to add exceptions to a statute. For example, the state claims that in order to accept the defendant's interpretation of § 54-251 (b), this court would have to read into the statute language authorizing the court to " 'terminate' " or to " 'exempt at any time' " an individual from registration if the court were to find that registration " 'is no longer' " required for public safety. In response, the defendant contends that the state propounds an illogical reading of § 54-251 (b) in light of the fact that the state's interpretation would require a court to determine whether an individual poses a risk to public safety at the time of sentencing rather than at a later time when the individual would have the opportunity to present evidence of his or her rehabilitation since the time of initial registration. We disagree with the state's claims.

Despite its contention that a court must construe a statute as written, the state essentially would have us interpret § 54-251 (b) as providing that there is a tempo-

ral restriction on the court's authority to grant an exemption. In effect, the state ignores the absence of a temporal limitation and reads into the statute language such as "at the time of sentencing" or "before the obligation to register has commenced." Although, under § 54-251 (a), an individual's obligation to register as a sex offender does not commence until that individual is released into the community, the plain language of § 54-251 (b) indicates that an individual's right to seek an exemption arises upon the entry of the judgment of conviction of § 53a-71 (a) (1) and continues throughout his or her obligation to register. Furthermore, it is evident that § 54-251 (b) contains no provision imposing a temporal limitation on an individual's statutory right to file an application for an exemption from registration. Therefore, the interpretation of the statute that the state advances would require us to "engraft language onto the statute" limiting the court's authority to grant the exemption to the time before the individual's statutory obligation to register takes effect, which is something we cannot do. *Laliberte* v. *United Security, Inc.*, supra, 261 Conn. 186.

The state further urges this court to examine § 54-251 (b) in relation to other portions of § 54-251. Specifically, the state cites to § 54-251 (a), which requires registration within three days of release into the community or if "in the custody of the Commissioner of Correction, at such time prior to release as the commissioner shall direct," and § 54-251 (d), which requires that "[a]ny person who files an application with the court to be exempted from the registration requirements . . . notify the Office of Victim Services and the Victim Services Unit within the Department of Correction of the filing of such application." The state asserts that reading these two statutory provisions together leads to the conclusion that the legislature intended that an individual file an application for an exemption

from registration at the time of the individual's sentencing or while the individual was still incarcerated because, otherwise, it would lead to the absurd result of requiring the defendant in the present case, approximately seven years after his release from confinement and initial registration, to notify *both* the Office of Victim Services and the Victim Services Unit within the Department of Correction pursuant to § 54-251 (d). We disagree.

We are persuaded by the Appellate Court's reasoning on this issue. The Appellate Court reasoned that the state's claim "wrongly assumes that all defendants who are required to register will be imprisoned for their offenses." *State* v. *Obas*, supra, 147 Conn. App. 478. The Appellate Court further explained that "[t]he state's logic fails because registration also is required for offenses that would not require a defendant to be jailed," providing the example of the crime of public indecency in violation of General Statutes § 53a-186, which does not impose a mandatory term of imprisonment and "is sometimes punished only with a fine rather than incarceration . . . ." Id. Furthermore, we note that § 54-250 (10) (A) defines " '[r]elease into the community' " as, inter alia, "any release by a court after such conviction or finding of not guilty by reason of mental disease or defect, a sentence of probation or any other sentence . . . that does not result in the offender's immediate placement in the custody of the Commissioner of Correction . . . ."

Therefore, it is reasonable to believe that some criminal defendants who are required to register as sex offenders will not be sentenced to a period of incarceration, but will still maintain the right to file an application for an exemption pursuant to § 54-251 (b). See *State* v. *Obas*, supra, 147 Conn. App. 478. We conclude that it is not absurd or unworkable to require a criminal defendant convicted of a crime involving sexual con-

duct to notify both the Office of Victim Services and the Victim Services Unit within the Department of Correction of the filing of an application for an exemption years after having been released from confinement, as would be the case here. See *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 723, 104 A.3d 671 (2014) ("[i]t is axiomatic that '[w]e must interpret the statute so that it does not lead to absurd or unworkable results' ").

Our review of the plain language of the statute indicates that the legislature intended to allow an individual to file an application for an exemption from registration at any point during the required period of registration. Therefore, we conclude that the Appellate Court properly determined that the trial court had the authority to grant the defendant's application for an exemption in the present case.

II

The state further contends that, even if § 54-251 (b) allows for an individual to be exempted from registration as a sex offender once placed on the registry, the defendant was precluded from exercising his statutory right to file an application for an exemption from registration because he had entered into a plea agreement with the state that unambiguously required him to register as a sex offender for a period of ten years.[5]

[5] The state also claims that the trial court lacked the authority to grant the defendant's application for an exemption from registration because the trial court had accepted the terms of the plea agreement at the time of the defendant's sentencing and, therefore, was bound by the terms of the plea agreement. Specifically, although the state concedes that the trial court is not a party to the plea agreement, the state asserts that the trial court did not have to accept the plea agreement, and that by sentencing the defendant in accordance with the plea agreement, the court became bound by the terms of the agreement and could not subsequently modify its terms. Because we conclude that the terms of the plea agreement in the present case did not bar the defendant from exercising his right to file an application for an exemption from registration pursuant to § 54-251 (b), we need not address this claim.

Specifically, the state claims that both the state and the defendant were bound by the terms of the plea agreement, and that the trial court improperly disregarded the sanctity of plea negotiations by permitting the defendant to unilaterally seek modification of the term of his sex offender registration after having received the benefit of the agreement.[6] In response, the defendant asserts that: (1) the provision providing that

[6] The state cites to *People* v. *Evans*, 174 Ill. 2d 320, 673 N.E.2d 244 (1996), and *State* v. *Trujillo*, 117 N.M. 769, 877 P.2d 575 (1994), in support of its claim that to allow the defendant to exercise his right under § 54-251 (b) after the execution of the plea agreement at issue in this appeal would be inconsistent with principles of fairness and would damage the plea bargaining process. We do not find these cases to be relevant authority because both of these cases involved direct challenges to the defendants' negotiated sentences, rather than a defendant's exercise of a statutory right to modify a specific, statutorily mandated term of his probation available to the defendant after sentencing, as is the case here. *People* v. *Evans*, supra, 327; *State* v. *Trujillo*, supra, 770.

Evans involved two consolidated appeals, where both defendants sought to alter the terms of their sentences by filing motions for sentence reconsideration after having entered into negotiated plea agreements with the state. *People* v. *Evans*, supra, 174 Ill. 2d 327. One defendant filed a motion requesting that the court either reduce his ten year prison sentence or, alternatively, place him in a rehabilitation facility. Id., 322. The other defendant filed a motion for reconsideration, asserting that his sentences were excessive and should be reduced due to his mental disabilities. Id., 323. Unlike the defendants in *Evans*, the defendant in the present case does not challenge the sentence he received as a result of his plea agreement with the state. Rather, as we explained previously in this opinion, as a result of the parties' agreement that the defendant would plead guilty to a violation of § 53a-71 (a) (1), the defendant had a right to file an application for an exemption from registration pursuant to § 54-251 (b) and have that exemption granted at the discretion of the trial court.

Moreover, *Trujillo* is also factually distinct from the present case. In *Trujillo*, the defendant filed a petition for a writ of habeas corpus, claiming that the provision in a plea agreement requiring that she successfully complete an in-house drug rehabilitation program violated her constitutional rights. *State* v. *Trujillo*, supra, 117 N.M. 770. Without holding that the defendant's sentence was unconstitutional, the district court issued an order modifying the defendant's probation terms. Id. Unlike in *Trujillo*, the defendant in the present case had the specific, statutory right to file an application for an exemption from registration without filing a motion challenging his guilty plea or resulting sentence.

the defendant register for ten years was not a bargained for element of the plea agreement because § 54-251 (a) mandates a ten year period of registration; and (2) the state had the burden to secure the defendant's explicit promise not to file an application for an exemption from registration. We agree with the defendant.

We begin with an overview of the legal principles and standard of review governing the state's claims. This court has previously established that "the guilty plea and the often concomitant plea bargain are important components of [the] criminal justice system. . . . If every criminal charge were subjected to a full-scale trial, the [s]tates and the [f]ederal [g]overnment would need to multiply by many times the number of judges and court facilities." (Citation omitted; internal quotation marks omitted.) *State* v. *Revelo*, 256 Conn. 494, 505, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001). "As the United States Supreme Court . . . has stated, however, the benefits of plea bargaining presuppose fairness in securing agreement between an accused and a prosecutor." (Internal quotation marks omitted.) Id., 506.

"[P]rinciples of contract law and special due process concerns for fairness govern our interpretation of plea agreements. . . . Thus, [t]he validity of plea bargains depends on contract principles. . . . Because [plea agreements] implicate the waiver of fundamental rights guaranteed to persons charged with crimes, [however, they] must . . . be evaluated with reference to the requirements of due process. . . .

"When the contract language relied on by the trial court is definitive, the interpretation of the contract is a matter of law and our review is plenary. . . . When evaluating a contract, [w]e accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage

as applied to the subject matter of the contract. . . . [When] the language is unambiguous, we must give the contract effect according to its terms. . . . [When] the language is ambiguous, however, we must construe those ambiguities against the drafter. . . . Whether a contract is ambiguous is a question of law over which we exercise de novo review." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Rivers*, 283 Conn. 713, 724–25, 931 A.2d 185 (2007).

It is well established that in cases involving plea agreements, "the drafter of the agreement, the state, generally holds substantially superior bargaining power over the other party to the agreement, the criminal defendant. As the [United States Court of Appeals for the] Second Circuit has explained, [b]ecause the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant. . . . Thus, the state, as the drafting party wielding disproportionate power, must memorialize any and all obligations for which it holds the defendant responsible, as well as all promises that it has made for the purpose of inducing the defendant to cooperate. The terms of the agreement should be stated clearly and unambiguously, so that the defendant, in assenting to waive certain fundamental rights, knows what is expected of him and what he can expect in return. Likewise, such clarity ensures that the state knows what it may demand of the defendant and what it is obligated to provide in exchange for the defendant's cooperation." (Citations omitted; internal quotation marks omitted.) Id., 725–26.

In the present case, the state and the defendant entered into an oral plea agreement whereby the defendant agreed to plead guilty to sexual assault in the second degree in violation of § 53a-71 (a) (1) and to give "full and honest testimony" at a related criminal prosecution. In exchange, the state agreed to recom-

mend that the trial court sentence the defendant to ten years imprisonment, suspended after nine months, followed by ten years probation. In addition to the standard conditions of probation, special conditions were imposed, including that the defendant: be evaluated for a sex offender treatment program and, if deemed necessary, to successfully complete such a program; be prohibited from having any unsupervised contact with any child under the age of sixteen years; be prohibited from having any contact, directly or indirectly, with the victim; and register as a sex offender for ten years. The trial court accepted the terms of the plea agreement and sentenced the defendant accordingly.

It is undisputed that the defendant did not explicitly waive his right to file an application for an exemption from registration pursuant to § 54-251 (b) under the terms of the plea agreement. Thus, the sole basis for the state's contention that the terms of the plea agreement prohibit the defendant from filing an application for an exemption from registration is the fact that the plea agreement provided that the defendant "register as a sex offender for a period of ten years." To address the state's claim then, we must examine whether the provision in the plea agreement providing that the defendant "register as a sex offender for a period of ten years" clearly and unambiguously precludes the defendant from seeking an exemption from registration pursuant to § 54-251 (b). "If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 9, 35 A.3d 177 (2011). On the one hand, we find the state's interpretation reasonable—namely, that by stating that he would register for ten years, the defendant agreed not to seek an exemption from registration. On the other hand, given the absence of any mention of the defendant's relinquishment of his statutory right to file

an application for an exemption from registration on the record, we conclude that the defendant could have reasonably believed that, so long as he registered as a sex offender upon his release from incarceration and maintained his information on file up to date pursuant to the requirements set forth in § 54-251 (a), he remained free to file an application for an exemption from registration pursuant to § 54-251 (b) without violating the terms of the plea agreement. Therefore, we conclude that the provision of the plea agreement that the defendant must "register as a sex offender for a period of ten years" is ambiguous.

The Second Circuit has previously stated that it would "not imply a waiver in a plea bargain that is to be strictly construed against the government." *United States* v. *Podde*, 105 F.3d 813, 821 (2d Cir. 1997). In the present case, the state failed to clearly communicate to the defendant that he was relinquishing his right to file an application for an exemption from registration as consideration for the state's offering of a reduced charge and reduced sentence. There is no indication in the record that the defendant agreed that his assent to comply with the registration requirements of § 54-251 (a) would constitute a waiver of his right to file an application for an exemption from registration pursuant to § 54-251 (b). Construing the plea agreement in the defendant's favor, we do not infer from the defendant's mere assent to register for the statutory minimum term of ten years that he forfeited this statutory right.[7]

Our conclusion is consistent with this court's previous decision in *State* v. *Rivers*, supra, 283 Conn. 717–18, where the state and the defendant entered into a plea

[7] Although we recognize that "a voluntary and intelligent guilty plea operates as a waiver of all nonjurisdictional defects," because the defendant in the present case does not challenge his underlying conviction of sexual assault in the second degree, this principle does not apply. *State* v. *Johnson*, 253 Conn. 1, 42, 751 A.2d 298 (2000).

and cooperation agreement, under which "the defendant agreed to plead guilty to kidnapping in the first degree and to cooperate with the state, and the state agreed to make certain sentencing recommendations to the court." As a result, the defendant provided testimony consistent with his prior statement to the police at the probable cause hearing of a codefendant. Id., 718. When the state called the defendant as a witness at the codefendant's trial, however, the defendant invoked his privilege against self-incrimination under the fifth amendment to the United States constitution and declined to testify. Id., 719. Thereafter, the state declared its plea agreement with the defendant to be null and void, asserting that "the defendant's refusal to testify, although a proper exercise of his constitutional rights, nevertheless constituted 'a bad faith breach of the obligations [that] he [had] entered into in the [plea] agreement,' " and that, therefore, the defendant was no longer entitled to the benefits of the agreement. Id., 719–20. Specifically, although the state conceded that there was no express requirement in the plea agreement that the defendant testify, the state asserted that language in the plea agreement implied such an obligation.[8] Id., 728–29. The trial court agreed with the state. Id., 721–22. This court reversed. Id., 716. Relying on the principle that ambiguous language of a plea agreement must be construed against the state, this court concluded that the trial court had improperly read into the

[8] In *Rivers*, the state contended that the following language in the plea and cooperation agreement implied a requirement that the defendant testify: "It is understood that in the event [the defendant] becomes a witness at any trial and his testimony is materially different from any statements or information disclosed at this meeting, the [s]tate may and will use [the defendant's] statements at this meeting to impeach or cross-examine [the defendant]. It is also understood that materially different testimony at trial indicates a lack of candor by [the defendant], either in the original statement or at trial, which constitutes a breach of the agreement. The agreement will then become null and void." (Internal quotation marks omitted.) *State* v. *Rivers*, supra, 283 Conn. 728–29.

agreement an implicit obligation to testify. Id., 729. This court explained as follows: "Unless a plea agreement contains an explicit provision requiring that a defendant fulfill a substantial obligation such as testifying, this court will not require the defendant to do so. Likewise, the state may not claim retroactively that a particular act or omission of a defendant constituted a breach of an agreement when the language of the agreement does not prohibit such an act or omission." Id., 730.

Our interpretation is also consistent with the decisions of other courts that have considered similar issues. See *Innes* v. *Dalsheim*, 864 F.2d 974, 980 (2d Cir. 1988) (refusing to read ambiguous plea agreement as requiring defendant to waive his right to jury trial in event of breach), cert. denied, 493 U.S. 809, 110 S. Ct. 50, 107 L. Ed. 2d 19 (1989); *United States* v. *Podde*, supra, 105 F.3d 821 (refusing to read ambiguous plea agreement as requiring defendant to waive statute of limitations defense as to original charges upon withdrawal of guilty plea); *State* v. *Rosado*, 92 Conn. App. 823, 827–29, 887 A.2d 917 (2006) (refusing to read ambiguous plea agreement as providing that violation of rules and regulations of alternative incarceration center would constitute breach of plea agreement); *State* v. *Nelson*, 23 Conn. App. 215, 219, 579 A.2d 1104 (refusing to read ambiguous plea agreement as reserving right for state to reprosecute in event of victim's death), cert. denied, 216 Conn. 826, 582 A.2d 205 (1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991).

This court has previously reaffirmed the principle that pretrial negotiations play a "critical role" in the criminal justice system. *State* v. *Revelo*, supra, 256 Conn. 505. We reaffirm this principle again today and note that nothing stated in this opinion should be interpreted as undermining the plea bargaining process. Nevertheless, in light of the plea agreement in the present case,

the state may not claim that the defendant was barred from exercising his right pursuant to § 54-251 (b). Accordingly, on the basis of the plain language of § 54-251 (b) and our construction of the ambiguous phrase of the plea agreement in the present case against the state, we conclude that the Appellate Court properly affirmed the trial court's decision granting the defendant's application for an exemption from registration.

The judgment is affirmed.

In this opinion the other justices concurred.

MERSCORP HOLDINGS, INC., ET AL. *v.* DANNEL P. MALLOY ET AL.
(SC 19376)

Palmer, Zarella, Eveleigh, Espinosa and Robinson, Js.

Syllabus

The plaintiffs, which own and operate a national electronic mortgage registration database known as MERS, brought an action against the defendant state officials, seeking a judgment declaring unconstitutional the statutes (§§ 7-34a [a] [2] and 49-10 [h]) governing the fees imposed in connection with the recording of documents in municipal public land records. MERS is used by its members, including in-state and out-of-state mortgage lenders, to track ownership interests in mortgage loans secured by real estate and any changes in ownership of MERS-registered loans between its members. When a borrower and a lender who is a member of MERS agree to register the loan under MERS at the time of its origination, MERS becomes the mortgage nominee. The loan, in addition to being registered in the MERS database, is then recorded in the public land records of the town in which the property is located, with MERS being listed as the nominee in the land records. Any assignments between MERS members during the life of the loan, while registered in the MERS database, is not recorded in the land records. MERS remains the mortgagee of record in the public land records until the mortgage either is released or assigned to, or purchased by, a lender that is not a member of MERS. In 2013, the legislature amended §§ 7-34a and 49-10 to create a two tiered system under which a mortgage nominee such as MERS must pay recording fees approximately three times greater than do other mortgagees. The plaintiffs claimed that the statutory scheme violated, inter alia, the equal protection provisions of the federal

and state constitutions and the federal dormant commerce clause. The trial court granted the defendants' motion for summary judgment and rendered judgment thereon for the defendants, from which the plaintiffs appealed. *Held*:

1. The plaintiffs could not prevail on their claim that §§ 7-34a (a) (2) and 49-10 (h), by charging mortgage nominees such as MERS higher recording fees than other mortgagees, violated the equal protection guarantees of the federal and state constitutions: the plaintiffs' claim that the fees imposed by the statutory scheme, which bore some indicia of both a tax and a user fee, were unconstitutional was subject to rational basis review because the scheme neither implicated a fundamental right nor affected a suspect class, and claims that taxation schemes violate the equal protection rights of those who are more heavily taxed are subject to an especially deferential rational basis review; moreover, the parties agreed that the legislature's primary purpose in imposing higher recording fees on mortgage nominees such as MERS was to raise additional revenues, either to compensate for fees allegedly lost as a result of the MERS business model or to help balance the state's budget, such an objective was a legitimate public purpose, and the disparate treatment between MERS and other mortgagees was rationally related to the goal of raising revenues and recouping lost fees because the legislature reasonably could have concluded that a large corporation, such as MERS, which is involved in nearly two thirds of the nation's residential mortgage transactions, is better able to shoulder high recording fees than small mortgagees, and reasonably could have concluded that mortgage assignments that typically would be recorded in the land records would not be recorded for loans registered with MERS and, therefore, that it was necessary to compensate for the fees lost from the absence of the additional recordings that would have occurred over the course of the loans in the absence of MERS.

2. There was no merit to the plaintiffs' claim that §§ 7-34a (a) (2) and 49-10 (h) violated the dormant commerce clause of the federal constitution, which prohibits states from discriminating between transactions on the basis of some interstate element: this court assumed that interstate commerce was implicated because, although the recording transactions at issue were purely local in nature, the participation of MERS in those transactions indicated that many of the loans involved ultimately would be transferred on the national secondary loan market; furthermore, the challenged statutory provisions did not facially discriminate against interstate commerce, there having been no indication that the legislative choice to impose higher fees on either in-state or out-of-state mortgage nominees who operate national mortgage databases reflected invidious discrimination against out-of-state interests or an effort to favor in-state financial companies, and, even if the challenged provisions did discriminate against interstate commerce, such discrimination advanced the legitimate local purpose of recouping from MERS the recording fees

that its members otherwise would have paid upon the assignment or transfer of a mortgage in the secondary market; moreover, the imposition of higher fees on mortgage nominees such as MERS under §§ 7-34a (a) (2) and 49-10 (h) in order to compensate for the reduced number of recorded mortgage assignments or transfers did not unduly burden MERS or, by extension, interstate commerce, there having been no indication that the higher fees would so overshadow the benefits of participating in the national electronic registration system that borrowers and lenders would opt out of participating or that the vitality of the secondary mortgage market would be compromised.

3. This court found no merit to the plaintiffs' claims that the challenged statutory provisions violated their substantive due process rights under the federal and state constitutions, the federal constitutional prohibition against bills of attainder, and 42 U.S.C. § 1983 for the same reasons that it had rejected the plaintiffs' equal protection and commerce clause claims.

Argued October 14, 2015—officially released February 23, 2016

Procedural History

Action for a judgment declaring the unconstitutionality of certain statutes governing fees charged for the recording of documents in municipal land records, brought to the Superior Court in the judicial district of New Britain, where the court, *Sheridan*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed. *Affirmed*.

Linda L. Morkan, with whom were *Benjamin C. Jensen* and, on the brief, *James A. Wade* and *Norman H. Roos*, for the appellants (plaintiffs).

Matthew J. Budzik, assistant attorney general, with whom were *Heather J. Wilson*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, for the appellees (defendants).

Ryan P. Barry and *Michael J. Dyer* filed a brief for the Connecticut Bankers Association et al. as amici curiae.

J. L. Pottenger, Jr., *Jeffrey Gentes*, and *Aurelia Chaudhury*, *Nicholas Gerschman* and *Marian Messing*, law student interns, filed a brief for the Jerome N.

Frank Legal Services Organization and the Connecticut Fair Housing Center as amici curiae.

Opinion

PALMER, J. In 2013, the legislature amended the statutes governing Connecticut's public land records system to create a two tiered system in which a mortgage nominee operating a national electronic database to track residential mortgage loans must pay recording fees approximately three times higher than do other mortgagees. The plaintiffs, MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc., who are currently the only entities required to pay the increased recording fees, commenced the present action against the defendants, Governor Dannel P. Malloy, Attorney General George Jepsen, Treasurer Denise L. Nappier, Kendall F. Wiggin, the state librarian, and LeAnne R. Power, the state public records administrator,[1] seeking, inter alia, injunctive relief and a judgment declaring that this two tiered fee structure violates various provisions of the federal and state constitutions. Specifically, the plaintiffs alleged that General Statutes §§ 7-34a (a) (2) and 49-10 (h), as amended, violate the equal protection, due process, and takings provisions of the federal and state constitutions, the federal dormant commerce clause, and the federal prohibition against bills of attainder. The plaintiffs further alleged that enforcement of the statutes violates 42 U.S.C. § 1983. The parties filed motions for summary judgment, and the trial court granted the state's motion for summary judgment on all counts and rendered judgment thereon. This appeal followed.[2] We affirm the judgment of the trial court.

[1] We hereinafter refer to the defendants collectively as the state.

[2] The plaintiffs appealed from the judgment of the trial 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.

The plaintiffs have not appealed from the trial court's ruling that the challenged statutes do not offend the takings provisions of the federal and state constitutions, and, accordingly, those claims are not before us.

I

This case concerns the filing fees that the parties to a residential mortgage loan must pay to record mortgage documents in the public land records in Connecticut. Because the plaintiffs raise both federal and state constitutional issues of first impression, it will be helpful before considering the plaintiffs' claims to briefly review the traditional procedure for recording residential mortgage documents, certain relatively recent changes to that system, and the novel response of the Connecticut legislature to those changes.

Under the traditional residential mortgage model, a person seeking to finance the purchase of a residential property obtains a loan from a lender, typically a bank, in exchange for a promissory note committing the borrower to repay the loan. To secure the loan, the borrower provides the lender a mortgage on the property. Although, in Connecticut, there is no legal requirement that the lender record the mortgage in the public land records, mortgages typically are recorded—via the clerk of the town in which the property is situated—in order (1) to perfect the lender's security interest by giving public notice thereof, and (2) to maintain a complete public chain of title.

Under the traditional model, the bank or other lender maintains the loan on its books and continues to service the loan until it is repaid. At that point, the parties typically record a release of the mortgage in the land records. At a minimum, then, the life of a residential mortgage loan may involve only two recordable events, although other events—for example, a transfer of the mortgage loan to another lender, or the creation or

We granted permission for two groups to file amicus curiae briefs: the Connecticut Bankers Association, Connecticut Mortgage Bankers Association, and American Land Title Association; and the Jerome N. Frank Legal Services Organization and the Connecticut Fair Housing Center.

subordination of a home equity credit line—also may arise under the traditional model.

The most significant factor in the decline of the traditional residential mortgage model has been the development and evolution of the secondary mortgage market. A secondary market is created when the initial lender sells the mortgage loan to outside investors. Doing so provides local lenders with greater liquidity, which facilitates additional home buying, and also allows large outside investors to pool—and thus to minimize —the risk that any particular loan will go into default. Although the modern secondary mortgage market had its genesis in the creation of the Federal Housing Authority and associated government sponsored financing corporations such as Fannie Mae in the 1930s, it expanded dramatically in the 1980s with the advent of new types of mortgage backed securities for sale in the private equity markets.

For mortgage loans sold in the secondary market, the investor typically engages a third party to perform servicing functions such as payment collection and file maintenance. Both the loan itself and the servicing rights may be sold or transferred multiple times over the life of a loan. Under the common-law rule, as codified in many states, the mortgage follows the note, so that an investor who acquires a residential note automatically obtains the attached security interest as well.

Although the development of a robust and sophisticated secondary market has had a dramatic impact on the liquidity and, with some notable exceptions, the stability of the residential mortgage loan market, it also has created challenges for the public land record system. Because the ownership and servicing rights to a loan may be transferred multiple times over the life of a loan, the mortgagee of record, which may be either the note holder or the servicer as nominee, will frequently

change. This means that each subsequent holder must choose either (1) to undertake the costly and time-consuming process of recording each of the numerous mortgages that it may briefly hold, subject to the varying costs and requirements of each state's county or, as in Connecticut, each town clerk, or (2) to decline to record its interest, which may result in potential problems and costs resulting from an incomplete public chain of title.

To address these problems, in the 1990s, the major public financial service corporations, in collaboration with various private interests, developed the national Mortgage Electronic Registration Systems (MERS) system. There are two primary components to the MERS model.[3] First, MERS operates a national electronic registration system that tracks any changes in the ownership and servicing rights of MERS-registered loans between MERS members, who include in-state and out-of-state mortgage lenders, servicers and subservicers, and public finance institutions. In this sense, MERS operates as a centralized, virtual alternative to the hundreds of traditional county or town land recording systems throughout the country. Second, because MERS members cannot completely eschew the use of the public land records, MERS becomes the mortgage nominee on any loans held by MERS members, and is identified as such when the mortgage is initially recorded in the land records. Recording a mortgage with MERS as a mortgage nominee essentially creates a placeholder for the electronic MERS system in the public records, allowing the two systems to interoperate. That is to say, if a party searching the chain of title on a property comes upon a recorded mortgage to MERS, the party

[3] For the sake of brevity, in this opinion, we use the term MERS to refer to (1) the electronic recording system, (2) the entities that are the plaintiffs in this case, in their capacity as operators of the MERS system, and (3) the general model according to which changing legal interests in residential mortgages and mortgage loans are recorded in the MERS system.

is thereby notified that the MERS database may be consulted to determine the present beneficial owner of the mortgage and loan, as well as any related servicing rights or subordinate security interests. MERS remains the mortgagee of record in the public records until the mortgage either is released or assigned to a nonmember of MERS.

One potential advantage of the MERS system is that it eliminates the costs, in both time and fees, associated with recording each subsequent mortgage assignment in the public land records. Although the plaintiffs in the present case do not concede that any such savings have been realized in Connecticut, the parties do agree that, as of 2013, approximately 65 percent of mortgage loans nationally and in Connecticut originated with MERS acting as the mortgagee. The plaintiffs' principal place of business is in Virginia.

Turning our attention to the legislation that led to the present action, we note that, prior to July 15, 2013, § 7-34a required that all filers pay the town clerk $10 for the first page of each document filed in the land records, plus $5 for each subsequent page. General Statutes (Rev. to 2013) § 7-34a (a). Section 7-34a imposed additional fees of $3 and $40 per filing; General Statutes (Rev. to 2013) § 7-34a (d) and (e); and an additional fee of $2 per assignment after the first two assignments. General Statutes (Rev. to 2013) § 7-34a (a).

In 2013, General Statutes (Rev. to 2013) § 7-34a was amended by Public Acts, No. 13-184, § 98 (P.A. 13-184), and Public Acts, No. 13-247, § 82 (P.A. 13-247). As amended, § 7-34a defines a "nominee of a mortgagee" as "any person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii)

is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of such note." General Statutes § 7-34a (a) (2) (C). The parties agree that MERS is presently the only entity that qualifies as a nominee of a mortgagee, as so defined, and that the legislature crafted the statutory language with MERS specifically in mind.

Section 7-34a, as amended, further provides that, with two exceptions, when a nominee of a mortgagee files a document in the land records, the town clerk shall collect a fee of $116 for the first page filed and $5 for each additional page. General Statutes § 7-34a (a) (2) (A). In addition, the clerk continues to collect $3 for each document pursuant to § 7-34a (d) and $40 for each document pursuant to § 7-34a (e). The two exceptions are that, when a nominee of a mortgagee files "(i) an assignment of mortgage in which a nominee of a mortgagee appears as assignor, or (ii) a release of mortgage by the nominee of a mortgagee," the town clerk collects a fee of $159, plus $10 for the first page and $5 for each additional page.[4] See General Statutes § 7-34a (a) (1) and (2) (B). The recording fees for all other filers remain unchanged under the amended statute.

The net effect of the amendments to § 7-34a (a) is to collect from a nominee of a mortgagee, namely, MERS, substantially more for the filing of deeds, assignments, and other documents in the land records than from any

[4] The state interprets § 7-34a (a) (2) (B) to mean that, in addition to the $159 recording fee, a nominee of a mortgagee filing an assignment or release under that subparagraph must pay $10 for the first recorded page and $5 for each additional page pursuant to § 7-34a (a) (1). The plaintiffs contend that it is unclear whether town clerks are permitted to charge these additional fees, in light of the statement in § 7-34a (a) (2) (B) that "[n]o other fees shall be collected from the nominee for such recording." For purposes of this appeal, because we glean from the state's brief that these additional fees are in fact being imposed on the plaintiffs, and that they are therefore a subject of the plaintiffs' complaint, we assume without deciding that the statute authorizes such additional fees.

other filer. When filing a mortgage deed, for example, if MERS is a party to the transaction, the recording fee will be $159 ($116 plus $3 plus $40) for the first page and $5 for each additional page. See General Statutes § 7-34a (a) (2) (A), (d) and (e). If MERS is not a party to the transaction, the recording fee will be $53 ($10 plus $3 plus $40) for the first page and $5 for each additional page. See General Statutes § 7-34a (a) (1), (d) and (e). When filing a mortgage assignment or release, if MERS is a party to the transaction, the recording fee will be $159, plus $10 for the first page and $5 for each additional page.[5] See General Statutes § 7-34a (a) (1) and (2) (B). If MERS is not a party to the transaction, the recording fee will be $53 ($10 plus $3 plus $40) for the first page and $5 for each additional page. See General Statutes § 7-34a (a) (1), (d) and (e).

The 2013 amendments also shifted how the recording fees on MERS-related transactions are allocated. See generally P.A. 13-184, § 97, and P.A. 13-247, § 81, codified at General Statutes § 49-10 (h). The $159 assessed for the filing of mortgage deeds in connection with MERS transactions is allocated as follows: $10, plus any fees for additional pages, to the town clerk; $39 to the municipality's general revenue accounts; and $110 to the state, of which $36 is paid into the community investment account and $74 into the state's general fund. General Statutes § 49-10 (h). The $159 fee assessed in connection with MERS-related assignments and releases is allocated slightly differently: $32 to municipal general revenue accounts; $36 to the state's community investment account; and $91 to the state's general fund. General Statutes § 49-10 (h). By contrast, the $53 paid by other mortgagees for all recorded transactions continues to be allocated as follows: $12 for the first page ($10 plus $1 of the $3 fee pursuant to § 7-34a [d], plus $1 of the $40 fee pursuant to § 7-34a [e]),

[5] See footnote 4 of this opinion.

and $5 per additional page to the town clerk; $3 to the municipality for local capital improvement projects; and $38 to the state, of which $2 is dedicated to historic document preservation and $36 for community investment. See General Statutes § 7-34a (a) (1), (d) and (e).

The parties agree that the legislature adopted the amendments to § 7-34a (a) at least in part as a revenue enhancing measure to help balance the state budget. They also agree that there is no evidence that any member of MERS has discontinued its membership in the MERS system or halted or reduced its use of that system as a result of the 2013 amendments. Finally, the parties agree that, in most cases, the recording fees at issue will be collected from the borrowers at closing and not paid by MERS itself.

II

As an initial matter, we must address the dispute between the parties about whether the fees imposed by § 7-34a are more properly characterized as user fees or taxes. The state contends that the payments are more akin to taxes than user fees because the statute was enacted primarily to raise revenues for the state and its municipalities and because the lion's share of the fees incurred in connection with MERS-related transactions is allocated to the state's general fund, the state's community investment account, and municipal general revenue accounts, whereas only a small fraction of the fees is retained by the town clerks as compensation for the recording service. The plaintiffs, by contrast, contend that the fees, which are identified in the statute as recording "fees"; General Statutes § 7-34a; and are paid in exchange for a discrete service of benefit to the filer, are properly considered user fees. Courts in other jurisdictions that have considered the question in other contexts—e.g., for purposes of the federal tax injunction law, 28 U.S.C. § 1341 (2012)—have reached differ-

ent conclusions as to whether a purported "fee" that generates more revenue than is needed to fund the service for which the fee is charged, with the surplus allocated to the government's general fund, constitutes a tax or a fee. Compare, e.g., *Empress Casino Joliet Corp.* v. *Balmoral Racing Club, Inc.*, 651 F.3d 722, 730 (7th Cir. 2011) (tax), with, e.g., *San Juan Cellular Telephone Co.* v. *Public Service Commission*, 967 F.2d 683, 686 (1st Cir. 1992) (fee). But see S. Wolfe, "Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the 'Silver Bullet'?," 26 Stetson L. Rev. 727, 729 (1997) ("[r]ecent rulings by the [United States Supreme] Court suggest that the difference between user fees and taxes may be a distinction without a difference"). Because the payments at issue in this case are hybrids, bearing some indicia of both taxes and user fees, and because the parties have not fully briefed the issue, we will assume, solely for purposes of the present appeal, that we must apply the constitutional standards governing both taxes and fees.

III

We now address the merits of the plaintiffs' various constitutional challenges,[6] beginning with the plaintiffs' claim that §§ 7-34a (a) (2) and 49-10 (h), by charging nominees such as MERS higher recording fees than other mortgagees, violate the equal protection guarantees of the state and federal constitutions.[7] We reject this claim.

[6] Because a challenge to the constitutionality of a statute presents a question of law, our review is plenary. E.g., *Keane* v. *Fischetti*, 300 Conn. 395, 402, 13 A.3d 1089 (2011). We recognize, however, that legislation that structures and accommodates the burdens and benefits of economic life carries a strong presumption of constitutionality. See, e.g., *Schieffelin & Co.* v. *Dept. of Liquor Control*, 194 Conn. 165, 186, 479 A.2d 1191 (1984).

[7] The equal protection clause of the fourteenth amendment to the United States constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. Article first, § 20, of the constitution of Connecticut provides in relevant part: "No person shall be denied the equal protection of the law . . . ."

"To prevail on an equal protection claim, a plaintiff first must establish that the state is affording different treatment to similarly situated groups of individuals. . . . [I]t is only after this threshold requirement is met that the court will consider whether the statute survives scrutiny under the equal protection clause." (Citation omitted; internal quotation marks omitted.) *Keane* v. *Fischetti*, 300 Conn. 395, 403, 13 A.3d 1089 (2011). For purposes of this case, we will assume without deciding that the similarly situated requirement is satisfied and proceed to consider whether the legislature was warranted in singling out the plaintiffs for disparate treatment. Cf. *City Recycling, Inc.* v. *State*, 257 Conn. 429, 449, 778 A.2d 77 (2001).

"When a statute is challenged on equal protection grounds, whether under the United States constitution or the Connecticut constitution, the reviewing court must first determine the standard by which the challenged statute's constitutional validity will be determined." (Internal quotation marks omitted.) *D.A. Pincus & Co.* v. *Meehan*, 235 Conn. 865, 875, 670 A.2d 1278 (1996). In the present case, to prevail on their equal protection claim, the plaintiffs must overcome a highly deferential standard of review. "If the statute does not [affect] either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose . . . ." (Internal quotation marks omitted.) Id. This rational basis review test "is satisfied [as] long as there is a plausible policy reason for the classification . . . the legislative facts on which the classification is apparently based rationally may have been considered to be true by the gov-

Neither party contends that the state and federal constitutional analyses diverge with respect to equal protection challenges to tax and fee statutes. Accordingly, for purposes of this case, we treat the relevant state and federal protections as coextensive. See, e.g., *Keane* v. *Fischetti*, 300 Conn. 395, 403, 13 A.3d 1089 (2011).

ernment decisionmaker . . . and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational . . . ." (Citations omitted; internal quotation marks omitted.) Id., 876.

"It is undisputed that the constitutionality of the taxation scheme at issue . . . must be analyzed under rational basis review because it neither implicates a fundamental right, nor affects a suspect class. Indeed, claims that taxation schemes violate the equal protection rights of those more heavily taxed are subject to an especially deferential rational basis review. The United States Supreme Court has explained that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions [that a reviewing] [c]ourt cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . . Accordingly, that court has repeatedly held that inequalities [that] result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation." (Citation omitted; internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 70, 23 A.3d 668 (2011); see, e.g., *Alabama Dept. of Revenue* v. *CSX Transportation, Inc.*, 575 U.S. 21, 28, 135 S. Ct. 1136, 191 L. Ed. 2d 113 (2015). "Similarly, this court consistently has held that the state does not violate the equal protection clause by singling out a particular class for taxation or exemption." *Markley* v. *Dept. of Public Utility Control*, supra, 71. Rather, "[t]he burden is on the one attacking the legislative arrangement to negative *every conceivable basis* [that] might support it." (Emphasis in original; internal quotation marks omitted.) *D.A. Pincus & Co.* v. *Meehan*, supra,

235 Conn. 876–77. The same deferential standards govern equal protection challenges to user fees. See, e.g., *United States* v. *Sperry Corp.*, 493 U.S. 52, 65, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989); *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 462–63, 108 S. Ct. 2481, 101 L. Ed. 2d 399 (1988).

Turning to the case before us, we first consider whether the challenged statutes seek to accomplish a legitimate public purpose. The parties agree that one primary purpose of the legislature in imposing higher recording fees on mortgage nominees such as MERS was simply to raise additional revenues, either to compensate for fees allegedly lost as a result of the MERS business model or, more generally, to help balance the state's budget. It is well established that raising revenues is a legitimate purpose—often the primary purpose—of a tax or a fee. See *Harbor Ins. Co.* v. *Groppo*, 208 Conn. 505, 511, 544 A.2d 1221 (1988) (tax); *Eagle Rock Sanitation, Inc.* v. *Jefferson County*, United States District Court, Docket No. 4:12-CV-00100-EJL-CWD (D. Idaho November 22, 2013) (fee). Accordingly, the first prong of the test is satisfied.[8]

The dispute between the parties thus centers around the question of whether it is permissible for the legislature to impose a higher share of the state's revenue burden on nominees such as MERS than it does on other recording parties. That is to say, we must determine

[8] The plaintiffs also contend that the amendments to §§ 7-34a and 49-10 were motivated by an impermissible desire to punish MERS for its business model. The trial court rejected this allegation, and we find no support for it in the legislative history. Even if it were true, however, the outcome of our analysis would be no different. As long as the challenged distinction is rationally related to some legitimate public purpose that conceivably may have motivated the legislature, it is irrelevant whether certain legislators also may have been motivated by animus toward the plaintiffs. See, e.g., *United States* v. *O'Brien*, 391 U.S. 367, 383–84, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); see also *Wisconsin Education Assn. Council* v. *Walker*, 705 F.3d 640, 653 (7th Cir. 2013).

whether the disparate treatment imposed by §§ 7-34a (a) (2) and 49-10 (h) is rationally related to the goal of raising revenues and recouping lost fees.

Before considering whether the legislature had a rational basis for imposing higher recording fees on nominees such as MERS than on other mortgagees, we first address the plaintiffs' contention that we must restrict our analysis in this regard to those theories that the state raised before the trial court and that find evidentiary support in the record. The plaintiffs misstate the law. As the trial court properly recognized, the state "has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom [fact-finding] and may be based on rational speculation unsupported by evidence or empirical data. . . . A statute is presumed constitutional . . . and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . whether or not the basis has a foundation in the record." (Citations omitted; internal quotation marks omitted.) *Heller* v. *Doe ex rel. Doe*, 509 U.S. 312, 320–21, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Indeed, it is well established that a reviewing court need not restrict its analysis even to those rationales proffered by the parties but may itself hypothesize plausible reasons why a legislative body might have drawn the challenged statutory distinctions. See, e.g., *Federal Communications Commission* v. *Beach Communications, Inc.*, 508 U.S. 307, 318, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); *Kadrmas* v. *Dickinson Public Schools*, supra, 487 U.S. 462–63; *American Express Travel Related Services Co.* v. *Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011). In the present case, in light of the highly deferential standard of review that applies to tax and user fee legislation and other forms of purely economic regulation, we perceive at least two conceivable bases on which the legis-

lature might reasonably have imposed higher recording fees on nominees such as MERS than on other mortgagees.

First, the legislature might simply have concluded that a large corporation such as MERS, which is involved in nearly two thirds of the nation's residential mortgage transactions, is better able to shoulder high recording fees than are smaller mortgagees. Although it is true that large banks, loan servicing companies, and other well-heeled mortgagees may be no less able to afford such fees, a statute subject to rational basis review can be under inclusive without running afoul of the equal protection clause. See, e.g., *Nordlinger* v. *Hahn*, 505 U.S. 1, 11, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992) ("[i]n structuring internal taxation schemes the [s]tates have large leeway in making classifications and drawing lines [that] in their judgment produce reasonable systems of taxation" [internal quotation marks omitted]); *Markley* v. *Dept. of Public Utility Control*, supra, 301 Conn. 70 ("[A] legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts [that] would support it." [Internal quotation marks omitted.]); *Harbor Ins. Co.* v. *Groppo*, supra, 208 Conn. 511 ("[R]ecognizing that any plan of taxation necessarily has some discriminatory impact . . . we have previously stated the operative test for the validity of a tax statute to be the following: As long as some *conceivable* rational basis for the difference exists, a classification is not offensive merely because it is not made with mathematical nicety." [Citations omitted; emphasis in original; internal quotation marks omitted.]). Indeed, our sister state courts have upheld taxation schemes that impose a heightened burden on individual corporate taxpayers when there is a princi-

pled basis for doing so. See, e.g., *North Pole Corp.* v. *East Dundee*, 263 Ill. App. 3d 327, 336–37, 635 N.E.2d 1060 (1994); *Horizon Blue Cross Blue Shield* v. *State*, 425 N.J. Super. 1, 21–23, 39 A.3d 228 (App. Div.), cert. denied, 211 N.J. 608, 50 A.3d 41 (2012); see also *Verizon New England, Inc.* v. *Rochester*, 156 N.H. 624, 631, 940 A.2d 237 (2007) (city could tax one public utility more heavily than others if selective taxation was reasonably related to legitimate public interest).[9]

Second, as the trial court recognized, the legislature reasonably may have determined that mortgage assignments that typically would be recorded in the public land records are not recorded for loans registered with the MERS system because MERS remains the mortgagee of record for its members. Accordingly, the legis-

[9] The equal protection cases on which the plaintiffs rely are readily distinguishable, as they primarily address legislative distinctions that (1) implicate federalism or other constitutional interests, (2) are transparently arbitrary and without rational basis, or (3) impose criminal or quasi-criminal sanctions. See, e.g., *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 449–50, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (in rare case in which United States Supreme Court held that challenged social legislation failed to withstand rational basis review, court concluded that irrational fear of mentally disabled individuals did not justify discriminatory zoning ordinance); *Williams* v. *Vermont*, 472 U.S. 14, 23, 105 S. Ct. 2465, 86 L. Ed. 2d 11 (1985) (state impermissibly discriminated against nonresidents); *Zobel* v. *Williams*, 457 U.S. 55, 64, 65, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982) (apportioning state benefits on basis of duration of residency would impermissibly divide citizens into castes and unduly infringe interstate travel rights); *James* v. *Strange*, 407 U.S. 128, 138–39, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (statute imposed "unduly harsh or discriminatory terms" on indigent criminal defendants and potentially infringed right to counsel); *City Recycling, Inc.* v. *State*, supra, 257 Conn. 453 (trial court's specific factual findings "directly negate[d] every conceivable rational basis for the legislation"); *State* v. *Reed*, 192 Conn. 520, 531–32, 473 A.2d 775 (1984) (quasi-penal statute imposing liability for hospital care expenses on certain confined individuals but not others was deemed to be "entirely arbitrary"); *Caldor's, Inc.* v. *Bedding Barn, Inc.*, 177 Conn. 304, 316–18, 417 A.2d 343 (1979) (applying stricter standard in case of penal statute); see also *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336, 345, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989) (county assessor failed to comply with uniform state tax policy).

lature could have raised the initial recording fee that MERS pays, as well as the final fee that is paid when the mortgage is released or transferred out of the MERS system, to compensate for the fees "lost" over the course of the life of the loan.

The plaintiffs offer four arguments in response: (1) there is no evidence in the record to support the contention that assignments are recorded less frequently for MERS loans than for other mortgagees' loans; (2) there is no legal requirement that assignments be recorded in the public land records; (3) even if town clerks do perform fewer recording duties with respect to MERS loans than non-MERS loans, there is no reason to compensate town clerks for lost recording revenues because they already save the costs associated with not having to record assignments of MERS loans, or, put differently, clerks are not entitled to payment for services that they do not perform; and (4) even if town clerks have lost recording fees under the MERS system, there is no rational relationship between those losses and the fees imposed under §§ 7-34a (a) (2) and 49-10 (h) because those fees are primarily allocated to the state's general fund and to municipal accounts, rather than to the clerks themselves. We consider each argument in turn.

With respect to the plaintiffs' argument that there is no evidence in the record that mortgage assignments are recorded less frequently for MERS-listed loans than for non-MERS loans, we already explained that, under the rational basis test, our review is not limited to theories that the state has documented at trial or that have been subject to judicial fact-finding. Rather, courts may consider—and it is the plaintiffs who must debunk—any rationale that might plausibly have motivated the legislature. In the present case, it cannot be seriously suggested that the MERS model might not result in fewer recordings in the public land records, with con-

comitant cost savings to MERS and its users. Indeed, the plaintiffs' argument is undercut repeatedly by the amici supporting their own position. The amici comprising two bankers associations and a land title association represent, for example, that (1) prior to the advent of MERS, recording expenses added at least $30 to the cost of each loan, and sometimes substantially more, (2) MERS was devised "with an eye toward eliminating many of the unnecessary costs . . . associated with land title and recording issues," (3) assignments that typically were filed on the land records before the establishment of MERS are no longer required, (4) this reduced need for assignments results in lower title insurance and closing costs for both buyers and sellers using the MERS system, and (5) MERS "made the transfer of loans in the secondary market both cheaper and simpler."

The amici also direct our attention to scholarly literature concluding that MERS "reduces the need to pay additional recording fees associated with subsequent transfers of mortgage loans or mortgage loan servicing rights" and to an article published by a former senior executive officer of MERS predicting that, because MERS "eliminates the need to record later assignments in the public land records . . . MERS will save the mortgage industry $200 million a year by eliminating the need for many assignments. Because MERS should decrease the cost of servicing transfers, mortgage loan portfolios may begin to reflect a price difference if the loans are MERS registered." Moreover, "[w]hether [town recorders'] assignment revenues will drop [as a result] remains an open question." In light of these publicly available statements, we have no difficulty concluding that the legislature might reasonably have determined that parties to MERS-listed loans can obtain significant cost savings in recording fees over the life of a loan and that, as a result, it is not unfair to ask them

to pay higher recording fees at the outset and again when the mortgage ultimately is released or transferred out of the MERS system.

The plaintiffs' second argument, namely, that there is no legal requirement that assignments of loan servicing rights be recorded in Connecticut, is a red herring. It is clear from the above quoted statements that, when the plaintiffs represent that the MERS system "eliminates the *need* to record later assignments in the public land records"; (emphasis added); they refer not to any legal recording requirement but, rather, to the fact that, from a practical standpoint, loan assignments must be recorded if the holder is to perfect its security interest and to avoid potentially costly gaps in the chain of title.

Nor are we persuaded by the plaintiffs' third argument, namely, that the legislature had no legitimate reason to compensate town clerks for lost recording revenues because, if a document is not recorded, the town clerk has performed no service for which he or she deserves to be compensated. There are three flaws with this argument. First, the argument accounts for only the marginal costs associated with recording a document. The costs of running a town clerk's office, including the clerk's salary and benefits, building and utilities, information technology infrastructure, and the like, are largely fixed. By contrast, the marginal costs associated with recording any particular document—a bit of paper and ink, or the digital equivalents thereof—are quite limited. Thus, if increased use of the MERS system means that a clerk's workload drops by 10 percent, it is unlikely that the clerk's office will recognize a corresponding 10 percent cost savings. It therefore was reasonable for the legislature to impose higher upfront and back-end fees on MERS transactions to help the town clerks maintain budget stability.

Second, the plaintiffs fail to acknowledge that the service provided by a clerk's office only begins with

the recording of a document. The principal service provided, and the principal value to the recording party, is that a record of the transaction is perpetually maintained and made available to the public for search by any interested party. This is the primary reason parties opt to record assignments and other loan documents. One value of the MERS system to subsequent transferees, then, is that it allows them essentially to free ride on the public recording system. They reap the benefit of MERS' initial recording as mortgagee, without having to pay—at least without having to pay the clerk—for the ongoing benefit of the public notice. It is reasonable to assume that the legislature imposed higher up-front recording fees on MERS loans as a way to remedy this free rider problem.

Third, the plaintiffs go astray in considering the issue solely from the standpoint of the town clerk. Regardless of whether the clerks have lost money as a result of a lower recording rate for assignments of MERS loans, it seems clear that MERS, its members, and the buyers and sellers involved in MERS-listed transactions do achieve some savings in recording costs. If the legislature concluded that this system of loan processing results in significant cost savings for MERS members and its users, the legislature was free to impose a higher tax or fee on those transactions in order to recapture a portion of those savings. See *Rosemont* v. *Priceline.com, Inc.*, United States District Court, Docket No. 09 C 4438 (N.D. Ill. October 14, 2011) (equal protection clause was not offended when town imposed hotel tax on only those travel companies using distinct business model that otherwise would have resulted in tax savings for those companies); *Horizon Blue Cross Blue Shield* v. *State*, supra, 425 N.J. Super. 22–23 (equal protection clause was not offended when state imposed tax solely on health service companies, of which plaintiff was sole

exemplar, which previously had advantage of certain tax loopholes).

Finally, the plaintiffs' fourth argument is that, even if town clerks have lost recording fees as a result of the MERS system, there is no rational relationship between those losses and the heightened fees imposed under §§ 7-34a (a) (2) and 49-10 (h), which primarily are allocated to the state's general fund and municipal accounts. This argument fails because, among other things, it assumes a system of municipal financing that is largely obsolete. Pursuant to General Statutes § 7-34b (b), "[a]ny town may, by ordinance, provide that the town clerk shall receive a salary in lieu of all fees and other compensation provided for in the general statutes . . . . Upon the adoption of such ordinance the fees or compensation provided by the general statutes to be paid to the town clerk shall be collected by such town clerk and he shall deposit all such money collected by him in accordance with such provisions of law as govern the deposit of moneys belonging to such town." On the basis of publicly available documents, the legislature reasonably could have concluded that only a handful of Connecticut towns still hew to the traditional model under which financially independent clerks' offices retain the recording fees they collect, and that, in most cases, such fees are now paid into a town's general revenues. See Office of Legislative Research, Connecticut General Assembly, Report No. 2006-R-0297, Town Clerks: Duties, Responsibilities, and Fee Collection (April 26, 2006). Accordingly, a falloff in recording fees will adversely impact municipal budgets and potentially result in a heightened need for local community support by the state. For these reasons, we conclude that the distinctions established by §§ 7-34a (a) (2) and 49-10 (h) are rationally related to legitimate public interests and, therefore, do not offend the equal

protection provisions of the state or federal constitution.

IV

We next consider the plaintiffs' claim that §§ 7-34a (a) (2) and 49-10 (h) violate the dormant commerce clause of the federal constitution. The commerce clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes . . . ." U.S. Const., art. I, § 8, cl. 3. "Although the [c]lause is framed as a positive grant of power to Congress, [the United States Supreme Court has] consistently held this language to contain a further, negative command, known as the dormant [c]ommerce [c]lause, prohibiting certain state [regulation] even when Congress has failed to legislate on the subject." (Internal quotation marks omitted.) *Comptroller of the Treasury* v. *Wynne*, 575 U.S. 542, 548–49, 135 S. Ct. 1787, 191 L. Ed. 2d 813 (2015). "[T]he dormant [c]ommerce [c]lause precludes [s]tates from discriminat[ing] between transactions on the basis of some interstate element. . . . This means, among other things, that a [s]tate may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the [s]tate. . . . Nor may a [s]tate impose a tax [that] discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of multiple taxation." (Citations omitted; internal quotation marks omitted.) Id., 549–50.

Although the recording transactions at issue in this case may themselves be purely local in nature, the presence of MERS as a participant indicates that many of the mortgage loans involved ultimately will be transferred on the national secondary loan market. For this reason, and in light of the unique role that MERS plays in the national secondary market, we will assume that

interstate commerce is implicated. See *Camps Newfound/Owatonna, Inc.* v. *Harrison*, 520 U.S. 564, 573, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997) ("if it is interstate commerce that feels the pinch, it does not matter how local the operation [that] applies the squeeze" [internal quotation marks omitted]).

We first consider what legal standard governs challenges to taxes and user fees under the dormant commerce clause. The plaintiffs, at varying times, suggest that the fees at issue in this case should be assessed according to the tests and legal analysis that the United States Supreme Court has applied to dormant commerce clause challenges against (1) general regulatory measures, (2) tax schemes, and (3) user fees. The plaintiffs may be forgiven for any confusion in this regard, however, as the United States Supreme Court's dormant commerce clause jurisprudence is less than a model of clarity, particularly in the area of user fees and general and special revenue taxes.[10] That court itself has acknowledged "the uneven course of [its] decisions in this field"; *American Trucking Assns., Inc.* v. *Scheiner*, 483 U.S. 266, 269, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987); and has indicated that its inability to settle on a guiding legal framework has created "a quagmire of judicial responses . . . ." (Internal quotation marks omitted.) Id., 280; see also S. Wolfe, supra, 26 Stetson L. Rev. 778–81 (discussing ambiguous state of law). Moreover, the high court's recent dormant commerce clause decisions have been decided by the narrowest of margins, with substantial disagreement among the members of that court as to the proper test or tests to be applied. See, e.g., *Comptroller of the Treasury* v.

[10] Because the statutory scheme at issue in this case allocates a portion of the nominee filing fees to the state's general fund and municipal accounts, and a portion to the town clerks and the state's community investment account, the fees have characteristics of both general and special revenue taxes.

Wynne, supra, 575 U.S. 544. As a result, several distinct but partially overlapping tests may be thought to govern the present case. See, e.g., id., 561–62 (applying internal consistency test to income tax scheme); *Dept. of Revenue* v. *Davis*, 553 U.S. 328, 338–40, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) (general two part test governs all state regulations, including taxes, but different rules may govern taxes and fees imposed by state in its dual capacity as market participant and regulator); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) (establishing four part test governing state taxes that impact interstate commerce); *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716–17, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972) (establishing three part test governing user fees and special revenue taxes); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) (establishing balancing test governing any facially neutral state regulation). As United States Supreme Court Justice Antonin Scalia recently lamented: "One glaring defect of the negative [c]ommerce [c]lause is its lack of governing principle. Neither the [c]onstitution nor our legal traditions offer guidance about how to separate improper state interference with commerce from permissible state taxation or regulation of commerce. So we must make the rules up as we go along. That is how we ended up with the bestiary of ad hoc tests and ad hoc exceptions that we apply nowadays . . . ." (Citations omitted.) *Comptroller of the Treasury* v. *Wynne*, supra, 574 (Scalia, J., dissenting).

Fortunately, we need not wade into this quagmire or attempt to divine the precise standards by which the United States Supreme Court might judge the statutes at issue in this case. This is because the parties apparently agree that their dispute boils down to the question of whether two central criteria—criteria that reappear

throughout the United States Supreme Court's various dormant commerce clause tests and frameworks—are satisfied. First, a state user fee or tax is presumed to violate the dormant commerce clause if it facially discriminates against interstate commerce. See, e.g., *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007). "In this context, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. . . . Discriminatory laws motivated by simple economic protectionism are subject to a virtually per se rule of invalidity . . . [that] can . . . be overcome [only] by a showing that the [s]tate has no other means to advance a legitimate local purpose . . . ." (Citations omitted; internal quotation marks omitted.) Id., 338–39. Second, a fee or tax that is facially neutral nevertheless may offend the dormant commerce clause if it has the practical effect of imposing a burden on interstate commerce that is disproportionate to the legitimate benefits. See, e.g., *Dept. of Revenue* v. *Davis*, supra, 553 U.S. 365 (Kennedy, J., dissenting). We consider each criterion.

A

Facial Discrimination

The plaintiffs first contend that the challenged statutes discriminate on their face against interstate commerce because they impose higher recording fees only on those transactions involving a mortgage nominee, such as MERS, that operates in conjunction with a national electronic database. The plaintiffs argue that there is no apparent justification for penalizing companies that operate *national* databases, as opposed to a hypothetical nominee operating a database that tracks only mortgage loans transferred between Connecticut-based entities or securing Connecticut-based proper-

ties. For this reason, they contend, §§ 7-34a (a) (2) and 49-10 (h) presumptively violate the dormant commerce clause. There are at least four problems with this argument.

First, although the plaintiffs correctly note that a statute can facially discriminate against interstate commerce even if it does not expressly favor in-state over out-of-state businesses; see *Healy* v. *Beer Institute*, 491 U.S. 324, 340–41, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989); the United States Supreme Court nevertheless has emphasized that "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the [c]onstitution was designed to prevent." *C & A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 390, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994); see also *Dept. of Revenue* v. *Davis*, supra, 553 U.S. 337–38 ("economic protectionism . . . designed to benefit in-state economic interests by burdening out-of-state competitors" is paradigmatic form of discrimination [internal quotation marks omitted]); *Healy* v. *Beer Institute*, supra, 326 (challenged statute ensured favorable pricing for residents of Connecticut and maintained competitiveness of Connecticut-based retailers); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978) ("[t]he crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects [on] interstate commerce that are only incidental"). In the present case, there is no indication that the legislative choice to impose higher fees on nominees—whether in state or out of state—who operate national mortgage databases reflected an invidious discrimination against out-of-state interests, or an effort to favor Connecticut-based financial compa-

nies. If anything, the opposite is true, as the likely result will be that Connecticut homeowners, who, the parties agree, typically absorb the higher upfront fees for MERS-listed loans, will subsidize out-of-state banks and government sponsored financing corporations or their agents, who, upon acquiring the loans in the secondary market, will receive the benefits of recordings in the public land records without having to pay the associated costs. See *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, supra, 550 U.S. 345.

Nor do we believe that the hypothetical favored mortgage nominee the plaintiffs conjure up—one that operates a Connecticut only electronic database—is anything other than a chimera. Because the secondary residential mortgage market is national in scope and is dominated by federal agencies that are located outside of this state, there would be no reason for a company to invest in an electronic registration system that tracks only loan transfers between Connecticut investors, or only loans issued in connection with Connecticut-based properties.[11] The plaintiffs do not contend that any such competitor currently exists or is likely to emerge in the foreseeable future. As the Supreme Court explained in *Associated Industries* v. *Lohman*, 511 U.S. 641, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994), "[it has] never deemed a hypothetical possibility of favoritism to constitute

[11] To the extent that they suggest otherwise, the plaintiffs place the cart before the horse. The amici consisting of the bankers associations and the land title association, who support the plaintiffs' position in this case, have presented scholarship indicating that it was the national mortgage lending industry and government sponsored financing corporations such as Fannie Mae and Freddie Mac that partnered to create MERS to fill the need for a central registry for the national residential mortgage industry. See R. Arnold, "Yes, There Is Life on MERS," 11 Prob. & Prop. 33, 33 (1997); see also P. Sargent & M. Harris, "The Myths and Merits of MERS" (September 25, 2012). From its very inception, then, the MERS business was necessarily national in scope.

discrimination that transgresses constitutional commands." Id., 654; see also *Exxon Corp.* v. *Governor*, 437 U.S. 117, 125, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) (disparate treatment claim was meritless when state's entire gasoline supply flowed in interstate commerce).

Second, notwithstanding the statutory reference to national electronic databases; General Statutes § 7-34a (a) (2) (C); we do not interpret the challenged statute to be a facial attack on interstate commerce. Rather, the record suggests—and the plaintiffs conceded at oral argument—that the language in question appears in § 7-34a only because the legislature cut and pasted it from MERS' own corporate documents describing the company's business model. In other words, the legislature's apparent intent was not to impose higher recording fees on residential mortgage transactions with a national character but, rather, merely to indicate that the higher fees are directed at MERS and any other mortgage nominees that may develop virtual recording systems to facilitate transactions in the secondary mortgage market. It is only because that market, like many modern financial markets, happens to be national in scope that the "national electronic database" language found its way into § 7-34a.[12] Both this court and the United States Supreme Court have emphasized in this regard "the importance of looking past the formal language of [a] tax statute [to] its practical effect . . . ." (Internal quotation marks omitted.) *Chase Manhattan Bank* v. *Gavin*, 249 Conn. 172, 210, 733 A.2d 782, cert. denied, 528 U.S. 965, 120 S. Ct. 401, 145 L. Ed. 2d 312 (1999); accord *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 310, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). As we discuss hereinafter, we perceive no deleterious

[12] Although the plaintiffs suggest in their reply brief that the statutes bespeak a legislative intent to punish MERS for transacting business outside of Connecticut, there is no evidence in either the record of this case or the legislative history to support such a suggestion.

effect of the challenged legislation on the national secondary mortgage market.

Third, the United States Supreme Court has explained that "a fundamental element of dormant [c]ommerce [c]lause jurisprudence [is] the principle that any notion of discrimination assumes a comparison of substantially similar entities." (Internal quotation marks omitted.) *Dept. of Revenue* v. *Davis*, supra, 553 U.S. 342. As we explained in part III of this opinion, MERS is not substantially similar to other mortgagees—even other mortgage nominees—with respect to the roles they play in Connecticut's residential mortgage recording market. Whereas traditional mortgagees are primarily lenders or loan servicing companies, MERS is identified as a mortgagee in the public land records as a sort of placeholder, indicating to interested parties that the recent chain of title to a MERS-listed property may be traced by consulting the MERS database. Accordingly, the statutes do not facially discriminate against interstate commerce. Rather, they simply recognize that MERS, which uses the public land records as a means of enhancing the value that its member companies obtain from its electronic registration services, may realize a distinct and greater benefit from recording its interests than do other mortgagees.

Fourth, and relatedly, even if we believed that the statutes in question discriminated against interstate commerce, we would conclude, for reasons discussed in part III of this opinion, that there is no constitutional violation because such discrimination advances a legitimate local purpose. See, e.g., *Camps Newfound/Owatonna, Inc.* v. *Harrison*, supra, 520 U.S. 581. It is well established that interstate commerce can be made to "pay its way" under a state regulatory scheme without running afoul of the dormant commerce clause. (Internal quotation marks omitted.) *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 616, 101 S. Ct. 2946, 69

L. Ed. 2d 884 (1981). In the present case, to the extent that the purpose of the challenged legislation was merely to recoup from MERS the recording fees that its members otherwise would have paid upon the transfer of a mortgage in the secondary market, §§ 7-34a (a) (2) and 49-10 (h) represent a legitimate attempt to level the playing field between MERS members and nonmembers and to ensure that recording revenues are not lost as a result of MERS' novel business model. For all of the foregoing reasons, we agree with the state that the statutes do not discriminate impermissibly against interstate commerce.

B

Undue Burden

We next consider the plaintiffs' claim that the challenged statutes place an undue burden on the national secondary mortgage market. Their argument appears to be that, despite the dearth of any evidence that the increased fees have adversely impacted MERS' business or the secondary mortgage market in general, the simple fact that the state receives more than $5 million per year in increased fees on MERS-related transactions is, ipso facto, proof that interstate commerce has been burdened. The plaintiffs further contend that, because both the costs to the state and the benefits to the filers are the same for the recording of MERS and non-MERS transactions, but MERS is forced to pay fees that are approximately three times higher than other mortgagees, the costs imposed are necessarily disproportionate to the benefits. We are not persuaded.

The amount of a tax or user fee is presumed to be appropriate; S. Wolfe, supra, 26 Stetson L. Rev. 739; and the plaintiffs must demonstrate that the burdens imposed on interstate commerce *clearly* outweigh the benefits. See, e.g., *Dept. of Revenue* v. *Davis*, supra, 553 U.S. 353. As we explained in part III of this opinion,

we are not convinced that either the costs or the benefits of recording a MERS-listed mortgage are the same as for any other mortgagee. Let us assume that a hypothetical non-MERS thirty year mortgage loan is transferred to a different lender every ten years during the life of the loan and that each subsequent holder records its interest in the public land records. Under that scenario, the original lender's recording fees would afford it the benefit of ten years of public notice of its interest in the property, and the clerk's office would receive three recording fees—the initial one and the fees for two assignments—to subsidize its costs of operation over the term of the loan, not including the release when the loan is fully repaid. Under the same circumstances, however, MERS and its members would continue to receive the benefit of the initial filing fee for the entire thirty year term of the loan, regardless of the number of intervening assignments among MERS members, and the clerk's office will be correspondingly poorer. See S. Wolfe, supra, 742 (noting that length of use of public service "strongly affects cost"); id., 744 (noting importance of intangibles in calculating value of public service and that continued consumer use suggests that fees are not disproportionate to value provided). Accordingly, we cannot say that imposing higher front-end and back-end fees on MERS transactions in order to compensate for the reduced number of recorded mortgage assignments imposes an undue burden on MERS or, by extension, interstate commerce. See *Associated Industries* v. *Lohman*, supra, 511 U.S. 647 (interstate and intrastate transactions may be taxed differently, as long as ultimate burdens are comparable).

The United States Supreme Court also has suggested that, in gauging the burdens imposed on interstate commerce, a reviewing court should consider whether, if every state were to adopt the challenged policy, the result would be to "place interstate commerce at a

disadvantage as compared with commerce intrastate." (Internal quotation marks omitted.) *Comptroller of the Treasury* v. *Wynne*, supra, 575 U.S. 562. In the present case, even if every state were to charge $106 extra to record MERS-listed mortgages in its corresponding land records, there is nothing in the record to suggest that those higher fees, taken together, would unduly burden interstate commerce. There is no indication that higher recording fees would so overshadow the benefits of participation in a national electronic registration system that borrowers and lenders would opt not to participate in MERS or that the vitality of the secondary mortgage market would be compromised. The parties have agreed that higher fees have not resulted in a loss of MERS business within this state, and there is no reason to believe the outcome would differ elsewhere, or nationally. Nor is there any evidence of (1) what share of the estimated $5.4 million that the state will receive in additional annual recording fees will be borne by MERS and its members, and how that amount compares to the annual profits on their residential mortgage lending business in Connecticut, (2) what share of the increased fees will be borne by borrowers, and what impact those fees will have on their total closing costs, or (3) what cost savings MERS, its members, and borrowers in MERS-related transactions have achieved as a result of the MERS system. We are mindful in this regard of the United States Supreme Court's recent guidance that the judiciary is particularly ill-suited to making the sorts of complex predictions and subtle cost-benefit calculations necessary to assess whether a particular tax scheme is unduly burdensome. See *Dept. of Revenue* v. *Davis*, supra, 553 U.S. 355.

In *Davis*, the United States Supreme Court also cautioned that a court "should be particularly hesitant to interfere . . . under the guise of the [c]ommerce [c]lause [when] a [state or] local government engages

in a traditional government function," of which the maintenance of public land records is clearly an example. (Internal quotation marks omitted.) Id., 341, quoting *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, supra, 550 U.S. 344. In light of this guidance, and given the parties' stipulation that the legislation at issue has not redounded to the tangible detriment of the MERS business model, we are compelled to defer to the legislature's judgment that the fees at issue represent a reasonable approximation of the savings in recording costs generated by use of the MERS system. Accordingly, §§ 7-34a (a) (2) and 49-10 (h) do not offend the dormant commerce clause,[13] and we reject the plaintiffs' claim to the contrary.[14]

The judgment is affirmed.

In this opinion the other justices concurred.

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[13] It might also be argued that, insofar as the state's purpose in imposing higher recording fees on MERS-listed mortgages is to prevent a competitor in the mortgage recording business from free riding on its public recording system, the state acts as a market participant—as well as a regulator—with respect to MERS and, therefore, is immune from challenge under the dormant commerce clause. See, e.g., *Dept. of Revenue* v. *Davis*, supra, 553 U.S. 339; *SSC Corp.* v. *Smithtown*, 66 F.3d 502, 510–12 (2d Cir. 1995), cert. denied, 516 U.S. 1112, 116 S. Ct. 911, 133 L. Ed. 2d 842 (1996); see also *McBurney* v. *Young*, 569 U.S. 221, 235–36, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2015) (state, having created market by offering program, does not offend dormant commerce clause by restricting access to that market so as to favor local interests). Because neither party has raised this argument, however, we need not consider it.

[14] On appeal, the plaintiffs also contend that enforcement of the challenged statutes violates their substantive due process rights under the federal and state constitutions, the federal constitutional prohibition against bills of attainder, and 42 U.S.C. § 1983. We have reviewed these claims and, for essentially the same reasons that we rejected the equal protection and commerce clause claims, we find them to be without merit.

BEVERLY STUDER *v.* JOHN CARL STUDER (SC 19508)

Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The plaintiff, whose marriage to the defendant was dissolved in Florida, filed a motion to indefinitely extend the defendant's postmajority child support payments for the benefit of their autistic child, C, in accordance with Florida law. After the judgment of dissolution was rendered, the parties and C moved to Connecticut. The plaintiff subsequently filed a motion to extend the defendant's postmajority child support until C's high school graduation. The trial court granted that motion and, shortly before C's graduation, the plaintiff filed the motion to extend the defendant's postmajority child support obligations indefinitely. The trial court concluded that, pursuant to the statute (§ 46b-71 [b]) governing choice of law in proceedings pertaining to foreign matrimonial judgments, Florida law controlled the duration of the defendant's child support obligation and, accordingly, ordered the defendant to pay child support indefinitely. On the defendant's subsequent appeal, *held* that the defendant could not prevail on his claim that the trial court improperly extended his child support obligation indefinitely, this court having concluded that because Florida was the first state to enter a child support order in this case, Florida law governed the duration of the defendant's obligation; the plain language of the statute (§ 46b-213q [d]) governing choice of law in proceedings pertaining to the modification of a child support order entered in another state vests the first state to issue a child support order with control over the duration of the child support obligation, notwithstanding subsequent modifications by tribunals of another state, and expressly prohibited the application of Connecticut law in determining the duration of the defendant's child support obligation here.

Argued November 13, 2015—officially released February 23, 2016

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Circuit Court in the Nineteenth Judicial District of Martin County, Florida; judgment dissolving the marriage and granting certain other relief; thereafter, the defendant filed a certified copy of the judgment of dissolution in the judicial district of Fairfield pursuant to statute; subsequently, the court, *Pin-*

kus, *J.*, granted the plaintiff's motion to modify child support, and the defendant appealed. *Affirmed.*

Jeffrey D. Ginzberg, for the appellant (defendant).

Alexander H. Schwartz, for the appellee (plaintiff).

Opinion

EVELEIGH, J. The sole issue in this appeal is whether the trial court properly concluded that the duration of a child support order was governed by the law of the state in which it was originally issued. The defendant, John Carl Studer, appeals from the judgment of the trial court modifying the duration of his child support obligation and ordering that he pay child support indefinitely to the plaintiff, Beverly Studer, for the benefit of their autistic child[1] in accordance with Florida law.[2] On appeal, the defendant contends that the trial court improperly applied Florida law in determining the duration of his child support obligation. We disagree with the defendant's claim and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The parties' marriage was dissolved in Florida in 2002. The amended final judgment of dissolution of marriage (Florida judgment) provided that the defendant would pay child support until the child "reaches the age of [eighteen], become[s] emancipated, marries, dies, or otherwise becomes self-supporting" or "until [the] age [of nineteen] or graduation from high school whichever

[1] We note that, although the defendant was also obligated to pay child support for their eldest child, the present appeal involves the defendant's support obligation solely for the benefit of their youngest child. For the sake of simplicity, we refer to the younger of the parties' two children as the child throughout this opinion.

[2] The plaintiff appealed from the judgment of the trial 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.

occurs first, if a child reaches the age of [eighteen] and is still in high school and reasonably expected to graduate prior to the age of [nineteen]." Both parties were aware that the child was autistic at the time of the dissolution and the Florida judgment specifically referenced the child's condition.

After the Florida judgment was rendered, the parties and the child moved to Connecticut.[3] In 2003, the defendant filed a certified copy of the Florida judgment in Connecticut Superior Court and moved to modify the amount of his child support and alimony obligations. The court granted the defendant's motion to modify and reduced the amount of child support and alimony the defendant was required to pay.[4]

In 2010, the plaintiff filed a postjudgment motion for postmajority support for the child. The plaintiff claimed that, as a result of the child's autism, she would not graduate from high school until after her twenty-first birthday. Consequently, the plaintiff claimed that the child was entitled to support beyond her eighteenth birthday under Florida law. Applying Florida law, the court granted the plaintiff's motion for postmajority support and ordered the defendant to continue paying child support until the child's high school graduation (2010 support order). The court further found that there was an arrearage in support payments owed to the plaintiff and ordered the defendant to pay that sum as well.

Before the child's graduation from high school in June, 2013, the plaintiff filed a second motion for postmajority support seeking to extend the defendant's

[3] The defendant no longer resides in Connecticut.

[4] In 2007, the parties agreed to a second modification of the amount of alimony and child support and stipulated to an arrearage in support payments. In 2008, the amount of the defendant's child support obligation was again modified.

child support obligation indefinitely beyond the child's high school graduation. The trial court concluded that under General Statutes § 46b-71 (b),[5] Florida law controlled the duration of the defendant's child support obligation and ordered the defendant to pay child support indefinitely. This appeal followed.

On appeal, the defendant claims that the trial court improperly concluded that Florida law, rather than Connecticut law, governed the duration of his child support obligation. In support of his claim, the defendant asserts that the Florida judgment had been filed in Connecticut and that the amount of child support specified in the Florida judgment had been previously modified by a Connecticut court. The defendant also asserts that, because Connecticut law would not have allowed post-majority support in this case,[6] the trial court improperly extended the defendant's child support obligation beyond the terms of the 2010 support order, which provided that child support would terminate upon the child's graduation from high school. In response, the plaintiff contends that Florida law governs the duration of the defendant's child support obligation because the initial child support order in the present case was issued in Florida. We agree with the plaintiff and, accordingly, affirm the judgment of the trial court, albeit on different grounds.

This appeal requires that we examine the provisions of our Uniform Interstate Family Support Act (act),

[5] General Statutes § 46b-71 (b) provides in relevant part that "in modifying, altering, amending, setting aside, vacating, staying or suspending any such foreign matrimonial judgment in this state *the substantive law of the foreign jurisdiction shall be controlling.*" (Emphasis added.)

[6] General Statutes § 46b-84 (c) provides in relevant part: "The court may make appropriate orders of support of any child with intellectual disability . . . or a mental disability or physical disability . . . who resides with a parent and is principally dependent upon such parent for maintenance *until such child attains the age of twenty-one.* . . ." (Emphasis added.)

General Statutes (Rev. to 2013) § 46b-212 et seq.[7] and the uniform version of that act (uniform act) as promulgated in our sister states. See Uniform Interstate Family Support Act of 2001, 9 U.L.A. (Pt. IB) 159 (2005). The uniform act, "which has been adopted by all states, including Connecticut, governs the procedures for establishing, enforcing and modifying child and spousal support, or alimony, orders, as well as for determining parentage when more than one state is involved in such proceedings." (Footnote omitted.) *Hornblower* v. *Hornblower*, 151 Conn. App. 332, 333, 94 A.3d 1218 (2014). The plaintiff claims that General Statutes (Rev. to 2013) § 46b-213q (d) applies to the present case.[8] We agree.

In examining the issues in the present appeal, "we are guided by the well established principle that [i]ssues of statutory construction raise questions of law, over which we exercise plenary review. . . . We are also guided by the plain meaning rule for statutory construction." (Citations omitted; internal quotation marks omitted.) *Cales* v. *Office of Victim Services*, 319 Conn. 697, 701, 127 A.3d 154 (2015); see also General Statutes § 1-2z.

[7] We note that the legislature made changes to the act in 2015. See Public Acts 2015, No. 15-71. Hereinafter, all references to the act, unless otherwise indicated, are to the version appearing in the 2013 revision of the General Statutes.

[8] The plaintiff contended in her initial appellate brief that the trial court properly determined that § 46b-71 (b) governed the present case. The plaintiff, however, abandoned this claim at oral argument before this court. Specifically, counsel for the plaintiff stated: "I agree with counsel [for the defendant] that [the act] applies." Therefore, we do not address the applicability of § 46b-71 to the facts of the present case. The plaintiff also contended in her initial appellate brief that the defendant's claim is nonjusticiable because the defendant did not register the Florida judgment in accordance with the act. For the same reasons, we conclude that the plaintiff abandoned this claim at oral argument before this court. As a result, following oral argument, this court ordered the parties to file supplemental briefs addressing the issue of whether the trial court's judgment may be affirmed on the alternative ground of General Statutes (Rev. to 2013) §§ 46b-213j and 46b-213q (d) in the event that § 46b-71 was found not to apply to this case.

In accordance with § 1-2z, we begin with the relevant statutory text. General Statutes (Rev. to 2013) § 46b-213q (d) provides in relevant part: "In a proceeding to modify a child support order, the law of the state that is determined to have issued the *initial controlling order* governs the duration of the obligation of support. . . ."[9] (Emphasis added.) Resolution of this appeal, therefore, requires us to determine the meaning of the term, "initial controlling order . . . ." The term "initial controlling order" is not defined in § 46b-213q, nor is it defined in the provision setting forth the definitions used within the act, General Statutes (Rev. to 2013) § 46b-212a. "In the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Efstathiadis* v. *Holder*, 317 Conn. 482, 488, 119 A.3d 522 (2015).

The term "initial" is defined with substantial similarity in a number of dictionaries. Webster's Third New International Dictionary (2002) defines "initial" as "of or relating to the beginning . . . ." The American Heritage College Dictionary (4th Ed. 2007) defines "initial" as "[o]f, relating to, or occurring at the beginning" or "first . . . ." Lastly, the Oxford English Dictionary (2d Ed. 1991) defines "initial" as "[o]f or pertaining to a beginning," "existing at, or constituting, the beginning of some action or process," "existing at the outset" or "primary . . . ." Using the definition of "initial" indicates that the legislature and the drafters of the uniform act intended for the first state that issues a child support

[9] In 2001, the uniform act was amended to include the language that is contained within § 46b-213q (d). See Public Acts 2007, No. 07-247; Uniform Interstate Family Support Act of 2001, § 611, 9 U.L.A. (Pt. IB) 255 (2005).

order to control the duration of the child support obligation.

"Furthermore, we note that [i]n interpreting a statute, [r]elated statutory provisions . . . often provide guidance in determining the meaning of a particular word. . . . In accordance with § 1-2z, we next turn to other related statutes for guidance." (Citations omitted; internal quotation marks omitted.) *Lieberman* v. *Aronow*, 319 Conn. 748, 759, 127 A.3d 970 (2015). The act itself, in turn, expressly mandates that its provisions be construed "to promote uniformity of the law with respect to its subject matter" among the other states that have enacted the uniform act. General Statutes (Rev. to 2013) § 46b-213v. Accordingly, we find it helpful to turn to the case law of other jurisdictions that have enacted similar statutory provisions.

Courts in jurisdictions that have adopted a statute analogous to § 46b-213q (d), or have considered the potential effect of the adoption of such a statute, regard the law of the state that has issued the first child support order between the same parties for the benefit of a particular child as controlling the duration of the child support obligation under the language of the uniform act. See, e.g., *Lunceford* v. *Lunceford*, 204 S.W.3d 699, 708 (Mo. App. 2006) (noting that, had Missouri adopted 2001 amendments to uniform act, "the question of whether the Missouri trial court properly ordered [the] [f]ather to continue child support beyond the termination date provided in the Kansas divorce decree would be easily addressed"); *Wills* v. *Wills*, 16 Neb. App. 559, 565, 745 N.W.2d 924 (2008) (holding that District Court improperly extended duration of child support obligation initially issued in New Mexico to conform with age of majority in Nebraska).

For example, in *In re Schneider*, 173 Wn. 2d 353, 369–71, 268 P.3d 215 (2011), the Washington Supreme

Court held that the Washington Court of Appeals had improperly affirmed the trial court's award of postsecondary educational support in accordance with Washington law when the initial child support order was issued in Nebraska and Nebraska law would not have allowed the award of such support under the circumstances. In *In re Schneider*, after the parties' divorce, the mother moved with the children to Washington, where she registered the Nebraska decree and a Washington court modified the duration of the child support obligation without the father's objection. Id., 356–57. The mother subsequently filed a motion to modify the order seeking postsecondary educational support for one of the children. Id., 357. The trial court granted the mother's motion and the father appealed, contending that the Washington court did not have the authority under the uniform act to extend his child support obligation beyond the age of majority in Nebraska, which is nineteen years. Id. The Washington Court of Appeals affirmed the trial court's decision, concluding that the uniform act "did not apply to the award of postsecondary educational support because the trial court modified its own . . . order, not the Nebraska order" and Washington law permits the award of postsecondary educational support. Id., 357–58, 364. The Washington Supreme Court reversed the judgment of the Court of Appeals, relying in part on the language of Washington's equivalent to § 46b-213q (d) and the official comments to the uniform act corresponding to that section. Id., 364–65. The court reasoned as follows: "It may seem anomalous to deny postsecondary educational support for [the child], who has lived in Washington for several years and attends a Washington state university. But there are two sides to this result. A child who is initially allowed the potential of postsecondary educational support in Washington will be able to receive that support even after moving to another state. Every state has

adopted the [the uniform act] in some form and [the uniform act] provides that the originating state's law applies to the duration of child support." Id., 370.

Similarly, the New Hampshire Supreme Court in *In re Scott*, 160 N.H. 354, 360–62, 999 A.2d 229 (2010), held that the law of the first state to issue a child support order, Massachusetts, governed the duration of the father's child support obligation, despite the fact that a New Hampshire court had subsequently modified the Massachusetts orders by increasing the amount of child support. Although New Hampshire had not adopted the 2001 amendments to the uniform act, the court noted that the official comments to the equivalent of § 46b-213q (d) in the uniform act "provide[d] insight into the intended meaning of New Hampshire's existing statute." Id., 361. Furthermore, in *In re Martinez*, 450 S.W.3d 157, 164 (Tex. App. 2014), the Court of Appeals of Texas, relying in part on a statute analogous to § 46b-213q (d), held that the trial court could not modify the duration of an expired New York support decree "to impose a further support obligation upon [the obligor] or create a new obligation based on [the child's] disability" because the duration of the child support obligation was governed by New York law, "which the parties [had] stipulated does not provide for support of adult disabled children."

Our examination of the plain language of the statute and related statutes indicates that § 46b-213q (d) vests the first state to issue a child support order with control over the duration of the child support obligation, notwithstanding any subsequent modifications of the child support order by a tribunal of another state. Furthermore, our review of the case law of other states that have enacted or considered analogous statutes also supports this understanding. Accordingly, because it is undisputed that the Florida judgment was rendered before any of the Connecticut orders, the initial control-

ling order in the present case is the Florida judgment and, therefore, Florida law governs the duration of the defendant's child support obligation. Furthermore, the parties in the present case do not dispute that Florida law provides for support for adult disabled children.[10]

The defendant, however, claims that § 46b-213q (d) does not apply to the present case. Specifically, the defendant contends that this statute applies to the modification of a child support order of another state and that the trial court's order extending indefinitely the duration of the defendant's child support obligation modified the 2010 support order that was issued by a Connecticut court, not the Florida judgment.[11] We disagree with the defendant.

[10] Under Florida law, child support obligations generally terminate when the child reaches the age of eighteen. See Fla. Stat. Ann. § 61.14 (9) (West 2012). A court may, however, order support beyond age eighteen for a dependent person "when such dependency is because of a mental or physical incapacity which began prior to such person reaching majority . . . ." Fla. Stat. Ann. § 743.07 (2) (West 2010).

[11] The defendant also makes a number of other nonmeritorious contentions that we reject. First, the defendant contends that the trial court improperly modified the child support order without first finding "a substantial change in the circumstances" as required by General Statutes § 46b-86 (a). We reject this claim, however, because we conclude that Florida law governs the duration of the defendant's child support obligation and Florida law does not require a court to find "a substantial change in the circumstances" before extending the duration of a child support order on the basis of a child's disability. See *Taylor* v. *Bonsall*, 875 So. 2d 705, 707, 709 (Fla. App. 2004) (noting that, but for parties' stipulation, trial court "would have had jurisdiction to extend" support beyond child's eighteenth birthday, pursuant to Florida law, without indicating there had been material change in circumstances).

Second, the defendant contends that the 2010 support order terminated by operation of its own terms upon the child's graduation from high school in June, 2013. The record indicates that the plaintiff's motion to modify the 2010 support order was filed in April, 2013, and that the child graduated from high school in June, 2013. Accordingly, because it is undisputed that the plaintiff's motion to modify was filed prior to the terminating event, namely, the child's graduation from high school, we find no merit in the defendant's contention.

Third, the defendant cites to General Statutes (Rev. to 2013) § 46b-212c (b) in support of his position. We decline to address this claim, however, because the defendant misquotes § 46b-212c (b) as directly applying to modification proceedings when, in fact, the statute provides in relevant part

We presume that the defendant's claim pertains to the title of § 46b-213q, which reads "Modification of child support order of another state." It is well established that "[a]lthough the title of a statute or regulation

that "[s]ections 46b-212 to 46b-213w, inclusive, do not: (1) [p]rovide the exclusive method of *establishing or enforcing* a support order under the laws of this state . . . ." (Emphasis added.)

Fourth, the defendant contends that the plain language of § 46b-213q (f) (2) indicates that once a Connecticut court assumes "continuing exclusive jurisdiction" over a child support order pursuant to the uniform act, Connecticut law controls all aspects of a subsequent modification proceeding, including the duration of the child support obligation. General Statutes (Rev. to 2013) § 46b-213q (f) (2) provides in relevant part that a court of this state "shall apply the provisions of sections 46b-212a to 46b-212*l*, inclusive, *and 46b-213g to 46b-213r, inclusive*, and the procedural and substantive law of this state to the proceeding for enforcement or modification. . . ." (Emphasis added.) Because § 46b-213q (d) is within the range of applicable statutes specified in § 46b-213q (f) (2), we find this claim to be without merit.

Fifth, the defendant cites to *State, Child Support Enforcement Division* v. *Bromley*, 987 P.2d 183 (Alaska 1999), *Groseth* v. *Groseth*, 257 Neb. 525, 527, 600 N.W.2d 159 (1999), and *In re Cooney*, 150 Or. App. 323, 326, 946 P.2d 305 (1997), in support of his claim. We do not find these cases to be relevant authority because these cases involved the application of the forum state's law to the modification of the *amount* of a child support obligation rather than the *duration* of the child support obligation.

Sixth, although the defendant contended at oral argument before this court that a postmajority award under Florida law requires an adjudication that the child is disabled or incapacitated and that there was no such adjudication in the present case, he did not provide any authority in support of this claim or make this claim in his appellate briefs. "It is well settled that claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court." *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). Accordingly, we decline to consider this claim.

Finally, to the extent that the defendant claims that the application of Florida law to determine the duration of the defendant's child support obligation would run afoul of 28 U.S.C. § 1738B, also known as the federal Full Faith and Credit for Child Support Orders Act, the argument is made in a mere four sentences of his appellate brief and is unaccompanied by any supporting analysis. We consider this claim inadequately briefed and therefore decline to address it. See *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. Claims are also inadequately briefed when they . . . consist of 'conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . .' " [Citation omitted.]).

and its placement within a group of statutes or regulations may provide some evidence of its meaning . . . such considerations cannot trump an interpretation that is based on an analysis of the statutory or regulatory language and purpose." (Citation omitted.) *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 75, 52 A.3d 636 (2012); see General Statutes, preface, pp. vi–vii ("A boldface catchline follows the section number of each section of the General Statutes. These catchlines are prepared, and from time to time changed, by the Revisors [of the General Statutes] and are intended to be informal descriptions of the contents of the sections. . . . These boldface catchlines should not be read or considered as statements of legislative intent since their sole purpose is to provide users with a brief description of the contents of the sections."); see also *Clark* v. *Commissioner of Correction*, 281 Conn. 380, 389 n.14, 917 A.2d 1 (2007).

The defendant's interpretation is contrary to the plain language of § 46b-213q (d). There is no language in § 46b-213q providing that once a Connecticut court modifies an out-of-state child support order and thereby assumes "continuing exclusive jurisdiction" over the child support order pursuant to § 46b-213q (e), the language in § 46b-213q (d) becomes inapplicable. The plain language of § 46b-213q expressly imposes restrictions on which elements of a child support order originally issued in another state may be modified. The official comments to the 2001 amendments to the uniform act, as quoted in *In re Scott*, confirm that the modification of an out-of-state child support order by a Connecticut court does not confer upon the courts of this state the unrestricted authority to apply Connecticut substantive law in all respects in a subsequent modification proceeding. See *In re Scott*, supra, 160 N.H. 361 (noting that "although the initial child support order 'may be

modified and replaced by a new controlling order . . . the *duration* of the [child support] obligation remains constant, even though virtually every other aspect of the original order may be changed' " [emphasis in original]). Therefore, despite the fact that Connecticut acquired "continuing exclusive jurisdiction" over the child support order as a result of its previous modifications of the amount of the defendant's child support obligation, the language of § 46b-213q (d) expressly prohibits the application of Connecticut law in determining the duration of the defendant's child support obligation in the present case.

The defendant further contends that even if § 46b-213q (d) applies, Connecticut, rather than Florida, issued the "initial controlling order" when a Connecticut court first modified the Florida judgment in 2003. We are not persuaded.

We are mindful that "[i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Internal quotation marks omitted.) *Tilcon Connecticut, Inc.* v. *Commissioner of Environmental Protection*, 317 Conn. 628, 663, 119 A.3d 1158 (2015). As previously noted in this opinion, neither party disputes that the Florida judgment controlled the defendant's child support obligation before a Connecticut court modified the Florida judgment. The defendant's reading of § 46b-213q (d) would render the term "initial" in that statute meaningless. In addition, we note that the Washington Supreme Court in *In re Schneider* rejected a similar claim, reasoning as follows: "The trial court held that it had jurisdiction to modify its own 2007 child support order. The Court of Appeals affirmed, holding that because the trial court was modifying its own order and not the

Nebraska child support order, [the uniform act] did not apply. . . . This conclusion is contrary to the plain language of [Washington's equivalent to § 46b-213q (d)], which refers to the 'initial controlling order.' In this case, the Nebraska child support order was clearly the *initial controlling order* because it was modified by the 2007 Washington order. Child support orders are frequently modified as children grow older or when circumstances change. . . . If the [uniform act] ceased to apply after the first modification, the reference to the state that issued the *initial controlling order* would be superfluous." (Citations omitted; emphasis in original.) *In re Schneider*, supra, 173 Wn. 2d 364. Therefore, we reject the defendant's proposed construction of § 46b-213q (d).

Furthermore, the interpretation of the statutory scheme that the defendant advances would defeat one of the primary purposes underlying the uniform act, namely that of preventing forum shopping by the parties to a child support order. See id. (" 'Prior to 1993, American case law was thoroughly in chaos over modification of the duration of a [child support] obligation when an obligor or obligee moved from one state to another state and the states had different ages for the duration of child support. The existing duration usually was ignored by the issuance of a new order applying local law, which elicited a variety of appellate court opinions. [In 1992, the uniform act] determined that a uniform rule should be proposed, to wit, duration of the [child support] obligation would be fixed by the initial controlling order.' "); see also *Lunceford* v. *Lunceford*, supra, 204 S.W.3d 707 ("[v]esting control of the duration of child support in the first order is consistent with the policy of [the uniform act] to promulgate a [single order] system for child support and avoid forum shopping by the parties under a child support order"). As the Washington Supreme Court explained in *In re Schnei-*

der, to hold that the law of the responding tribunal controlled the duration of a child support obligation would subvert "the purpose of [the uniform act] to preclude forum shopping by either the obligee or the obligor: One would need only to move to a state with laws offering a more appealing duration of child support, have the order modified in some other way, then petition to modify the duration according to the laws of the new forum state." *In re Schneider*, supra, 365–66.

Lastly, the defendant urges this court to consider the application of General Statutes (Rev. to 2013) § 46b-213j to the present case and advances two claims in support of his position that Connecticut law clearly applies to the present case under this statute. First, the defendant contends that because Connecticut modified the Florida judgment in 2003 and thereby issued the controlling order, Connecticut, rather than Florida became the "issuing state" within the meaning of § 46b-213j (a). Second, the defendant claims that even if Florida remained the "issuing state," § 46b-213j (d) required the trial court to apply Connecticut law to the present case because a Connecticut court previously consolidated arrears in child support payments. We disagree.

Insofar as §§ 46b-213j and 46b-213q are facially in tension, we are mindful of "the well established principle of statutory interpretation that requires courts to apply the more specific statute relating to a particular subject matter in favor of the more general statute that otherwise might apply in the absence of the specific statute. [I]t is a [well settled] principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. . . . The provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more

general in its coverage." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 301–302, 21 A.3d 759 (2011).

The text of the two statutes at issue and their respective locations within the act demonstrate that § 46b-213q more specifically applies to the child support issue in the present case. First, we recognize that a child support order of another state may be registered in Connecticut for enforcement purposes pursuant to General Statutes (Rev. to 2013) §§ 46b-213g through 46b-213h, for modification purposes pursuant to General Statutes (Rev. to 2013) § 46b-213o, or both. Unlike General Statutes (Rev. to 2013) § 46b-213j (a) (1), which generally provides that "the law of the issuing state governs . . . [t]he nature, extent, amount and *duration* of current payments under a registered support order"; (emphasis added); without specifying the types of proceedings in which the statute is applicable, General Statutes (Rev. to 2013) § 46b-213q (d) specifically applies to "a proceeding *to modify* a child support order . . . ." (Emphasis added.) Furthermore, we note that § 46b-213q directly follows General Statutes (Rev. to 2013) § 46b-213p, which is entitled "Effect of registration for modification" and provides in relevant part that "[a] family support magistrate may enforce a child support order of another state registered for purposes of modification, in the same manner as if the order has been issued by a family support magistrate, *but the registered order may be modified only if the requirements of section 46b-213q . . . have been met*." (Emphasis added.) Therefore, § 46b-213p makes clear that a court must consult the restrictions on modification in § 46b-213q before modifying the order. Section 46b-213j, on the other hand, directly follows General Statutes (Rev. to 2013) § 46b-213i, which is entitled "Effect of registration for enforcement." Second, we

note that unlike the language of § 46b-213q (d), which specifically references the duration of a child support obligation, General Statutes (Rev. to 2013) § 46b-213j (d) provides in relevant part that "[a]fter a tribunal of this . . . state determines which is the controlling order and issues an order consolidating arrears, if any, *a tribunal of this state shall prospectively apply the law of the state issuing the controlling order, including its law on . . . current and future support . . . .*" (Emphasis added.) Therefore, § 46b-213j applies to enforcement proceedings and § 46b-213q applies to modification proceedings. Accordingly, in the absence of any clear legislative intent to the contrary, we conclude that § 46b-213q (d), the provision that is more specific with respect to modification of the duration of a child support obligation, should apply over § 46b-213j.

On the basis of our review of the plain language of § 46b-213q (d), other related statutes, and their direction to interpret them uniformly with other states, § 46b-213q (d) applies to a modification of the duration of the child support obligation in the present case. Accordingly, we conclude that because Florida was the first state to enter a child support order in the present case, the trial court properly concluded that Florida law governed the duration of the defendant's child support obligation.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ALAIN LECONTE (SC 19258)

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

Syllabus

Convicted of the crimes of robbery in the first degree, robbery in the second degree, murder, felony murder and attempt to commit murder in connection with three separate armed robberies in Greenwich, Norwalk and Stamford, the defendant appealed to this court. In the Norwalk robbery, the defendant shot and killed a clerk at a gas station, in the Greenwich robbery, the defendant shot another gas station clerk, who ultimately survived, and, although the defendant was armed during the Stamford robbery, no one was shot. The three sets of charges stemming from each incident were joined and tried in a single proceeding before a jury. On appeal, the defendant claimed, inter alia, that he had been deprived of his sixth amendment right to counsel when the trial court admitted incriminating statements regarding his involvement in the Greenwich and Norwalk robberies that he had made to a cellmate while he was incarcerated for charges relating to the Stamford robbery. Although the defendant acknowledged that the statements about his involvement in the Greenwich and Norwalk robberies concerned offenses for which he had not yet been represented by counsel at the time he made those statements and, therefore, that those statements were admissible with respect to the Greenwich and Norwalk charges, he claimed that, because all three cases were tried together, the incriminating statements could have led the jury to infer that, if the defendant was involved in the Greenwich and Norwalk robberies, it was likely that he was involved in the Stamford robbery and, therefore, that his conviction on the charges relating to the Stamford robbery should be reversed. *Held*:

1. The defendant could not prevail on his claim that he was entitled to reversal of his conviction on the charges stemming from the Stamford robbery because, even if this court presumed that the trial court had committed error in admitting the defendant's incriminating statements, the error was harmless beyond a reasonable doubt; there was overwhelming and compelling evidence of the defendant's guilt with respect to the Stamford robbery, including his own voluntary statement to the police confessing his role in that robbery, the testimony of a fellow inmate that the defendant told him that he had committed that robbery, and testimony from multiple eyewitnesses corroborating the defendant's account of his involvement in that robbery.
2. There was no merit to the defendant's claim that the trial court violated his sixth amendment right to confrontation or otherwise abused its discretion by restricting defense counsel's cross-examination of N, one

of the defendant's coconspirators in the Greenwich robbery, who testified regarding the defendant's participation in the Greenwich and Norwalk robberies: defense counsel was not deprived of a meaningful opportunity to effectively cross-examine N because N testified extensively, during direct examination, cross-examination, and redirect examination, regarding the circumstances leading up to and surrounding a cooperation agreement that he had entered into with the state, including his obligation to tell the truth under that agreement and the fact that he repeatedly had lied to the authorities regarding his involvement in the Greenwich robbery before finally admitting to it and agreeing to cooperate by testifying against the defendant; moreover, even though the trial court precluded defense counsel from asking N certain questions on cross-examination, counsel had ample opportunity throughout cross-examination to challenge N's credibility, and the answers to those questions either would have led to cumulative evidence or would have been irrelevant to the issue of N's credibility.

Argued November 9, 2015—officially released February 23, 2016

Procedural History

Amended information charging the defendant, in three cases, with four counts of the crime of robbery in the first degree and one count each of the crimes of murder, felony murder and attempt to commit murder, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *White*, *J.*, granted the state's motion for joinder and denied the defendant's motion to suppress certain evidence; thereafter, the cases were tried to the jury before *White*, *J.*; verdicts and judgments of guilty of two counts each of robbery in the first degree and robbery in the second degree, and one count each of murder, felony murder and attempt to commit murder, from which the defendant appealed to this court. *Affirmed.*

Daniel J. Foster, assigned counsel, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, *James Bernardi*, supervisory assistant state's attorney, and *David I. Cohen*, former state's attorney, for the appellee (state).

ZARELLA, J. The defendant, Alain Leconte, appeals from the judgments of the trial court convicting him of crimes committed during a string of armed robberies in the cities of Stamford and Norwalk, and the town of Greenwich, between October and December, 2009.[1] The defendant claims that his convictions resulting from the Stamford robbery should be reversed on the ground that his constitutional right to counsel was violated when the trial court admitted incriminating statements he made to an informant regarding the Norwalk and Greenwich robberies while he was incarcerated and represented by counsel. The defendant also claims that his convictions resulting from the Norwalk and Greenwich robberies should be reversed on the ground that the trial court violated his sixth amendment right to confrontation or, in the alternative, abused its discretion by restricting defense counsel's cross-examination of a key prosecution witness. The state responds that the trial court's admission of the incriminating statements and its restrictions on counsel's cross-examination of the witness did not violate the defendant's sixth amendment rights or constitute an abuse of the trial court's discretion and that, even if they did, any error was harmless. We affirm the judgments of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. Between October and December, 2009, the defendant participated in three armed robberies, each of which resulted in criminal charges against him.

[1] The defendant was convicted of one count of murder in violation of General Statutes § 53a-54a (a), one count of felony murder in violation of General Statutes § 53a-54c, one count of attempt to commit murder in violation of General Statutes §§ 53a-54a (a) and 53a-49 (a) (2), two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), and two counts of robbery in the second degree in violation of General Statutes (Rev. to 2009) § 53a-135 (a) (2).

The first robbery took place on October 10, 2009. The defendant, together with an accomplice, entered a Shell gas station and convenience store in Norwalk and demanded that the store clerk hand over the money in the cash register, which contained approximately $1300. He then shot the clerk in the head before fleeing with his accomplice. The clerk later died from the gunshot wound.

The second robbery took place on November 21, 2009. The defendant and three accomplices drove to a Mobil gas station in Greenwich. While two of the accomplices waited in the car and the third, Teran Nelson, stood outside as a lookout, the defendant entered the convenience store and ordered the clerk at gunpoint to give him the money in the cash registers. After the clerk handed over approximately $638 and several boxes of cigarettes, the defendant shot him in the head and drove off with Nelson. The clerk ultimately recovered from the gunshot wound.

The third robbery occurred on December 12, 2009. The defendant called and asked a friend, who also was a police informant, to give him a ride in her car. During the ride, the defendant told her to stop at a certain location, where he picked up a gun, smoked marijuana, and met an accomplice, David Hackney, with whom he decided to commit a robbery. The informant then drove the defendant and Hackney to a Walgreens store in Greenwich. While the two men waited in the car, the informant purchased a pair of stockings that the defendant said he wanted for his mother and contacted the police by cell phone to warn of a possible robbery in Stamford. When the informant returned to the car, she drove the defendant and Hackney back to Stamford and dropped them off on Vista Street. The men then walked a short distance to Adams Grocery Store. After the defendant and Hackney pulled the stockings over their heads, they entered the store and the defendant

ordered everyone at gunpoint to get down on the floor. When the defendant encountered difficulty trying to open the cash register, the store clerk offered to help. The defendant then grabbed approximately $203 in cash and fled from the store with Hackney. A short time later, the police caught the defendant as he was running down the street.

The defendant was detained and arrested, and various individuals who had been in Adams Grocery Store during the robbery identified the defendant and Hackney as the men who had just robbed the store. Police officers who had observed the men in immediate flight also identified the defendant, who was wearing the same clothing he had worn during the robbery. The defendant then was brought to the police station, where he provided a written statement in which he confessed to his involvement in the Stamford robbery and provided details regarding the incident. The defendant subsequently was charged with two counts of robbery in the first degree in connection with this robbery.

During the defendant's incarceration for the Stamford robbery, he told Anthony Simmons, a cellmate who had agreed to be a cooperating witness for the state, that he had been involved in the Norwalk and Greenwich robberies. On the basis of this information and the evidence obtained from several other persons who also were cooperating witnesses, the defendant was charged with murder, felony murder and robbery in the first degree for his participation in the Norwalk robbery and with attempt to commit murder and robbery in the first degree for his participation in the Greenwich robbery.

The three cases were joined for trial on August 21, 2012, and a jury found the defendant guilty as charged, except with respect to the two first degree robbery charges in the case involving the Stamford robbery. With respect to those charges, the jury found the defen-

dant guilty of two counts of the lesser included offense of robbery in the second degree because evidence had been admitted that the gun he had used in the Stamford robbery was inoperable. On February 13, 2013, the court rendered judgments of conviction and imposed a total effective sentence of ninety years incarceration.

I

The defendant first claims that he was deprived of his sixth amendment right to counsel[2] when the trial court admitted the incriminating statements he made to Simmons regarding his participation in the Norwalk and Greenwich robberies at a time when he was represented by counsel in the case involving the Stamford robbery. The defendant acknowledges that, because the statements concerned offenses for which he was not yet represented by counsel, they were admissible with respect to the charges stemming from the Norwalk and Greenwich robberies at the time of his trial on those charges. He claims, however, that, because the trial court granted the state's motion for joinder and tried the charges in all three cases in a single proceeding, the incriminating statements could have invited the jury to infer that, if the defendant had committed the Norwalk and Greenwich robberies, he was likely to have committed the Stamford robbery. The defendant further claims that the trial court's error was not harmless beyond a reasonable doubt.

The state responds that the admission at trial of the defendant's incriminating statements to Simmons was not improper because the Norwalk and Greenwich robberies were separate offenses from the Stamford robbery and the defendant's right to counsel, which is

[2] The sixth amendment right to counsel is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335, 342–44, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

offense specific, had not yet attached to the Norwalk and Greenwich robbery charges when he mentioned his involvement in those robberies to Simmons. See, e.g., *Texas* v. *Cobb*, 532 U.S. 162, 167, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001) (sixth amendment right to counsel is " 'offense specific,' " meaning it does not attach until prosecution has commenced). The state adds that, to the extent the admission of this evidence was improper, it constituted harmless error. We agree with the state that the evidence of the defendant's guilt, even without the testimony of Simmons regarding the Norwalk and Greenwich robberies, is so overwhelming and compelling that any error, even if it did exist, was harmless beyond a reasonable doubt.

With respect to harmless error analysis, we have observed that, "[i]f the claim is of constitutional magnitude, the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt. . . . Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . In order to assess the harmfulness of the impropriety, we review the record to determine whether there is a reasonable possibility that the evidence . . . complained of might have contributed to the conviction

. . . .” (Citation omitted; internal quotation marks omitted.) *State* v. *Santos*, 318 Conn. 412, 425, 121 A.3d 697 (2015). We apply a de novo standard of review to the defendant’s sixth amendment claim.

Applying this standard in the present case, we conclude that any presumed error was harmless beyond a reasonable doubt. The defendant notes in his brief that “the identity of the perpetrator(s) in each incident, including the Stamford robbery, was the principal issue in this case.” The defendant also concedes that a confession “is probably the most probative and damaging evidence that can be admitted against [a defendant] . . . .” (Citation omitted; internal quotation marks omitted.) *State* v. *Artis*, 314 Conn. 131, 154, 101 A.3d 915 (2014). Thus, it is extremely probative in this case that the defendant voluntarily gave a detailed statement to the police one day after the Stamford robbery confessing to his role in that incident and that another fellow inmate, Cheikh Seye, testified that the defendant had told him in July, 2010, that he had committed the Stamford robbery. Four eyewitnesses also gave testimony regarding the Stamford robbery that corroborated the defendant’s description of events inside the store, and two of the eyewitnesses who had chased him down the street following the robbery not only corroborated the defendant’s account of many of his actions after running out of the store but saw him apprehended by the police when he was still wearing the stocking to conceal his face. Accordingly, we conclude that the defendant’s convictions resulting from his participation in the Stamford robbery should not be reversed because any presumed error by the trial court in admitting the incriminating statements was harmless beyond a reasonable doubt.[3]

[3] The defendant argues that counsel made a strategic decision at trial not to deny that the defendant had committed the Stamford robbery and not to attack the reliability of the Stamford confession because the trial court’s joinder of the three cases had necessitated that counsel distinguish the modus operandi of the Stamford robbery from that of the Norwalk and

II

The defendant next claims that the trial court violated his sixth amendment right to confrontation,[4] or, in the alternative, abused its discretion when it restricted defense counsel's cross-examination of Teran Nelson, one of the defendant's coconspirators in the Greenwich robbery, who testified regarding the defendant's participation in the Norwalk and Greenwich robberies. The state responds that the defendant's sixth amendment right to confrontation was not violated and that the trial court did not abuse its discretion because the trial court's rulings did not prevent the defense from embarking on a far ranging cross-examination of Nelson that exposed all of the information the defendant sought to enter into evidence and adequately addressed Nelson's credibility. We agree with the state.

The following additional facts are relevant to our resolution of this claim. At trial, Nelson repeatedly acknowledged on direct examination that he had entered into a cooperation agreement with the state in exchange for his promise to testify truthfully at trial and for immunity from several pending charges that could subject him to significant prison time. Nelson then testified regarding his involvement in the Greenwich robbery and how the defendant had entered the store and robbed and shot the clerk. He also testified that, in the aftermath of the Greenwich robbery, the defendant implied that he had committed the robbery

Greenwich robberies in order to establish that the defendant was not guilty of the Norwalk and Greenwich robberies. Defense counsel's trial strategy, however, has nothing to do with the issue that the defendant raises on appeal, namely, whether he was deprived of his sixth amendment right to counsel when the trial court admitted evidence of the incriminating statements he made to Simmons. Accordingly, this argument has no merit.

[4] The sixth amendment right to confrontation is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 403, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

and murder in Norwalk. Nelson admitted, however, that he had lied to the police during an interview in the summer of 2010, when he denied being involved in the Greenwich robbery, and during an interview in September, 2010, when he again denied participating in that robbery but stated that he had driven the defendant to Bridgeport following its commission. Nelson ended by testifying that, in December, 2010, upon learning that the defendant had spoken to the police regarding the robberies, he finally told the truth, confessed to participating in the Greenwich robbery and entered into a cooperation agreement with the state.

On cross-examination, defense counsel repeatedly queried Nelson about his obligation to tell the truth under the cooperation agreement, his repeated lies to the police before December, 2010, concerning the Greenwich robbery, the multiple attempts by the Greenwich police to persuade him to tell the truth, his reasons for entering into the cooperation agreement with the state and, finally, the substance of the cooperation agreement, including the elimination of prison time for various pending charges in exchange for his truthful disclosure of any and all information he might possess in connection with the Norwalk and Greenwich robberies. Defense counsel also questioned Nelson regarding certain details relating to the police interrogations, including being "threatened" on several occasions to tell the truth or "they would make this about you," because the police already had evidence from other sources regarding the robberies and would know if Nelson was lying. In connection with this point, Nelson testified that Detective Pasquale Iorfino had told him during the summer interview about certain details relating to the case that he wanted Nelson to confirm so he "would get a free walk," even though Nelson resisted and did not tell the truth until December, 2010. In addition, defense counsel elicited testimony from Nelson

that, if he did not testify truthfully at trial, he would risk losing the benefits provided under the cooperation agreement.

On redirect examination, Nelson again testified that he had lied to the police until he learned in December, 2010, that they had obtained information concerning the Greenwich robbery from other sources and "had everything on tape . . . ." Nelson also explained that he had heard parts of an audio recording in which Detective Iorfino was talking about the crime and that he had been told that the police also had an audio recording of the defendant talking about the crime, at which point Nelson decided to tell the truth in order to "[s]ave [him]self."

Turning to the governing legal principles and the standard of review, we note that "[t]he sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . . As an appropriate and potentially vital function of cross-examination, exposure of a witness' motive, interest, bias or prejudice may not be unduly restricted. . . . Compliance with the constitutionally guaranteed right to cross-examination requires that the defendant be allowed to present the jury with facts from which it could appropriately draw inferences relating to the witness' reliability. . . . [P]reclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements of the sixth amendment. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense. . . .

"However, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not

cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . Thus, [t]he confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination. . . . The court determines whether the evidence sought on cross-examination is relevant by determining whether that evidence renders the existence of [other facts] either certain or more probable. . . . [Furthermore, the] trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . [Finally, the] proffering party bears the burden of establishing the relevance of the offered testimony. . . .

"Although [t]he general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial [court] . . . this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . The constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . . Indeed, if testimony of a witness is to remain in the case as a basis for conviction, the defendant must be afforded a reasonable opportunity to reveal any infirmities that cast doubt on the reliability of that testimony. . . . The defendant's right to cross-examine a witness, however, is not absolute. . . . Therefore, a claim that the trial court unduly restricted cross-examination generally involves a two-pronged analysis: whether the aforementioned constitutional standard has been met,

and, if so, whether the court nonetheless abused its discretion . . . .'' (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Brown*, 273 Conn. 330, 338–40, 869 A.2d 1224 (2005).

Mindful of these principles, we first consider whether the restrictions that the trial court placed on defense counsel's cross-examination of Nelson complied with the minimum constitutional standards required by the sixth amendment. ''The defendant's constitutional right to cross-examination is satisfied [w]hen defense counsel is permitted to expose to the jury the facts from which it appropriately can draw inferences relating to the reliability of the witness . . . . [W]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial.'' (Citation omitted; internal quotation marks omitted.) Id., 340. After reviewing the record, we conclude that the defendant was not deprived of a meaningful opportunity to cross-examine Nelson because Nelson testified extensively regarding the circumstances leading up to and surrounding his cooperation agreement with the state, including his repeated lies to the police. The defense thus was ''permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'' (Internal quotation marks omitted.) Id.

The defendant nonetheless claims that the trial court prevented defense counsel from asking Nelson five questions on cross-examination that would have afforded the defense a reasonable opportunity to reveal weaknesses that might cast doubt on the reliability of Nelson's testimony. These questions included: (1) whether certain Greenwich police officers, including Detective Iorfino, told Nelson what they wanted him

to say in order to obtain the cooperation agreement;[5] (2) whether Nelson had confessed or intended to "take the rap" for the Greenwich robbery and the attempted homicide;[6] (3) whether Nelson made changes to his

[5] Regarding this issue, the defendant cites the following testimony:

"[Defense Counsel]: Mr. Nelson, Detective Iorfino kept telling you things that he wanted you to say, right?

"[The Supervisory Assistant State's Attorney (Prosecutor)]: Your Honor, at this point, what I am going to ask for if the question is not going to be about what Detective Iorfino—if the questions are going to be about what Detective Iorfino had to say during this interview as opposed to what his responses were, I think it's already out that he denied knowing anything about the case. I am just going to ask that it be read to the jury, the September, the August 10—

"The Court: The questions are being asked about a document that is not in evidence, and nobody has asked to put it in. So, the witness had indicated what he had indicated. I think we've been over this repeatedly, so let's wrap up the cross-examination, counsel."

Thereafter, the following exchange occurred:

"[Defense Counsel]: And later on, some of the other details that you were given were that you were at a barber shop with [the defendant], right?

"[Nelson]: Yes.

"[Defense Counsel]: He told you to say that?

"[Nelson]: Yes.

* * *

"[The Prosecutor]: If we could just put this in, please.

"The Court: I am going to sustain the objection. I am going to sustain the objection.

* * *

"[Defense Counsel]: At that time, you told them the details that they wanted you to tell them, correct?

"[Nelson]: Yes.

"[The Prosecutor]: Objection. How does he know what they want? He gave details.

"The Court: Sustained.

"[Defense Counsel]: They told you the details that they wanted, correct?

"[The Prosecutor]: Objection, Your Honor. They did not tell him and I—

"The Court: Sustained, sustained.

"[Defense Counsel]: You knew at that time, after they had spoken to you, that they have certain evidence, correct?

"[The Prosecutor]: Your Honor—

"The Court: I am going to sustain the objection. At the appropriate time, [defense counsel], you will have a chance to make any argument you want. This is not the time to make arguments."

[6] With respect to this issue, the defendant refers to the following exchange:

"[Defense Counsel]: . . . Didn't you tell the officers that you were going to take the rap for [the Greenwich robbery] yourself?

"[The Supervisory Assistant State's Attorney (Prosecutor)]: If we may, Your Honor. I have no objection to this coming in—

written statement to the police after entering into the cooperation agreement;[7] (4) whether the supervisory assistant state's attorney (prosecutor) was the person who would decide whether Nelson was telling the truth; and (5) whether Nelson was compelled, in order to secure the benefit of the cooperation agreement, to

"The Court: Is there an objection?

"[Defense Counsel]: Yes, there is an objection.

"The Court: He is the one that stood up.

"[Defense Counsel]: Oh, I am sorry.

"The Court: Are you objecting to that question?

"[The Prosecutor]: Yes, Your Honor, cross-examination off a document not in evidence.

"The Court: Sustained.

"[Defense Counsel]: Your Honor, I am asking him what he said.

"The Court: I heard what you asked. There was an objection. I sustained the objection. Move on.

"[Defense Counsel]: Mr. Nelson, it wasn't until the police told you that there were more people involved that you decided to change your story and not take the rap for yourself, correct?

"[The Prosecutor]: If I may object, Your Honor.

"The Court: Sustained.

"[The Prosecutor]: It's [a] mischaracterization of what he just testified to this morning."

[7] The defendant relies on the following exchange:

"[Defense Counsel]: Isn't it true that the Greenwich Police Department got you because they found out that you had told some lies to them in the previous interview and statement that you had given?

"[Nelson]: Yes.

"[Defense Counsel]: And they wanted you to straighten it out, correct?

"[Nelson]: Yes.

"[Defense Counsel]: They wanted you to change your statement?

"[Nelson]: Yes.

"[Defense Counsel]: And this was after you had already sworn it under oath, correct?

"[Nelson]: Yes.

"[Defense Counsel]: And this was after you had already been promised your cooperation agreement?

"[The Supervisory Assistant State's Attorney (Prosecutor)]: Objection. It's the same day, December 10. I think the document in evidence says December 10.

"[Defense Counsel]: The actual cooperation agreement that is—

"The Court: Are you asking a question or are you making a comment now?

"[Defense Counsel]: I was responding to the objection if there was an objection.

"The Court: I sustained the objection. Let's move on."

stand by the statements he had made to the police in exchange for the cooperation agreement.[8]

Following a careful review of the record, we conclude that the defendant's sixth amendment right to confrontation was not violated when the trial court restricted defense counsel's cross-examination by preventing him from asking Nelson the foregoing questions. With respect to the first question concerning whether Detective Iorfino told Nelson what the police wanted him to say in exchange for the cooperation agreement, which the trial court precluded in part on the ground that it was based on a document not in evidence, Nelson already had testified that Detective Iorfino told him during the September, 2010 interview about certain details relating to the robbery that he wanted Nelson to confirm in exchange for the agreement.[9] Similarly,

[8] The defendant maintains that Nelson repeatedly testified that the only thing he had to do to satisfy his end of the bargain was to tell the truth. When defense counsel asked Nelson, however, if the prosecutor would be the one to decide whether he had told the truth, the prosecutor objected, claiming that the jury would make that decision. The court sustained that objection. Defense counsel later asked: "[W]hatever you tell them as the details of this case as you've told them in the past that they've said that they would accept as the truth, okay, you've got to stick with that [or], otherwise, you are going to lose the benefit of your agreement, right?" The court sustained the prosecutor's objection to that question.

[9] This issue was addressed in the following exchange regarding Nelson's September, 2010 interview with Detective Iorfino:

"[Defense Counsel]: Now, during that interview, Detective Iorfino tried to get you to talk about the Greenwich [robbery], didn't he?

"[Nelson]: Yes.

"[Defense Counsel]: And you didn't want to talk about it?

"[Nelson]: No.

"[Defense Counsel]: In fact, you denied involvement many times during that interview, correct?

"[Nelson]: Yes.

"[Defense Counsel]: And, in response to your denials in that interview, Detective Iorfino told you some details about this case, correct?

"[Nelson]: Yes.

"[Defense Counsel]: He told you that they already had [a coconspirator], right?

"[Nelson]: Yes.

with respect to the second question concerning whether Nelson had confessed to the police or intended to "take the rap" for the Greenwich robbery and the attempted homicide, which the trial court also precluded because it was based on a document not in evidence, even if Nelson had responded in the affirmative, he already had testified that he lied repeatedly to the police regarding the extent of his participation in the Greenwich robbery. Thus, the trial court's preclusion of potential testimony that Nelson was willing to "take the rap" for the Greenwich robbery would not have raised a new ground on which to challenge his credibility. It merely would have added another inconsistent statement in a long line of inconsistent statements regarding the extent of his participation in the Greenwich robbery and the attempted homicide.

With respect to the third question of whether Nelson made changes to his written statement after entering into the cooperation agreement, the defendant misunderstands the question defense counsel wanted to ask. Counsel did not ask Nelson that question but, rather,

* * *

"[Defense Counsel]: And, despite what Detective Iorfino told you, you continued to deny being involved in any way with the Greenwich [robbery], correct?

"[Nelson]: Yes.

"[Defense Counsel]: And one of the ways that Detective Iorfino tried to get you to acknowledge the details was to tell you that you would get a free walk, correct?

"[Nelson]: Yes.

"[Defense Counsel]: And that didn't persuade you either at that point, all the efforts he made in that regard, correct?

"[Nelson]: Yes.

"[Defense Counsel]: And [Detective] Iorfino also told you . . . some of the things that he wanted you to say, correct?

"[Nelson]: Yes.

* * *

"[Defense Counsel]: And he told you repeatedly that he knows the facts. He just wants you to say them, right?

"[Nelson]: Yes."

asked whether the police wanted him to change certain statements he made prior to December, 2010, in which he had lied under oath during his interviews with the police despite the *promise* of a cooperation agreement. Accordingly, the trial court did not preclude defense counsel from asking the question alleged to have been asked in this appeal.

As for defense counsel's query regarding whether the prosecutor himself would determine whether Nelson was telling the truth, this question was not relevant to Nelson's credibility or reliability as a witness because it had nothing to do with his testimony regarding either his or the defendant's participation in the Norwalk and Greenwich robberies.

Finally, the question regarding whether Nelson was compelled to stand by his past truthful testimony or risk losing the benefit of the cooperation agreement was similar to many other questions by the defense intended to challenge Nelson regarding his obligation to tell the truth in exchange for the cooperation agreement. We thus conclude that the trial court did not improperly preclude defense counsel from asking this question because Nelson had given extensive prior testimony on direct examination and cross-examination, and subsequently gave additional testimony on redirect examination, describing his initial lies to the police and his eventual decision to tell the truth in exchange for the cooperation agreement.

In sum, we conclude that the trial court's rulings did not violate the defendant's sixth amendment right to confrontation because the defense was given ample opportunity throughout cross-examination to challenge Nelson's credibility. The issue of his credibility also was raised on direct and redirect examination, when he stated in response to repeated questioning that he initially had lied to the police over a period of several

months regarding his participation in the Greenwich robbery and that he finally had decided to tell the truth in order to "save [him]self" from having to serve significant prison time for multiple pending charges. In addition, the defense was able to establish that Detective Iorfino had presented Nelson with certain details relating to the Greenwich robbery that he hoped Nelson would confirm by telling the truth in exchange for the cooperation agreement. Accordingly, we next consider the defendant's claim that the restrictions on defense counsel's cross-examination of Nelson constituted an abuse of the trial court's discretion.

The defendant argues that the trial court abused its discretion for the same reasons its restrictions on cross-examination violated his sixth amendment right of confrontation. We disagree. Some of the questions that the trial court precluded would have elicited testimony on facts already established, such as the questions concerning whether Detective Iorfino told Nelson what the police wanted him to say in exchange for the cooperation agreement, whether Nelson intended to "take the rap" for the Greenwich robbery and the attempted murder, and whether Nelson was compelled, in order to secure the benefit of the cooperation agreement, to stand by the statements he had made to the police in exchange for the cooperation agreement. See *Motzer* v. *Haberli*, 300 Conn. 733, 742, 15 A.3d 1084 (2011) ("[o]ur rules of evidence vest trial courts with discretion to exclude relevant evidence when its probative value is outweighed . . . by considerations of undue delay, waste of time or needless presentation of cumulative evidence" [internal quotation marks omitted]); see also Conn. Code Evid. § 4-3. Of the two remaining questions the trial court allegedly precluded, one question was never asked and the other question regarding whether the prosecutor was the person who would decide if Nelson was telling the truth was not relevant to the

issues of Nelson's credibility or to his testimony regarding the Norwalk and Greenwich robberies. Accordingly, the trial court did not abuse its discretion in restricting defense counsel's cross-examination of Nelson.

The judgments are affirmed.

In this opinion the other justices concurred.

NPC OFFICES, LLC *v.* WILLIAM KOWALESKI ET AL. (SC 19408)

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

Syllabus

The plaintiff, the owner of a certain parcel of real property presently used as a psychologist's office, appealed, and the defendant adjacent property owners cross appealed, to the Appellate Court from the judgment of the trial court terminating an easement over a shared driveway located on certain of the defendants' property. The easement was created by an agreement between previous owners of the properties that contained a provision providing for termination of the easement in the event the plaintiff's property was used for purposes other than residential or professional offices. The plaintiff's property was subsequently used as a mortgage brokerage, a home health-care agency, and an appliance delivery coordination service. Thereafter, the defendants constructed a fence on the properties' common boundary that severely restricted access to a parking area behind the plaintiff's property. The plaintiff then filed the present action seeking, inter alia, to quiet title to the easement and injunctive relief ordering removal of the fence. The defendants filed special defenses alleging, inter alia, that the easement had terminated because the plaintiff's property had been used for purposes other than professional offices or residential uses, and also filed counterclaims of quiet title, civil trespass and private nuisance. The trial court concluded that the easement had terminated because the previous uses of the plaintiff's property did not constitute professional offices under the agreement and, accordingly, rendered judgment for the defendants on the plaintiff's complaint and for the defendants, in part, on their counterclaims, rejecting their claims of trespass and private nuisance. On the plaintiff's appeal and the defendants' cross appeal, the Appellate Court concluded that the previous uses of the plaintiff's property did not qualify as professional offices because a high level of training and proficiency was not required for their operation. The Appellate Court

also concluded that, because the defendants failed to present any evidence as to damages, a reversal of the trial court's rejection of their trespass and nuisance claims would result in an award of nominal damages. Accordingly, the Appellate Court affirmed the trial court's judgment, from which the plaintiff, on the granting of certification, appealed to this court. *Held* that the Appellate Court improperly affirmed the trial court's judgment based upon its conclusion that the easement was terminated by the prior tenancies of the plaintiff's property: the language of the agreement was ambiguous where dictionaries contained both narrow and broad definitions of the term "professional," the agreement did not define the term "professional office," and the parties provided no evidence at trial to suggest that the term "professional" in the agreement was intended to have any special or unusual connotation, and, construing that ambiguity in favor of the plaintiff as the grantee of the easement, under the broader definition of the term "professional" as any pursuit for gain or livelihood, the agreement did not preclude use of the plaintiff's property as a mortgage broker, a home health-care agency, or an appliance delivery coordination service; because reversing the judgment of the Appellate Court did not dispose of all of the claims relating to the agreement and the parties' respective properties, the case was remanded to the trial court for a new trial to consider those issues.

Argued December 9, 2015—officially released March 1, 2016

Procedural History

Action for a temporary and permanent injunction prohibiting the defendants from interfering with the plaintiff's alleged right-of-way on certain of the defendants' real property, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendants filed a counterclaim; thereafter, the trial court, *Bear*, *J.*, granted the plaintiff's motion to cite in 184–188 South Main Street, LLC, as a defendant; subsequently, the defendant 184–188 South Main Street, LLC, filed a counterclaim and the matter was tried to the court, *Abrams*, *J.*; judgment for the defendants on the complaint and in part for the plaintiff on the counterclaims, from which the plaintiff appealed and the defendants cross appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Mullins* and *Mihalakos*, *Js.*, which affirmed the judgment of the trial court, and

the plaintiff, on the granting of certification, appealed to this court. *Reversed; new trial.*

Michael S. Taylor, with whom, on the brief, were *James P. Sexton* and *Matthew C. Eagan*, for the appellant (plaintiff).

Michelle M. Seery, with whom was *William J. O'Sullivan*, for the appellees (defendants).

Opinion

EVELEIGH, J. The dispositive issue in this appeal is the determination of the meaning of the term "professional offices" as used in a right-of-way agreement (agreement), which created an express easement for the benefit of property owned by the plaintiff, NPC Offices, LLC, over a driveway located on the property owned by the defendant 184–188 South Main Street, LLC, a limited liability company under the ownership and control of the defendants William Kowaleski and Sharon Kowaleski. The plaintiff appeals, on the granting of certification,[1] from the judgment of the Appellate Court affirming the judgment of the trial court quieting title to the driveway in favor of the defendants and declaring the easement terminated. *NPC Offices, LLC* v. *Kowaleski*, 152 Conn. App. 445, 447–48, 100 A.3d 42 (2014). On appeal to this court, the plaintiff claims that the Appellate Court improperly affirmed the judgment of the trial court based upon its conclusion that the plaintiff's property had been used for purposes other

[1] We granted the plaintiff's petition for certification to appeal, limited to the following issues: "1. Did the Appellate Court properly affirm the trial court's decision based upon its conclusion that the doctrine of disproportionate forfeiture does not apply in this matter? [and] 2. Did the Appellate Court properly affirm the trial court's decision based upon its conclusion that the premises had been used for purposes other than 'professional offices?' " *NPC Offices, LLC* v. *Kowaleski*, 314 Conn. 936, 936–37, 102 A.3d 1115 (2014). Because we conclude that the Appellate Court improperly determined that the premises had been used for purposes other than "professional offices," we do not reach the first certified question.

than "professional offices" in violation of the terms of the agreement. We agree with the plaintiff and, accordingly, reverse the judgment of the Appellate Court and remand the case for a new trial in accordance with this opinion.

The opinion of the Appellate Court sets forth the following undisputed facts and procedural history. "The plaintiff, a limited liability company of which Marc Aronson is the sole member, owns an office building located at 192 South Main Street in Middletown. Aronson operates a psychologist's office. The defendant 184–188 South Main Street, LLC, a limited liability company under the ownership and control of the defendants William Kowaleski and Sharon Kowaleski, owns an office building located at 184–188 South Main Street, which is situated on property abutting the plaintiff's property. The defendants operate a hair salon. The buildings are separated by a driveway, located on the defendants' property, which provides access to a parking area behind both buildings.

"The plaintiff's claimed right of access to the driveway stems from an agreement entered into by previous owners of the two properties. Created in 1960, the agreement referred to the owners of the property located at 184–188 South Main Street as the 'First Parties' and the owners of the property at 192 South Main Street as the 'Second Parties.' It provided that 'the First Parties grant to the Second Parties and unto the survivor of them, and unto such survivor's heirs and assigns forever the right (in common with the First Parties' heirs and assigns) to pass and re-pass by vehicle or on foot over the entire length of said driveway running from South Main Street to the garages on the First Parties' premises, except that, in the event that [192 South Main Street] shall be used for purposes other than residential or professional offices, the Second Parties' right to use the said driveway shall terminate.' The

agreement was recorded and was the sole instrument in either property's chain of title governing the rights and obligations of the parties as they relate to the driveway. The garages referenced in the agreement no longer existed at the time of trial, but the driveway remained intact.

"In 1990, the defendants acquired their property and the plaintiff acquired its property in 2008. Soon after, the use of the driveway and the parking area behind the offices became a source of frequent disputes, leading to an acrimonious relationship between the parties. On or about September 6, 2008, the defendants constructed an iron fence behind the buildings along the properties' common boundary in an effort to separate the properties' respective parking areas. The fence severely restricted access to and maneuverability in the parking area behind the plaintiff's property.

"Thereafter, the plaintiff commenced the present action and filed a complaint dated September 8, 2008. The plaintiff's operative complaint asserted, [in addition to claims of fraudulent transfer, entry and detainer, and creation of prescriptive and implied easements] a quiet title claim asking the court to find that the erection of the fence violated the terms of the agreement and to clarify the extent of the [easement], and a claim seeking an injunction restoring the plaintiff's rights under the agreement. The defendants denied the plaintiff's claims and raised special defenses, including an assertion that the plaintiff's property had been used for purposes other than professional offices or residential uses, thus terminating the . . . agreement. The defendants also asserted counterclaims, including, among other things, claims of quiet title asking the court to find that the agreement had been terminated, civil trespass and private nuisance. The plaintiff denied the defendants' counterclaims and raised special defenses.

"After a trial, the court found that the . . . agreement created an express easement for the benefit of the plaintiff's property. The court found that this easement was in effect until the plaintiff's property was used by a mortgage brokerage, a home [health-care] agency and an appliance delivery coordination service. The court concluded that the operation of these businesses constituted use of the property for purposes other than residential or professional offices, thus terminating the easement." *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 448–50. The trial court explained as follows: "While the court in no way wishes to diminish the undeniable social utility of the three businesses in question, it is clear that each can be operated without 'a prolonged course of specialized instruction and study' " and, thus, they do not constitute "professional office[s]." The court further found that no prescriptive or implied easement existed on behalf of the plaintiff, and rejected the defendants' counterclaims of trespass and private nuisance. Finally, in regard to the plaintiff's claim of fraudulent transfer, the court noted that "the facts support the conclusion that the transfer was done for reasons wholly unrelated to this [action]."

The plaintiff appealed from the judgment of the trial court to the Appellate Court. The defendants cross appealed, claiming that the trial court improperly rejected the defendants' civil trespass and private nuisance counterclaims. The Appellate Court consulted the dictionary definitions of the terms "professional" and "office" and determined that "the unambiguous meaning of 'professional office' as used in the easement is a place where business is conducted or services are performed by persons who belong to a learned profession or whose occupation requires a high level of training and proficiency." *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 452. Using this definition, the

Appellate Court concluded that the trial court had properly determined that the mortgage brokerage, home health-care agency, and appliance delivery coordination service that had been operated out of the plaintiff's property "did not qualify as professional offices, as a high level of training and proficiency was not required for their operation." Id., 453. Furthermore, in regard to the defendants' claims on cross appeal, the Appellate Court concluded that the defendants "failed to present any evidence of damages at trial" and that, thus, "a reversal of the [trial] court's conclusion rejecting the defendants' trespass and private nuisance claims would result only in an award of nominal damages to the defendants." Id., 458. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id. This appeal followed.

On appeal, the plaintiff claims that the Appellate Court improperly concluded that the meaning of the term "professional offices" in the agreement is unambiguous. Specifically, the plaintiff claims that the Appellate Court improperly relied upon a narrow, legal definition of the term "professional" when construing the language of the agreement and failed to consider broader, common dictionary definitions of the term. In response, the defendants contend that the Appellate Court properly affirmed the judgment of the trial court and properly concluded that the term "professional offices," as used in the agreement, is clear and unambiguous and is limited to the offices of individuals "whose occupation requires a high level of training and proficiency." *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 452. We agree with the plaintiff.

As a preliminary matter, we set forth the applicable standard of review and guiding legal principles. This appeal requires us to determine the meaning of the term "professional offices" in the agreement. "In construing a deed, a court must consider the language and terms

of the instrument as a whole. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance, and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . Thus, if the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity." (Citation omitted; internal quotation marks omitted.) *Il Giardino, LLC* v. *Belle Haven Land Co.*, 254 Conn. 502, 510–11, 757 A.2d 1103 (2000). Furthermore, "[t]he language of the grant will be given its ordinary import in the absence of anything in the situation or surrounding circumstances which indicates a contrary intent. . . . Any ambiguity in the instrument creating an easement, in a case of reasonable doubt, will be construed in favor of the grantee." (Citation omitted; internal quotation marks omitted.) *Lago* v. *Guerrette*, 219 Conn. 262, 268, 592 A.2d 939 (1991).

"Although in most contexts the issue of intent is a factual question on which our scope of review is limited . . . the determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary. . . . Nevertheless, [t]he determination of the scope of an easement is a question of fact . . . [and] is for the trier of fact whose decision may not be overturned unless it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Deane* v. *Kahn*, 317 Conn. 157, 166, 116 A.3d 259 (2015). In the present case, the trial court's determination of

the intent of the original parties to the agreement was based solely on the language of the agreement and did not involve a review of the trial court's resolution of any evidentiary issues of credibility. Accordingly, to the extent that we are interpreting the express terms of the agreement, our review of the Appellate Court's construction of the agreement is plenary.

Finally, we note that "[t]he general principle that servitudes should be interpreted in favor of validity, in contrast to the old rule that favored construction in favor of free use of land, facilitates safeguarding the public interest in maintaining the social utility of land while minimizing legal disruption of private transactions. A similar role is played by the rule that where two or more reasonable interpretations of a servitude are possible, the one more consonant with public policy is to be preferred." 1 Restatement (Third), Property, Servitudes § 4.1, comment (a), p. 498 (2000).

With these principles in mind, we begin our analysis with the language of the agreement. The agreement provides in relevant part that "in the event that [192 South Main Street] shall be used *for purposes other than residential or professional offices*, the Second Parties' right to use the said driveway shall terminate." (Emphasis added.)

Resolution of the plaintiff's claim depends on whether the term "professional offices," as used in the agreement, encompasses the previous tenants of the plaintiff's property, including a mortgage brokerage, a home health-care agency, and an appliance delivery coordination service.[2] In the present case, the

[2] The trial court found, and the parties agree, that a mortgage brokerage, a home health-care agency, and an appliance delivery coordination service had been operated out of the plaintiff's property. Furthermore, it is undisputed that Aronson's current operation of a psychologist's office at the property qualifies as a "professional office."

agreement does not define the term "professional offices" and the parties provided no evidence at trial to suggest that the term "professional" was intended to have "any special or unusual connotation . . . ." *Lakeview Associates* v. *Woodlake Master Condominium Assn., Inc.*, 239 Conn. 769, 777, 687 A.2d 1270 (1997). Thus, we must consider the ordinary meaning of the term.

"We often consult dictionaries in interpreting contracts . . . to determine whether the ordinary meanings of the words used therein are plain and unambiguous, or conversely, have varying definitions in common parlance." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 193, 112 A.3d 144 (2015). The Appellate Court adopted the definition of "professional" in Black's Law Dictionary, which provides as follows: " '[A] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency.' " *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 452, quoting Black's Law Dictionary (9th Ed. 2009). We are also aware, however, that numerous common dictionaries also contain a broader definition of the term.[3] Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) defines "professional" as, inter alia, "of, relating to, or characteristic of a profession" and "profession" as, inter alia, "a principal calling, vocation, or employment . . . ." The American Heritage Dictionary of the English Language (5th Ed. 2011) similarly defines "professional" as, inter alia, "[o]f, relating to, engaged in, or suitable for a profession" and "profession" as, inter alia, "[a]n occupation or career . . . ." Webster's Third New International

[3] Although we have relied on Black's Law Dictionary in order to ascertain the "common, natural, and ordinary meaning and usage" of a term; (internal quotation marks omitted) *Remillard* v. *Remillard*, 297 Conn. 345, 355–56, 999 A.2d 713 (2010); we note that it is often not the best source for determining the ordinary use of a term.

Dictionary (2002) defines "professional" as, inter alia, "one that engages in a particular pursuit, study, or science for gain or livelihood . . . ."

It is well established that "[i]f the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 9, 35 A.3d 177 (2011). The fact that these dictionaries contain both the narrow definition adopted by the Appellate Court and the aforementioned, broad definition indicates that both parties' interpretations of the term are reasonable. Therefore, on the basis of our review of the entire agreement and various dictionary definitions, we conclude that the term "professional offices" in the agreement is ambiguous. The trial court and the Appellate Court, however, ignored the broader definitions provided in common dictionaries and improperly concluded that the term "professional offices," as used in the agreement, was plain and unambiguous. See *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 452.

It is undisputed that there was no evidence presented at trial as to the circumstances surrounding the creation of the agreement and, thus, evidence of the original parties' intent regarding the term "professional offices." Therefore, we must construe the ambiguous language of the agreement in favor of the plaintiff, as the grantee of the easement. See *Lago* v. *Guerrette*, supra, 219 Conn. 268 ("[a]ny ambiguity in the instrument creating an easement, in a case of reasonable doubt, will be construed in favor of the grantee" [internal quotation marks omitted]). This conclusion is fortified by the application of the principle "that servitudes should be interpreted in favor of validity . . . ."[4] 1 Restatement (Third),

[4] We also recognize the rule of construction that provides that an ambiguity is construed against the party that drafted the instrument. See *Harbour Pointe, LLC* v. *Harbour Landing Condominium Assn., Inc.*, 300 Conn. 254, 260, 14 A.3d 284 (2011); 1 Restatement (Third), supra, § 4.1, comment (d),

supra, § 4.1, comment (a), p. 498. Therefore, we apply the broader definition of the term "professional" and conclude that the term "professional offices," as used in the agreement, means an office where one "engages in a particular pursuit, study, or science for gain or livelihood . . . ." Webster's Third New International Dictionary (2002). Using this definition of "professional" indicates that, contrary to the Appellate Court's conclusion, the agreement does not preclude offices of the type that had been previously operated out of the plaintiff's property, namely that of a mortgage broker, a home health-care agency, and an appliance delivery coordination service. See *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 453.

The defendants contend, however, that the application of the broader dictionary definition would render the term "professional" in the agreement meaningless.[5]

p. 500. Although there was some testimony at trial suggesting who the drafter of the agreement may have been, the trial court made no finding concerning this issue. Thus, we do not apply this principle of construction in the present case.

[5] The defendants make a number of nonmeritorious contentions that we reject. First, the defendants contend that this court should decline review of the plaintiff's claim because the plaintiff failed to adequately preserve its claim for appeal. Specifically, the defendants contend that the plaintiff did not advocate for the application of a broad definition of the term "professional offices" before the trial court. We disagree with the defendants. The trial court ordered the parties to file posttrial briefs on the question of the meaning of the term "professional" and subsequently held in favor of the defendants based upon its conclusion that the previous tenants of the plaintiff's property did not fall within the scope of the term "professional offices." The plaintiff advanced a broad definition of the term in its posttrial reply brief, asserting that the term "professional offices" in the agreement could reasonably be interpreted as a means of prohibiting the use of the property to house retail or manufacturing offices. The Appellate Court affirmed the judgment of the trial court on the basis of its conclusion that the plaintiff's property had been used for purposes other than "professional offices." See *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 452. Thus, because the issue of the meaning of the term "professional offices" was clearly at issue before both the trial court and the Appellate Court, we conclude that the present case does not present a situation that "would amount to trial by ambuscade." *State* v. *Santana*, 313 Conn. 461, 467, 97 A.3d 963 (2014);

Specifically, the defendants assert that our interpretation would violate the rule of construction that " 'militates against interpreting a contract in a way that renders a provision superfluous.' " *Awdziewicz* v. *Meriden*, 317 Conn. 122, 130, 115 A.3d 1084 (2015). We reject

see also id. (noting that "this court has expressed a willingness to review claims that a party did not explicitly raise to the trial court if it is clear from the record that the substance of the claim was raised").

Furthermore, the defendants represent in their brief to this court that the testimony of the plaintiff's expert in real estate law supports their understanding of the term "professional offices." Our review of the record, however, indicates that the trial court ruled that the plaintiff's expert was not qualified to give an opinion as to the definition of the term "professional offices." Therefore, we do not consider this testimony.

Second, the defendants cite to *Dlugos* v. *Zoning Board of Appeals*, 36 Conn. Supp. 217, 219, 416 A.2d 180 (1980), which the trial court also relied on, and several out-of-state cases in support of their claim that the Appellate Court properly adopted a narrow definition of the term "professional." See *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 452. We do not find these cases, which involved the interpretation of the term "professional" in certain zoning ordinances and statutes of limitations for professional malpractice actions, to be persuasive in the context of interpreting the agreement between the parties in the present case.

Third, the defendants contend that the interpretation of the term "professional" as used in the context of zoning ordinances is especially instructive in the present case because it would be logical for this court to infer that the original parties to the agreement intended to attach the same significance to the language in their agreement. Specifically, at oral argument before this court, counsel for the defendants contended that the fact that the plaintiff's property was located in a residential zone at the time the agreement was drafted indicates that the original parties' intention was to permit "limited professional use" of the property. The defendants never introduced evidence at trial regarding the zoning ordinances in effect at the time the agreement was drafted and the trial court made no finding on this issue. If the defendants wished to rely on the definition of "professional" in the context of zoning ordinances, the defendants should have provided evidence at trial that the agreement was drafted in accordance with the zoning ordinances in effect in 1960. Indeed, in their posttrial brief, the defendants acknowledged the fact that they solely provided these zoning cases in response to the trial court's order that the parties discuss cases defining the term "professional."

Furthermore, we note that the original parties to the agreement did not include language restricting the definition of the term "professional offices" or references to the zoning ordinances in effect at the time in the agreement. Thus, the interpretation of the agreement that the defendants advance would require us to add the term "limited" as a restrictive modifier of the term "professional offices," which is something we cannot do. See *Stratford* v. *Winterbottom*, 151 Conn. App. 60, 73, 95 A.3d 538 ("[i]n interpreting a contract courts cannot add new or different terms" [internal quotation marks omitted]), cert. denied, 314 Conn. 911, 100 A.3d 403 (2014). Accordingly, we reject the defendants' claim.

this claim for two reasons. First, we note that, contrary to the defendants' claim, our interpretation gives effect to all provisions of the agreement as we are construing the term "professional offices" as a whole. Second, the definition of "professional" that we conclude applies to the interpretation of the agreement in the present case does not include all offices, but rather is limited to offices where one engages in a pursuit "for gain or livelihood" as opposed to merely in pursuit of one's interests. Webster's Third New International Dictionary (2002). For example, the office of a local youth program or a similar organization would not qualify as a "professional office" under our interpretation of the agreement. Therefore, our interpretation does not render any term of the agreement in the present case meaningless.

Pursuant to Practice Book § 84-11, the defendants also filed a statement of alternative grounds for affirmance of the Appellate Court's judgment and of adverse rulings to be considered in the event of a new trial. In that statement, the defendants raised as alternative grounds for affirmance that the doctrines of judicial estoppel and induced error are applicable to the present case and that the plaintiff's use of its property to house multiple simultaneous businesses constituted use for "purposes other than residential or professional offices" in violation of the agreement.[6] Practice Book § 84-11 (a) provides in relevant part: "[T]he appellee may present for review alternative grounds upon which the judgment may be affirmed *provided those grounds were raised and briefed in the appellate court.* . . ." (Emphasis added.) Our review of the Appellate Court record reveals that the defendants did not raise these

[6] In their Practice Book § 84-11 statement, the defendants further asserted that the judgment of the Appellate Court could be affirmed on the alternative ground that the issue the plaintiff has raised on appeal was not properly preserved for review. We have previously addressed this issue in this opinion. See footnote 5 of this opinion.

grounds for affirming the judgment of the trial court in the Appellate Court. Thus, because the plaintiff would be prejudiced by our review of these issues, we decline to consider these issues in the present appeal.[7]

Furthermore, the defendants claim that the judgment of the Appellate Court could be affirmed on the alternative ground that the plaintiff's use of its rear parking lot for, inter alia, a "log-cutting operation" and the storage of boats and trailers constituted use for "purposes other than residential or professional offices" in violation of the agreement. We decline to review this claim because we conclude that it does not constitute an alternative ground for affirmance. The question of whether the plaintiff's performance of the aforementioned activities in its rear parking lot constitutes use for "purposes other than residential or professional offices" requires additional factual findings by the trial court, including a determination of whether the property was being used for residential purposes. Therefore, the judgment of the Appellate Court is reversed.

Reversing the judgment of the Appellate Court as to whether these prior tenancies of the plaintiff's property constituted "professional offices" within the meaning of the agreement does not dispose of all the claims relating to the agreement and the parties' respective properties. As a result of the trial court's determination that the easement had terminated, there are several claims that the trial court did not independently address. Accordingly, we now turn to the issues that

[7] We further note that the defendants failed to move for special permission to raise these alternative grounds. See Practice Book § 84-11 (a) ("If such alternative grounds for affirmation or adverse rulings or decisions to be considered in the event of a new trial were not raised in the appellate court, the party seeking to raise them in the supreme court must move for special permission to do so prior to the filing of that party's brief. Such permission will be granted only in exceptional cases where the interests of justice so require.").

the trial court must consider on remand in light of the conclusion that we have reached.[8]

We conclude that the trial court must address the following issues on remand. First, because the trial court determined that the easement had been terminated, it solely addressed the plaintiff's claims of fraudulent transfer, prescriptive easement, and implied easement. The trial court did not address the plaintiff's claims of quiet title, injunctive relief, and entry and detainer. Accordingly, on remand, the trial court must address these claims. Second, for the same reason, we conclude that the defendants will have the opportunity on remand to establish their counterclaims of overburdening the easement and breach of contract. Third, the defendants will also have the opportunity to establish their special defenses that the plaintiff breached other provisions of the agreement not at issue in this appeal and that the plaintiff's claims were barred by the doctrines of waiver and of unclean hands. Fourth, the defendants will have the opportunity on remand to establish their quiet title counterclaim and breach of contract special defense regarding the issue of whether the plaintiff's property had been used for "purposes other than residential or professional offices" to the extent that they relate to the question of whether the plaintiff violated the terms of the agreement by engaging in the

[8] In compliance with Practice Book § 84-11, the defendants further present an adverse ruling of the trial court for our consideration. Specifically, the defendants assert that the trial court improperly determined that the plaintiff's use of its rear parking lot for the aforementioned activities did not constitute an unreasonable use of the defendants' driveway. We understand the defendants' claim regarding the adverse ruling to be a part of the defendants' counterclaims for trespass and private nuisance. Thus, we conclude that the filing of a statement pursuant to § 84-11 is not the proper means to raise these claims in view of the fact that the Appellate Court concluded that these claims "if successful would entitle [the defendants] only to nominal damages." *NPC Offices, LLC* v. *Kowaleski*, supra, 152 Conn. App. 458. If the defendants wished to contest these issues, they should have filed a cross petition for certification to appeal.

aforementioned activities in its rear parking lot. Fifth, the plaintiff will have the opportunity to establish the special defenses that it had asserted in response to the defendants' counterclaims, namely that the defendants' counterclaims were barred by the doctrines of bad faith, unclean hands, collateral estoppel, and breach of contract. Finally, we note that, because the trial court did not fully determine the boundaries of the easement due to its conclusion that the easement had terminated, on remand, the trial court must make a determination regarding all of the dimensions of the easement.[9]

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court for a new trial in accordance with this opinion.

In this opinion the other justices concurred.

FAIRFIELD MERRITTVIEW LIMITED PARTNERSHIP *v.* CITY OF NORWALK ET AL.
(SC 19373)

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

Syllabus

The plaintiff partnership, F Co., and the plaintiff limited liability company, S Co., which are related entities with common owners, appealed from a decision by the defendant Board of Assessment Appeals for the defendant city of Norwalk declining to reduce an assessment of certain of their real property. As part of a city wide revaluation in 2008, the property, a commercial office complex, had been assessed by the defendant assessor at more than $49 million. F Co. originally had acquired the property in 1994 and thereafter transferred it to S Co. in 2007. A deed evidencing that transfer was filed in the city's land records. When the property was assessed in 2008, however, F Co. was inaccurately identified as the owner. S Co. challenged the assessment, but the board declined to

[9] We note that the defendants raised this issue in their Appellate Court brief and again in their Practice Book § 84-11 statement to this court.

reduce it, and mailed notice of its decision, again inaccurately addressed to F Co., to an attorney who was an authorized agent for both plaintiffs. F Co. appealed that decision to the trial court, alleging that it was the owner of the property at the time of the 2008 revaluation and that it had appeared unsuccessfully before the board. F Co. and S Co. subsequently filed an amended appeal in which both entities were named as plaintiffs and alleged that they both owned the property in 2008. The amended appeal was accompanied by a motion for permission to amend, which was granted by the trial court. At trial, the plaintiffs submitted two deeds into evidence, establishing both the original acquisition of the property by F Co. and the subsequent transfer to S Co. At the conclusion of the trial, the defendants argued for the first time that the trial court lacked subject matter jurisdiction because F Co., which had initiated the appeal and did not own the property at the time of the assessment, was not aggrieved and lacked standing to appeal pursuant to the statute (§ 12-117a) governing appeals from the board. The defendants acknowledged that S Co. owned the property at the time of the assessment and that the appeal had been amended to add S Co. as a plaintiff, and they did not challenge S Co.'s standing to bring the appeal, the addition of S Co. as a party, or the amendment of the complaint. The trial court rejected the defendants' jurisdictional claim and rendered judgment sustaining the plaintiffs' tax appeal and reducing the valuation of the property by approximately $15 million. That court concluded that at the time of the 2008 assessment, one of the two plaintiffs was the record owner of the property, which was sufficient to provide standing to maintain the appeal. The defendants appealed from that judgment to the Appellate Court, challenging the trial court's jurisdiction to hear the appeal claiming, inter alia, that F Co., as a former owner of the property, was not aggrieved by the city's assessment and could not appeal pursuant to § 12-117a. The defendants further claimed that S Co. was the actual owner of the property and had not appeared before the board, which was fatal to establishing jurisdiction. The plaintiffs contended, inter alia, that they were prevented from responding effectively to the defendants' jurisdictional challenge due to the fact that it was raised after the trial, and that F Co. and S Co. essentially were the same entity, having undergone a change in name and structure but retaining the same beneficial owners. The Appellate Court concluded that the trial court lacked subject matter jurisdiction over the plaintiffs' appeal, rejecting their claims that F Co. and S Co. were in fact the same legal entity and that the defendants' jurisdictional claim was untimely. The Appellate Court further concluded that because the appeals to the board and to the trial court were both brought by F Co., which lacked standing due to its nonownership of the property, the appeal was void ab initio and should have been dismissed by the trial court. Accordingly, the Appellate Court reversed the trial court's judgment and remanded the case to that court with direction to dismiss the plaintiffs' appeal. From that judgment, the

plaintiffs, on the granting of certification, appealed to this court, claiming, inter alia, that the Appellate Court improperly reversed the trial court's judgment because S Co. was the undisputed owner of the subject property on the date of the revaluation and was aggrieved and possessed standing to appeal, regardless of whether it had appeared in the proceedings before the board. The plaintiffs further claimed that their amended appeal naming S Co. as a party was filed promptly after the original complaint, and that the defendants never objected to the amendment. *Held* that the Appellate Court improperly concluded that the trial court lacked subject matter jurisdiction over the plaintiffs' appeal on the basis that S Co. had not appeared in the proceedings before the board, this court having concluded that the prompt amendment of the complaint to add S Co. as a party plaintiff was effective to confer jurisdiction on the trial court, regardless of whether the action initially was instituted by F Co., because the plaintiffs' filing, although captioned as an amendment, effectively was an addition or substitution of the correct plaintiff, to which the defendants did not object, and which the trial court in its discretion properly permitted: given the plain language of § 12-117a, S Co., as a taxpayer and property owner, was aggrieved by the board's refusal to reduce the claimed overassessment of the property and possessed standing to appeal the board's action, and by requiring the plaintiffs also to have proven that S Co. was the party who previously had appeared before the board, the Appellate Court read into § 12-117a a requirement that does not appear in that statute, which extends the right to appeal to any person claiming to be aggrieved by the board's action and indicates that such aggrievement is established by ownership of the property; moreover, although a party's lack of standing is a jurisdictional defect, it is amenable to correction and is not irremediably fatal to an action, pursuant to statute (§ 52-109), the discretionary addition or substitution of a party is allowed when, due to an error, an action is commenced in the name of the wrong party instead of the real party in interest, whose presence is required for a determination of the matter in dispute, and, although the plaintiffs' motion here was captioned as a request for permission to amend the appeal, this court's construction of that motion as a motion to add S Co. was consistent with the principles of statutory construction, the defendants not having identified any prejudice that they suffered from the action having been initiated and briefly maintained by F Co., and this court being unable to conceive of any such prejudice.

(*Two justices dissenting in one opinion*)

Argued September 17, 2015—officially released March 1, 2016

Procedural History

Appeal from the decision by the named defendant's Board of Assessment Appeals upholding the city asses-

sor's valuation of certain real property, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for permission to amend its appeal and application to add Fairfield Merrittview SPE, LLC, as a party plaintiff; thereafter the matter was tried to the court, *Hon. Arnold W. Aronson*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment sustaining the appeal, from which the defendants appealed to the Appellate Court, *Alvord*, *Sheldon* and *Harper*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to dismiss the appeal, and the plaintiff et al., on the granting of certification, appealed to this court. *Reversed; further proceedings.*

James R. Fogarty, for the appellants (plaintiff et al.).

Daniel J. Krisch, with whom were *Mario F. Coppola*, corporation counsel, and *Carolyn M. Colangelo*, assistant corporation counsel, for the appellees (defendants).

Opinion

ROGERS, C. J. This case concerns the standing requirements for maintaining a municipal property tax appeal. The plaintiffs, Fairfield Merrittview Limited Partnership (partnership) and Fairfield Merrittview SPE, LLC (LLC),[1] appeal from the judgment of the Appellate Court reversing the trial court's judgment that had sustained their property tax appeal and reduced the valuation of the LLC's property, for assessment purposes, by approximately $15 million. The Appellate Court reversed the judgment and remanded the case to the trial court with direction to dismiss the plaintiffs' appeal after agreeing with the defendant city of Norwalk

[1] The partnership initially filed the appeal and subsequently amended its complaint and added the LLC as a party plaintiff. Joint references to the partnership and the LLC are to the plaintiffs.

(city)[2] that the plaintiffs' appeal was void ab initio, due to the trial court's lack of subject matter jurisdiction, because the owner of the property at issue had not appeared in subsidiary administrative proceedings before the Board of Assessment Appeals of the City of Norwalk (board) and did not initiate the appeal to the court.[3] *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 149 Conn. App. 468, 477–78, 89 A.3d 417 (2014). The plaintiffs claim that the Appellate Court improperly reversed the trial court's judgment because the tax appeal to the trial court, although initially brought by a nonaggrieved party, the partnership, also was maintained by the LLC, which was an aggrieved party that properly had been added to the trial court proceedings by way of a promptly filed amended complaint. We agree with the plaintiffs and, accordingly, reverse the judgment of the Appellate Court.

The following facts and procedural history, which the parties do not dispute, are relevant to the appeal. The partnership and the LLC are related entities with common owners. The partnership acquired the property at issue, a commercial office complex, in 1994. It then transferred ownership of the property to the LLC in 2007. A deed evidencing this transfer was timely filed in the city's land records. On October 1, 2008, as part of a periodic city wide revaluation,[4] the city's tax assessor; see footnote 2 of this opinion; set the fair market

[2] The plaintiffs also named as defendants the Board of Assessment Appeals of the City of Norwalk (board) and the city's tax assessor, Michael J. Stewart (assessor). We refer hereinafter to these parties individually by name and jointly, with the city, as the defendants.

[3] We granted the plaintiffs' request for certification to appeal, limited to the following question: "Did the Appellate Court properly conclude that the plaintiffs lacked standing to appeal from the tax valuation of the subject property to the Superior Court pursuant to General Statutes § 12-117a?" *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 314 Conn. 901, 902, 99 A.3d 1167 (2014).

[4] See General Statutes § 12-62.

value of the property at $49,036,800. The assessor's field card inaccurately identifies the partnership as the owner of the property. The LLC challenged this assessment before the board pursuant to General Statutes § 12-111,[5] but the board declined to reduce it. The board mailed a notice of no change, again inaccurately addressed to the partnership, to an attorney who was an authorized agent for both entities.

On July 1, 2009, the partnership filed an appeal from the board's action to the Superior Court pursuant to General Statutes § 12-117a.[6] Therein, the partnership alleged that it was the owner of the property at issue on October 1, 2008, was aggrieved by the assessor's action and had appeared, unsuccessfully, before the board. Approximately one month later, on August 7, 2009, the partnership and the LLC filed an "Amended Appeal and Application" (amended appeal) with the trial court, naming both entities as plaintiffs and alleging

[5] General Statutes § 12-111 (a) provides in relevant part: "Any person . . . claiming to be aggrieved by the doings of the assessors of [a] town may appeal therefrom to the board of assessment appeals. . . . Such board . . . may increase or decrease the assessment of any taxable property or interest therein . . . . When the board increases or decreases the gross assessment of any taxable real property or interest therein, the amount of such gross assessment shall be fixed until the assessment year in which the municipality next implements a revaluation of all real property pursuant to section 12-62 . . . ."

[6] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of . . . the board of assessment appeals . . . in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom . . . to the superior court for the judicial district in which such town or city is situated . . . . The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable . . . . If the assessment made by the . . . board of assessment appeals . . . is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes . . . . The amount to which the assessment is so reduced shall be the assessed value of such property on the grand lists for succeeding years until the tax assessor finds that the value of the applicant's property has increased or decreased."

that they both had owned the property on October 1, 2008. The amended appeal was unclear regarding which entity had appeared before the board.[7]

The plaintiffs' amended appeal was accompanied by a motion for permission to amend. The defendants did not object to that motion, and the trial court, *Hon. A. William Mottolese*, judge trial referee, ultimately granted it by summary order dated February 16, 2010. Thereafter, the defendants did not file a motion to dismiss contesting jurisdiction, but rather, filed an amended answer that left the plaintiffs to their proof on their allegations regarding which entity or entities had owned the property on October 1, 2008, and which entity or entities had appealed to the board.

A brief trial was held in December, 2011. During the trial, the plaintiffs submitted two deeds into evidence, thereby establishing the partnership's acquisition of the property in 1994 and its transfer of the property to the LLC in 2007. After the trial concluded, the parties submitted simultaneous posttrial briefs. In their brief, the defendants cited to the deeds in evidence and argued for the first time that the trial court lacked subject matter jurisdiction because the partnership, the party that had initiated the appeal to the court, did not own the property at the time of its assessment and, therefore, was not aggrieved and lacked standing to appeal pursuant to § 12-117a. The defendants acknowledged that the LLC owned the property on October 1, 2008, and that the appeal to the court had been amended to add the LLC as a plaintiff. They did not argue that the LLC lacked standing to bring a § 12-117a appeal, that the addition of the LLC as a party was in any

[7] Specifically, the paragraph of the amended appeal describing the appeal to the board was unaltered from its original version, which provided only that "[t]he applicant . . . [had] appealed to the [board] . . . ."

way defective or that the trial court improperly had permitted the amendment of the complaint.[8]

In an August 6, 2012 memorandum of decision, the trial court, *Hon. Arnold W. Aronson*, judge trial referee, prior to sustaining the plaintiffs' appeal and reducing the defendants' valuation of the subject property from $49,036,800 to $34,059,753, rejected the defendants' jurisdictional claim. The court referenced the 2007 deed conveying the property from the partnership to the LLC and reasoned that, "[a]s of October 1, 2008, at least one of the two plaintiffs named in the amended [appeal] was the record owner of the [property], which is sufficient to provide standing to maintain this appeal." The defendants' appeal to the Appellate Court followed.

In their brief to the Appellate Court, the defendants again contested the trial court's jurisdiction to hear the plaintiffs' appeal, but expanded upon their original argument. In addition to arguing that the partnership, as a former owner, was not aggrieved by the city's assessment of the property and could not bring an appeal to the court pursuant to § 12-117a, the defendants contended further that the LLC, the actual owner of the property, had not appeared before the board and that this omission was fatal to establishing jurisdiction. *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, Conn. Appellate Court Records & Briefs, February Term, 2014, Defendants' Brief pp. 13–14, 16. Citing to the plaintiffs' original and amended appeals, the defendants claimed that it was the partnership, instead, that had appeared before that body. Id., pp. 13, 15. The defendants also stated that the LLC had been added as a party "long after" the period in which to bring an appeal to the trial court had expired, but did not elaborate or

[8] The defendants also argued that the plaintiffs had failed to prove that the property had been overassessed.

point to any evidence in support of this claim.[9] Id., p. 15. Again, in the Appellate Court, the defendants did not argue that the trial court improperly had permitted the amendment of the complaint to add the LLC as a party plaintiff.

In response, the plaintiffs argued that the amendment of the court appeal to add the LLC as a party was filed within thirty days of the return date and, therefore, was an amendment as of right that related back to the filing of the initial appeal; see General Statutes § 52-128; Practice Book § 10-59; or, effectively, was the discretionary addition of an interested party having standing to pursue the appeal. *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, Conn. Appellate Court Records & Briefs, supra, Plaintiffs' Brief pp. 10–11. The plaintiffs contended further that the defendants, by waiting until after the trial had concluded to raise the issue of subject matter jurisdiction, had engaged in an unfair ambuscade that had prevented the plaintiffs from responding effectively to that question. Id., pp. 13–16, 21–22. Finally, according to the plaintiffs, the partnership and the LLC essentially were the same entity, having undergone a change of name and structure but retaining the same beneficial owners. Id., pp. 16–17.

The Appellate Court agreed with the defendants that the trial court lacked subject matter jurisdiction over the plaintiffs' appeal. *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 149 Conn. App. 475. The Appellate Court first rejected the plaintiffs' contention that they were, in fact, the same legal entity, citing a lack of evidence in the record in that regard; id., 476; as well as other circumstances indicating that the two were distinct entities. Id., 476 n.7. It further disagreed

[9] The defendants also argued that the trial court's valuation of the subject property was clearly erroneous. *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, Conn. Appellate Court Records & Briefs, supra, Defendants' Brief pp. 16–19.

that the defendants' jurisdictional challenge was untimely and that the plaintiffs had had an inadequate opportunity in which to respond to it. Id., 477. Finally, the Appellate Court concluded, both the appeal to the board and the appeal to the trial court were brought by the partnership, a party which lacked standing due to its nonownership of the property at issue. Accordingly, the Appellate Court reasoned, the appeal was void, ab initio, and should have been dismissed by the trial court.[10] Id. The Appellate Court did not address the plaintiffs' contention that they properly had amended their complaint to include the LLC as a plaintiff, apparently concluding that the alleged absence of the LLC in the proceedings before the board was a fatal jurisdictional defect.[11]

Subsequent to the issuance of the Appellate Court's decision, the plaintiffs filed a motion for reconsidera-

[10] Because the Appellate Court concluded that the trial court lacked subject matter jurisdiction over the appeal, it did not reach the additional claim, made by the defendants, that the trial court improperly had reduced the valuation of the subject property. *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 149 Conn. App. 470 n.3.

[11] Notably, there was no evidence in the record before either the trial court or the Appellate Court regarding which party, or parties, had brought the appeal to the board and, as previously explained, the pleadings were inconclusive on this point. Apparently, the Appellate Court accepted, without verification, the multiple representations made by the defendants in their brief that the partnership, and not the LLC, had appeared before the board. The plaintiffs, for their part, did not refute those representations, but also did not expressly concede that they were true. Although we conclude, hereinafter, that the Appellate Court reached an improper legal conclusion when it determined that the LLC's purported absence before the board was a fatal jurisdictional defect, we also emphasize that that court should have rejected the defendants' claim in this regard due to the lack of an adequate record. In short, we agree with the contention of the plaintiffs, set forth in their brief, that the Appellate Court improperly found, without any evidentiary basis in the record, that the partnership was the entity that had appealed to the board, then ascribed to that finding dispositive significance. As we explain in footnote 13 of this opinion, the Appellate Court's assumption as to which party had appealed to the board ultimately was shown to be incorrect.

tion en banc, wherein they claimed that the court's decision was based on a material factual error, namely, that the partnership, and not the LLC, was the party that had filed the appeal to the board. The plaintiffs also reiterated their claim that the appeal to the trial court properly had been amended to include the LLC as a party plaintiff.[12] They contended further that the defendants had made a different jurisdictional argument in the Appellate Court than the one they had made to the trial court, and incorrectly had represented to the Appellate Court that the partnership was the party that had appealed to the board.[13] The Appellate Court denied the plaintiffs' motion for reconsideration. This appeal by the plaintiffs followed.

The plaintiffs claim that the Appellate Court improperly reversed the trial court's judgment, for want of subject matter jurisdiction, because the LLC, the undisputed owner of the property at issue on the date of revaluation, was aggrieved and possessed standing to appeal, regardless of whether it had appeared in the proceedings before the board. Accordingly, they claim,

[12] In addition to citing General Statutes § 52-128 and Practice Book § 10-59, governing the amendment of complaints as of right, the plaintiffs cited statutory and Practice Book provisions governing the addition or substitution of parties; see General Statutes §§ 52-108 and 52-109; Practice Book §§ 9-19 and 9-20; as well as cases applying them.

[13] To refute that representation, the plaintiffs attached two documents to their motion for reconsideration that were not part of the trial record: (1) a copy of the application to appeal to the board, which indicated that the applicant and property owner was the LLC, and (2) a copy of the board's decision on the appeal, indicating that the assessment would not be changed, which improperly was addressed to the partnership.

The defendants opposed the motion for reconsideration, arguing that the documents upon which the motion was predicated contradicted the allegations of the plaintiffs' appeal to the court, were not introduced at trial, and were not newly discovered or unavailable at trial. In addition to its opposition to the motion for reconsideration, the defendants also filed a motion to strike the documents appended to that motion, again arguing that those documents were not part of the trial record. The Appellate Court denied the defendants' motion to strike.

proof of that appearance was unnecessary to establish jurisdiction. The plaintiffs point to the plain language and historical antecedents of § 12-117a, and cases applying that provision, in support of this claim. The plaintiffs contend further that their amended appeal, naming the LLC as a party plaintiff, was filed promptly after the original complaint, as a matter of right, pursuant to § 52-128, that the defendants never have objected to the amendment, and that case law governing the addition and substitution of party plaintiffs in tax appeals further supports the addition of the LLC to the proceedings here.[14]

The defendants, in response, have refined further their argument that the trial court lacked subject matter jurisdiction. They again contend, as they did before the Appellate Court, that the partnership, the party that had initiated the appeal to the trial court, lacked standing to appeal because it did not own the subject property at the time of its assessment. The defendants claim further that, because the initial appeal was void for lack of jurisdiction, that appeal was "a legal nullity" that could not be amended properly to include the LLC as a party plaintiff. According to the defendants, the plaintiffs' only option was to withdraw the initial appeal, then to bring a new appeal in the name of the LLC, but even that option was unavailable by the time of the amended appeal because the statutory period in which to bring a § 12-117a appeal had expired.[15] The plaintiffs

[14] Contrary to the assertion of the dissenting justices that the plaintiffs raised the latter argument for the first time in their reply brief, the plaintiffs argued the applicability of jurisprudence governing additions and substitutions of party plaintiffs pursuant to General Statutes § 52-109 in both their main brief and their reply brief.

[15] In support of this contention, the defendants apparently rely on the decision date included on the notice of no change that the plaintiffs submitted to the Appellate Court, for the first time, as an attachment to their motion for reconsideration, a document that the defendants previously argued should be stricken from the record. See footnote 13 of this opinion. The defendants simultaneously argue that, to the extent the plaintiffs are relying on the same nonrecord evidence to prove their standing, such reliance

reply that the amendment of their complaint to add the LLC constituted a proper substitution of a party pursuant to General Statutes § 52-109 and Practice Book § 9-20, which related back to the filing of the original complaint, thereby rendering the timing of the amendment immaterial.

We conclude that the Appellate Court improperly held that the trial court lacked subject matter jurisdiction over the plaintiffs' appeal on the basis that the LLC, the undisputed owner of the property on the date it was assessed, had not appeared in the proceedings before the board. We conclude further that the prompt amendment of the complaint to add the LLC as a party plaintiff was effective to confer jurisdiction on the trial court, regardless of whether the action initially was instituted by an improper party, the partnership. Although captioned as an amendment, the plaintiffs' filing effectively was the addition or substitution of the correct plaintiff, to which the defendants did not object, and which the trial court in its discretion properly permitted.

We begin with the standard of review and general governing principles. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . ." (Internal quotation marks omitted.) *Cambodian*

is improper. Appellate tribunals typically do not rely on evidence that was not part of the trial record in deciding the issues before them. In any event, for the reasons that follow, we need not consider the materials submitted by the plaintiffs to the Appellate Court along with their motion for reconsideration.

Buddhist Society of Connecticut, Inc. v. *Planning & Zoning Commission*, 285 Conn. 381, 393, 941 A.2d 868 (2008). As a general matter, "one party has no standing to raise another's rights." *Sadloski* v. *Manchester*, 235 Conn. 637, 643, 668 A.2d 1314 (1995).

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . 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." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 282 Conn. 791, 802, 925 A.2d 292 (2007).

"[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. . . .

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) Id., 802–803.

"Two broad yet distinct categories of aggrievement exist, classical and statutory"; (internal quotation marks omitted) *Pond View, LLC* v. *Planning & Zoning Com-*

mission, 288 Conn. 143, 156, 953 A.2d 1 (2008); the latter of which is implicated in the present case. "[I]n cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) Id.

The plaintiffs claim that § 12-117a conferred standing on the LLC to pursue an appeal of the board's decision to the court, regardless of whether they proved that the LLC had appeared before the board. We agree. Section 12-117a provides[16] in relevant part that "[*a*]*ny person*, including any lessee of real property whose lease has been recorded as provided under section 47-19 and who is bound under the terms of his lease to pay real property taxes, *claiming to be aggrieved by the action of the . . . board of assessment appeals . . . in any town or city may*, within two months from the date of the mailing of notice of such action, *make application*, *in the nature of an appeal therefrom . . . to the superior court* for the judicial district in which such town or city is situated . . . . The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable . . . . *If the assessment made by the . . . board of assessment appeals . . . is reduced by said court*, *the applicant shall be reimbursed by the town or city for any overpayment of taxes* . . . . The amount to which the assessment is so reduced shall be the assessed value of such property on the grand lists for succeeding years until the tax assessor finds that the value of *the applicant's property* has increased or

[16] "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." General Statutes § 1-2z.

decreased." (Emphasis added.) General Statutes § 12-117a.

Given the plain language of the statute, we agree with the plaintiffs that the LLC[17] was aggrieved by the board's refusal to reduce the claimed overassessment of the subject property and, therefore, that the jurisdictional requirements of § 12-117a were satisfied. Specifically, as proven by the 2007 deed in evidence, the LLC was the owner of the property on the date of its assessment, and it remained so thereafter. Moreover, as owner of the property, it legally was responsible for the payment of any taxes levied on the basis of that assessment. As reflected in the clear wording of the statute, and as this court repeatedly has explained, § 12-117a "allows *taxpayers* to appeal the decisions of municipal boards of [assessment appeals] to the Superior Court, [and] provide[s] a method by which *an owner of property* may directly call in question the valuation placed by assessors upon *his property*." (Emphasis added.) *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 775, 946 A.2d 215 (2008); *Konover* v. *West Hartford*, 242 Conn. 727, 734, 699 A.2d 158 (1997). In short, as a property owner and taxpayer, the LLC is precisely the type of party at which the statute is directed, and it unquestionably possessed standing to appeal to the Superior Court to challenge the board's action.

By requiring the plaintiffs also to have proven that the LLC was the party who previously had appeared before the board, the Appellate Court read into § 12-117a a requirement that simply does not appear in that provision, which extends the right to appeal to "[a]ny person" claiming to be aggrieved by the board's action and indicates otherwise that such aggrievement is established through ownership of the property or, at

[17] The parties agree that the partnership lacked standing and was an improper party to bring an appeal from the board.

least in some cases, responsibility to pay taxes on property despite a lack of ownership. Notably, the Appellate Court did not cite to any authority in support of such a requirement, nor did it engage in an analysis of the statutory language directed at this question. Although we expect that, in the normal course of events, a party that brings an appeal to the trial court pursuant to § 12-117a first will have appeared in the proceedings before a board of tax review or assessment appeals that are a prerequisite to a court appeal, we are unable to conclude that that appearance, in all cases, is required.[18] Accordingly, the Appellate Court's holding to the contrary, and its order that the plaintiffs' appeal be dismissed on this basis, were improper.

Because the Appellate Court concluded that the LLC's purported absence from the proceedings before the board was fatal to the appeal before the trial court, it did not reach the question of whether the prompt amendment of the complaint to add the LLC as a party plaintiff was sufficient to confer standing on the trial court, despite the fact that the appeal initially was filed

[18] By requiring an appealing party to show that it has been aggrieved by the decision of a board of tax review or board of assessment appeals, § 12-117a necessarily requires that a hearing, sought by an aggrieved party; see General Statutes § 12-110; already has occurred before one of those boards. Compare General Statutes § 12-119 (permitting direct court action for wrongfully laid taxes). Moreover, any appeal from a board of tax review or board of assessment appeals must be taken shortly after that board's decision has been rendered. See General Statutes § 12-117a. Consequently, in the typical case, the same aggrieved property owner or taxpayer will appear before both the board and the trial court. As we have explained, however, § 12-117a requires only that the party seeking relief be "aggrieved by the action of the board," and not that it had appeared before that body. Consistent with this proposition is a Superior Court case holding that a party who acquired property subsequent to a decision by the board of tax review or board of assessment appeals concerning that property, but prior to the expiration of the statutory appeal period, is a proper party to contest the board's decision pursuant to § 12-117a. See *SG Stamford, LLC* v. *Stamford*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-08-4014088-S (September 22, 2009).

by the partnership, a party that, indisputably, did not have standing to appeal pursuant to § 12-117a. We conclude that it was sufficient.

Subsequent to the board's direction of correspondence relating to the assessment at issue to the partnership, despite the recordation in the city's land records of a deed evidencing the property's transfer to the LLC, the plaintiffs' counsel initially filed this appeal in the name of the partnership. Only one month later, however, counsel filed an amended appeal also naming the LLC as a plaintiff.[19] The defendants did not object to this amendment, and the trial court allowed it. In fact, the defendants did not contest the court's jurisdiction until almost three years later in a posttrial brief. Even then, the defendants' challenge focused on the partnership's lack of standing, and not on any procedural irregularity concerning the LLC.

Although a plaintiff's lack of standing is a jurisdictional defect; *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 282 Conn. 802; it is a type of jurisdictional defect that our legislature, through the enactment of § 52-109, has deemed amenable to correction and, therefore, not irremediably fatal to an action. That statute provides: "When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." General Statutes § 52-109.

This court has explained that § 52-109 "allow[s] a substituted plaintiff to enter a case [w]hen any action

[19] In view of this promptly filed pleading, we disagree with the dissent's contention that the plaintiffs took no action, either during or after trial, to remedy the jurisdictional defect of the action having been commenced in the name of the wrong party.

has been commenced in the name of the wrong person as [the] plaintiff,'' and that such a substitution will ''relate back to and correct, retroactively, any defect in a prior pleading concerning the identity of the real party in interest.'' (Internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 150, 998 A.2d 730 (2010). Thus, a ''substitution of a real party in interest as the plaintiff cures the lack of standing of the original plaintiff''; *Kortner* v. *Martise*, 312 Conn. 1, 13, 91 A.3d 412 (2014); and, further, is permissible even ''after the statute of limitations has run.''[20] (Internal quotation marks omitted.) Id., 13–14. An addition or substitution is discretionary, but generally should be allowed when, due to an error, misunderstanding or misconception, an action was commenced in the name of the wrong party, instead of the real party in interest, whose presence is required for a determination of the matter in dispute.[21] General Statutes § 52-109.

[20] ''[T]he substituted party is let in to carry on a pending suit, and is not regarded as commencing a new one. After he is substituted he is . . . treated and regarded for most purposes just as if he had commenced the suit originally. The writ, the complaint, the service of process, attachment made, bonds given, the entry of the case in court, the pleadings if need be, in short all things done in the case by or in favor of the original plaintiff . . . remain for the benefit of the plaintiff who succeeds him, as if done by and for him originally and just as if no change of parties had been made. So far as the defendant is concerned, the same suit upon the same cause of action, under the same complaint and pleadings substantially in most cases, goes forward to its final and legitimate conclusion as if no change had been made.'' (Internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 152. ''[T]he defendant rarely, if ever, will be prejudiced [by a § 52-109 substitution], as long as he was fully apprised of the claims against him and was prepared to defend against them.'' Id., 158.

[21] In *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 151, we stated, in dicta, that ''[u]nder § 52-109, substitution is permitted only when the trial court determines that the action was commenced in the name of the wrong plaintiff 'through mistake,' which properly has been interpreted to mean 'an honest conviction, entertained in good faith and not resulting from the plaintiff's own negligence that she is the proper person to commence the [action].' '' As authority for that proposition, which finds

Although the plaintiffs here captioned the motion that accompanied their amended complaint as a request for permission to amend, it clearly was, in its substance, a motion to add or substitute a party plaintiff.[22] See *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 351–52, 63 A.3d 940 (2013) (court may look "beyond the label of a motion to reclassify it when its substance [does] not reflect the label applied by the moving party"); *In re Haley B.*, 262 Conn. 406, 412–13, 815 A.2d 113 (2003) ("we must look to the substance of the relief sought by the motion rather than the form"); see also *In re Santiago G.*, 154 Conn. App. 835, 850, 108 A.3d 1184 ("[t]o hold [a litigant] strictly to the label on his filing

no support in the language of the statute or our jurisprudence preceding *DiLieto*, we cited a Superior Court decision that in fact rejected the recited definition of mistake as too limiting and, practically, too difficult to apply, especially given the ameliorative purpose of § 52-109. See *Wilson* v. *Zemba*, 49 Conn. Supp. 542, 549–50, 896 A.2d 862 (2004). Upon further reflection, we agree, and hold that the term "mistake," as used in § 52-109, should be construed in its ordinary sense, rather than as connoting an absence of negligence. As explained by the Appellate Court, which nonetheless concluded that it was bound to apply the definition of mistake that we articulated in *DiLieto*, the ordinary understanding of that term is "more expansive and, thus, seems more congruent with the remedial purpose of § 52-109." *Youngman* v. *Schiavone*, 157 Conn. App. 55, 66 n.8, 115 A.3d 516 (2015). Specifically, "Black's Law Dictionary (9th Ed. 2009) defines mistake, in relevant part, as: 'An error, misconception, or misunderstanding; an erroneous belief.' Merriam-Webster's Collegiate Dictionary (10th Ed. 1993) defines mistake as: '1: [A] misunderstanding of the meaning or implication of something. 2: [A] wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention . . . .' The American Heritage Dictionary (2d College Ed. 1985) defines mistake, in relevant part, as: '1. An error or fault. 2. A misconception or misunderstanding.' " *Youngman* v. *Schiavone*, supra, 66–67 n.8.

[22] As this court often has explained, pleadings should be construed broadly and realistically, not narrowly and technically. *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 462, 102 A.3d 32 (2014). Moreover, the numerous remedial provisions in our General Statutes reflect the legislative intent that cases should, whenever possible, be heard on their merits rather than dismissed for procedural irregularities. *New England Road, Inc.* v. *Planning & Zoning Commission*, 308 Conn. 180, 188–89, 61 A.3d 505 (2013). Our construction of the plaintiffs' motion is consistent with these principles.

would exalt form over substance"), aff'd, 318 Conn. 449, 121 A.3d 708 (2015). Moreover, under the undisputed facts and circumstances of the present case, there is no question that the foregoing requirements for an addition or substitution were met. Because the LLC was the sole owner of the property at issue at the relevant time, its addition as a party plaintiff undeniably was necessary for a determination of the matter in dispute, and the naming of the partnership, instead of the LLC, was due to an error, misunderstanding or misconception. The plaintiffs' counsel quickly took action to add the LLC as a party to the proceedings. The defendants have not identified any prejudice that they suffered from the action having been initiated and briefly maintained in the name of the wrong party, and we are unable to conceive of any. In sum, the trial court properly allowed the amendment to add the LLC, which cured any jurisdictional defect in the original complaint.[23]

The judgment of the Appellate Court is reversed and the case is remanded to that court for further proceedings to consider the defendants' remaining claims.

In this opinion PALMER, ZARELLA, EVELEIGH and ESPINOSA, Js., concurred.

McDONALD, J., with whom ROBINSON, J., joins, dissenting. There is no doubt that, under our rules of practice and the case law that existed prior to this litigation, the tax appeal of the plaintiffs, Fairfield Merrittview Limited Partnership (partnership) and Fairfield Merritt-

[23] In the dissent's view, it is clear that no substitution of parties occurred because, following the granting of the plaintiffs' motion, the partnership remained a party in the case. General Statutes § 52-109 and Practice Book § 9-20 explicitly permit, however, both substitutions and additions of proper party plaintiffs. Here, it is clear that the trial court properly allowed the addition of the LLC, regardless of whether the partnership also remained in the case.

view SPE, LLC (LLC), was jurisdictionally defective when the trial court rendered judgment. It is undisputed in this court that the partnership lacked standing when it commenced this action in its name. As the majority properly acknowledges, the only mechanism that could have cured such a jurisdictional defect was for the partnership to have been granted permission by the trial court to substitute the proper party, the LLC, for itself as the plaintiff. See General Statutes § 52-109; Practice Book § 9-20; see, e.g., *Kortner* v. *Martise*, 312 Conn. 1, 13, 91 A.3d 412 (2014); *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 150, 998 A.2d 730 (2010). The partnership never sought such a substitution, however, because it repeatedly took the position that it was a proper party to the action. That no substitution occurred is manifest in the partnership's continued presence in the case after the LLC was added to the tax appeal at the trial court, and its appearance in the subsequent appeals to the Appellate Court and this court. Nonetheless, the majority has magically turned back the hands of time, transmogrified the plaintiffs' litigation posture, and spontaneously made the partnership disappear as a party to this tax appeal. To accomplish this feat, the majority has had to disavow statements in an opinion of this court that would preclude affording exactly that relief, although no request to do so was ever made by the plaintiffs. See *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 151.

One might expect that such extraordinary actions must be justified by the need to avoid a terrible injustice that was not of the plaintiffs' making. That is patently not the case. Indeed, the issue resolved in the present case might better be framed as whether this court should rescue a party from a self-inflicted wound that it (or its counsel) readily could have prevented in a

timely way. I would firmly answer that question in the negative.[1]

The essential fact necessary to support standing to challenge the tax assessment made by the defendant city of Norwalk[2] was known to the plaintiffs from the outset. The partnership transferred ownership of the subject property from itself to a related but legally distinct entity, the LLC, by way of deed in June, 2007. Although naming both entities so similarly may not have been the wisest choice, the deed correctly identified the grantor and the grantee, and was duly recorded. The tax assessment at issue was made more than one year after the partnership transferred its ownership to the LLC.

The plaintiffs were represented by the same counsel throughout the proceedings before the defendant Board of Assessment Appeals of the City of Norwalk (board) and up to and including its appeal to the Appellate Court. In a malpractice action filed by the plaintiffs against that counsel following the Appellate Court's judgment in the present case, of which this court properly may take judicial notice,[3] the plaintiffs allege in

[1] I agree with the majority that the Appellate Court improperly rested its resolution of the jurisdictional issue on the basis of an assumption that was not supported by the record, insofar as it concluded that the partnership and not the LLC had appeared before the Board of Assessment Appeals of the City of Norwalk.

[2] In addition to the city of Norwalk, the other defendants named in the tax appeal were the Board of Assessment Appeals of the City of Norwalk and the city's tax assessor, Michael J. Stewart. Like the majority, I hereinafter refer to the three defendants collectively as the defendants, and individually by name where appropriate.

[3] Although it is well settled that this court may take judicial notice of files in other cases; see *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 391 n.3, 107 A.3d 931 (2015); *State* v. *Rizzo*, 303 Conn. 71, 122 n.42, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012); *Jewett* v. *Jewett*, 265 Conn. 669, 678 n.7, 830 A.2d 193 (2003); I underscore that I rely on the plaintiffs' allegations in the malpractice action solely as admissions by them as to their own knowledge. See *West Haven Sound Development Corp.* v. *West Haven*, 201 Conn. 305, 312, 514 A.2d 734 (1986) ("[f]actual allegations contained in pleadings upon which the cause is tried

their complaint that they knew that the administrative appeal had been drafted bearing the name of the wrong entity and had asked counsel to correct that mistake, unaware that the appeal already had been filed. See *Fairfield Merrittview SPE, LLC* v. *Murphy*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-15-6024413-S. Irrespective of whether such a request was in fact ever made, it is clear that either the plaintiffs or their counsel bear responsibility for the fact that the action was commenced under the name of an entity that lacked standing.

It also is important to recognize that the plaintiffs failed to take advantage of other opportunities to cure the jurisdictional defect before judgment entered. The original complaint alleged that the partnership was the owner of the subject property. Thereafter, the partnership filed a motion for permission to amend its appeal and application to add the LLC as a party plaintiff with "an interest in the real estate" pursuant to General Statutes § 52-101 (providing for joinder of interested parties) and Practice Book § 9-3 (same). In the amended appeal, the plaintiffs alleged that the partnership and the LLC were "applicants" before the board and the owner of the subject property. At trial, the deed transferring ownership from the partnership to the LLC was admitted into evidence. At no time before the close of evidence did the plaintiffs seek to substitute the LLC for the partnership pursuant to § 52-109, to withdraw the partnership from the action, or even to amend the complaint to conform to the evidence. After the defendants raised the issue of standing in their posttrial brief,

are considered judicial admissions and hence irrefutable as long as they remain in the case" [internal quotation marks omitted]); *Dreier* v. *Upjohn Co.*, 196 Conn. 242, 244, 492 A.2d 164 (1985) ("statements in withdrawn or superseded pleadings, including complaints, may be considered as evidential admissions by the party making them").

the plaintiffs again took no action to remedy the jurisdictional defect.[4]

Once judgment was rendered and the time passed to open the judgment, the plaintiffs relinquished the possibility of correcting this defect by way of substitution pursuant to § 52-109. Section 52-109 provides in relevant part that "[w]hen any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted . . . as plaintiff." Of course, it is well settled that the court that is supposed to be satisfied that these conditions have been met is the trial court. See *Joblin* v. *LaBow*, 33 Conn. App. 365, 367, 635 A.2d 874 (1993) ("[T]he statute or rule envisions

[4] The majority's recitation of facts strongly intimates that the defendants bear responsibility for the plaintiffs' predicament because they did not raise the issue of standing earlier in the litigation. Such a suggestion runs contrary to settled case law that the court's subject matter jurisdiction can be challenged at any stage in the proceedings, can be raised by the court sua sponte, and cannot be waived or conferred by agreement of the parties. See *Freedom of Information Officer, Dept. of Mental Health & Addiction Services* v. *Freedom of Information Commission*, 318 Conn. 769, 775, 122 A.3d 1217 (2015) ("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." [Internal quotation marks omitted.]); *Wheelabrator Lisbon, Inc.* v. *Dept. of Public Utility Control*, 283 Conn. 672, 685, 931 A.2d 159 (2007) ("[A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case." [Internal quotation marks omitted.]). To the extent that the majority views the defendants' conduct as raising equitable considerations that favor the result that it reaches, putting aside the fact that the plaintiffs never articulated any equitable theory to justify such a result, I question the wisdom, as well as the propriety, of determining subject matter jurisdiction through the lens of equity.

substitution while the action is pending. . . . Where judgment has been rendered, however, substitution is unavailable unless the judgment is opened." [Citations omitted.]), cert. denied, 229 Conn. 912, 642 A.2d 1207 (1994); see also *Systematics, Inc.* v. *Forge Square Associates Ltd. Partnership*, 45 Conn. App. 614, 619, 697 A.2d 701 (applying same principle), cert. denied, 243 Conn. 907, 701 A.2d 337 (1997).

Even when the defendants challenged the plaintiffs' standing on appeal to the Appellate Court, the plaintiffs did not claim that the amended appeal and the addition of the LLC corrected a mistake by substituting a proper party for an improper one. Instead, the plaintiffs again cited joinder of interested parties under § 52-101, and argued for the first time that the amendment was filed as of right under General Statutes § 52-128 and Practice Book § 10-59. See *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 149 Conn. App. 468, 475, 89 A.3d 417 (2014). Section 52-128 is limited to the correction of nonjurisdictional defects. See *LeConche* v. *Elligers*, 215 Conn. 701, 711, 579 A.2d 1 (1990); *Simko* v. *Zoning Board of Appeals*, 205 Conn. 413, 419, 533 A.2d 879 (1987); *Sheehan* v. *Zoning Commission*, 173 Conn. 408, 411–13, 378 A.2d 519 (1977); *Shapiro* v. *Carothers*, 23 Conn. App. 188, 191 n.3, 579 A.2d 583 (1990). The plaintiffs claimed that they in fact were a single entity whose name had changed, while at the same time also claiming that they were coexisting entities with "the identical legal interest and standing to pursue the appeal." In support of the propriety of the amended appeal, the plaintiffs cited case law distinguishing between an amendment that corrects a mere misnomer that does not affect the identity of a party and one that seeks to substitute a new party. See *Kaye* v. *Manchester*, 20 Conn. App. 439, 444, 568 A.2d 459 (1990).

In their certified appeal to this court, the plaintiffs acknowledge that the action had been commenced by

a party that lacked standing. In their main brief, they cite General Statutes §§ 52-123 and 52-128 as the basis for naming the LLC as a "co-plaintiff." Like § 52-128, § 52-123 is available only to correct technical or circumstantial defects, not jurisdictional ones. See *New England Road, Inc.* v. *Planning & Zoning Commission*, 308 Conn. 180, 193–94, 61 A.3d 505 (2013). It was not until the plaintiffs filed their reply brief that they invoked § 52-109 as authority to substitute a plaintiff.[5] Of course, it is well settled that this court generally will not consider an argument raised for the first time in a reply brief. See *Rathbun* v. *Health Net of the Northeast, Inc.*, 315 Conn. 674, 703–704, 110 A.3d 304 (2015); see also *Reardon* v. *Zoning Board of Appeals*, 311 Conn. 356, 367–68 n.8, 87 A.3d 1070 (2014) (citing general rule that claims may not be advanced for first time in reply brief, and noting additionally that issue was not proper subject of appeal because plaintiff advanced these claims before board and trial court "in only the most

[5] The majority's carefully phrased response to this point, that "the plaintiffs argued the applicability of *jurisprudence* governing additions and substitutions of party plaintiffs pursuant to . . . § 52-109 in both their main brief and their reply brief," speaks volumes. (Emphasis added.) See footnote 14 of the majority opinion. The plaintiffs never cited § 52-109 in their main brief. Instead, the plaintiffs' main brief states: "This court has held that . . . § 52-123 is remedial and should be liberally construed, even when faced with a claim of lack of subject matter jurisdiction in a tax appeal. *Andover* [*Ltd.*] *Partnership I* v. *Board of Tax Review*, 232 Conn. 392, 396–99, 655 A.2d 759 (1995). Our general policy with respect to pleadings is very liberal and permits the substitution of parties as the interests of justice require. *Reiner* v. [*West Hartford*, Superior Court, judicial district of New Britain, Docket No. CV-00-0502686-S (March 22, 2001)] (denial of motion to dismiss where tax appeal was taken by trustees, rather than by individual who was true owner of assessed property; amendment allowed over objection); *Udolf* v. [*West Hartford*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-93-0525699 (August 14, 1996) (17 Conn. L. Rptr. 520)] (denial of motion to dismiss where tax appeal was taken by individual, rather than by corporation which was true owner of assessed property; amendment allowed over objection)." The defendants reasonably understood this argument to seek a liberal interpretation of § 52-123 and limited their response accordingly.

tangential way," such that issue not addressed by board or trial court).

In order to rescue the plaintiffs from a mistake of their own making, one which they repeatedly disavowed making, the majority rejects as dicta this court's statement in *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 151, that a "mistake" for purposes of § 52-109 "properly has been interpreted to mean 'an honest conviction, entertained in good faith and not resulting from the plaintiff's own negligence that she is the proper person to commence the [action].' " Significantly, the plaintiffs never acknowledged this standard, let alone asked this court to revisit *DiLieto* or reject this statement of the law. This statement has been cited approvingly by this court and the Appellate Court; see *Kortner* v. *Martise*, supra, 312 Conn. 12; *Rana* v. *Terdjanian*, 136 Conn. App. 99, 110, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012); and, in at least one case, was dispositive of the action. See *Youngman* v. *Schiavone*, 157 Conn. App. 55, 65–70, 115 A.3d 516 (2015) (affirming judgment dismissing action after denying motion to substitute on ground that plaintiffs did not show they filed action in name of wrong person through mistake, as that term is defined in *DiLieto*).

In sum, the blame for the plaintiffs' predicament lies squarely on them. If fault for the missteps lies with their counsel, they have recourse. Counsel, in turn, presumably is protected by insurance. Courts have required parties to bear far more serious consequences of counsel's actions or omissions than the loss of a right to challenge the amount of a property tax assessment. See generally *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633–34, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (The United States Supreme Court stated with respect to the dismissal of a negligence action seeking damages for personal injury: "There is certainly no merit to the con-

tention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." [Internal quotation marks omitted.]); *Gionfrido* v. *Wharf Realty, Inc.*, 193 Conn. 28, 33–34, 474 A.2d 787 (1984) ("We are not insensitive to the apparent harshness of any decision by a court that may be perceived as punishing the client for the transgressions of his or her attorney. . . . We recognize that dismissal is a harsh sanction. Under the circumstances of this case, however, we would do a disservice to the great majority of attorneys, who are conscientious, and to the litigants of this state if we unduly interfered with the trial court's judicious attempts at caseflow management. We conclude that the trial court did not abuse its sound discretion in dismissing the plaintiff's action for failure to prosecute." [Citations omitted; footnote omitted; internal quotation marks omitted.]). I am deeply concerned that the majority's actions in the present case expose the court to the risk of either appearing to afford special treatment in one case or opening the door to requests to apply a similar revisionist view of history in other cases.

I respectfully dissent.

STATE OF CONNECTICUT *v.* JAMES P. CARTER, JR. (SC 19384)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald and Robinson, Js.

Argued November 4, 2015—officially released March 8, 2016

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal violation of a restraining order, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *D'Addabbo*, *J.*; verdict and judgment of guilty, from which the defendant appealed; thereafter, the Appellate Court, *Bear*, *Keller* and *Pellegrino*, *Js.*, affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

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

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Paul N. Rotiroti*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, James P. Carter, Jr., was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a and criminal violation of a restraining order in violation of General Statutes (Rev. to 2009) § 53a-223b (a) (1) (A) (2) (D),[1] for the fatal stabbing of his former girlfriend, Tiana Notice (vic-

[1] General Statutes (Rev. to 2009) § 53a-223b (a) provides in relevant part: "A person is guilty of criminal violation of a restraining order when (1) (A) a restraining order has been issued against such person pursuant to section 46b-15 . . . and (2) such person, having knowledge of the terms of the order . . . (D) threatens, harasses, assaults, molests, sexually assaults or attacks a person in violation of the order."

tim), on February 14, 2009. The defendant appealed from the trial court's judgment, claiming that his conviction of criminal violation of a restraining order was improper because the state adduced insufficient evidence to prove beyond a reasonable doubt that he had violated § 53a-223b (a) (1) (A) (2) (D).[2] Specifically, the defendant contended that the state had failed to prove that a restraining order was in effect on the date of the crime, that such an order prohibited him from assaulting the victim, and that he had knowledge of the terms of that order insofar as it imposed that prohibition. *State* v. *Carter*, 151 Conn. App. 527, 532, 534–35, 95 A.3d 1201 (2014).

The Appellate Court affirmed the judgment of conviction. Id., 529. It concluded that, although the state had proffered only the ex parte restraining order issued on January 8, 2009, which would have expired by its terms on January 16, 2009; id., 529–30; there was a reasonable evidentiary basis for the jury to infer that another order had been issued that was in effect on the date of the crimes.[3] Id., 535. The Appellate Court cited statements

[2] The defendant was sentenced to sixty years imprisonment on the murder conviction and five years imprisonment on the criminal violation of a restraining order conviction, the sentences to run concurrently. As the Appellate Court properly noted, the defendant's appeal of the lesser sentence is not rendered moot simply because we cannot afford him relief in terms of the length of his sentence. See *State* v. *Carter*, 151 Conn. App. 527, 532 n.6, 95 A.3d 1201 (2014) (citing collateral consequences of conviction).

[3] We assume that the state's failure to proffer the restraining order in effect at the time of the crimes was inadvertent. A restraining order agreement, signed by the defendant and approved by the court, *Prestley, J.*, on January 16, 2009, bearing an expiration date of July 16, 2009, is in the family court case file. That order barred the defendant from, inter alia, "having any contact in any manner" with the victim or "threatening, harassing, stalking, assaulting, molesting, sexually assaulting or attacking" the victim. *Notice* v. *Carter*, Superior Court, judicial district of New Britain, Docket No. FA-09-4019552 (January 16, 2009); see *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 391 n.3, 107 A.3d 931 (2015) (taking judicial notice of files in other cases); *Jewett* v. *Jewett*, 265 Conn. 669, 678–79 n.7, 830 A.2d 193 (2003) (same).

by the defendant on the day of the crimes admitting that there was a restraining order in effect, as well as a statement and actions by the police indicating that such an order was in effect. Id., 535–36. As to the terms of that order, the Appellate Court referred to the ex parte order, which, inter alia, barred the defendant from contacting or assaulting the victim, and reasoned that, because the defendant had continued to engage in the same conduct that had given rise to the ex parte order (unwanted communication with the victim) after issuance of that order, it would be reasonable to infer that the subsequent order would have imposed the same terms as the ex parte order. Id., 536–37. Finally, as to the defendant's knowledge of the terms of the order, including a prohibition on assaulting the victim, the Appellate Court relied on the defendant's statements to the police that he knew that there was a "full" restraining order against him and that he knew that he could not send the victim anything. Id., 535–36.

The defendant filed a petition for certification to appeal to this court, contending that review was warranted because the Appellate Court's decision contravened the best evidence rule and case law holding that evidence other than an original document is insufficient proof when the effective date and terms of that document are at issue. We granted the defendant's petition, limited to the following issue: "Did the Appellate Court properly conclude that there was sufficient evidence of a restraining order in effect that prohibited the defendant from assaulting the victim?" *State* v. *Carter*, 314 Conn. 915, 100 A.3d 850 (2014).

After having read the record and the parties' appellate briefs and after having considered their oral arguments, we have determined that certification of this matter was improvidently granted. The defendant no longer advances the broad proposition asserted in his petition for certification; indeed, at oral argument, he conceded

that an original restraining order would not necessarily be required evidence in every case if other testimonial and documentary evidence provided a sufficient basis to prove the document's terms beyond a reasonable doubt. Instead, he contends that the Appellate Court's conclusion was too speculative in light of the evidence proffered in the present case. In light of the shift in the defendant's focus, we conclude that certification was improvidently granted. See Practice Book § 84-2 (basis for certification by Supreme Court).

In dismissing this appeal, we take no position as to the correctness of the Appellate Court's opinion. See *Williams* v. *Commissioner of Correction*, 240 Conn. 547, 549 n.1, 692 A.2d 1231 (1997); see also *New London* v. *Foss & Bourke, Inc.*, 276 Conn. 522, 525, 886 A.2d 1217 (2005) ("a dismissal of a certified appeal on the ground that certification was improvidently granted should not be understood as either approval or disapproval of the decision from which certification to appeal was originally granted" [internal quotation marks omitted]).

The appeal is dismissed.

STATE OF CONNECTICUT *v.* RUSSELL PEELER (SC 19282)

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

Syllabus

Convicted, following a second trial by jury, of the crimes of murder, attempted murder, and risk of injury to a child in connection with certain shootings in Bridgeport, the defendant appealed to this court claiming that the trial court violated his constitutional right to counsel of his choice by improperly denying his motion for public funding of a private attorney, M. Although the defendant had originally retained M as his attorney, the state filed a motion to disqualify M before the defendant's first trial on the ground that it intended to call M as a witness in a separate

criminal proceeding against the defendant. The trial court granted the state's motion and subsequently appointed a second attorney, S, as assigned counsel to represent the defendant. The jury in the defendant's first trial returned a verdict finding the defendant guilty on all counts, and the trial court rendered judgment in accordance with that verdict. Thereafter, the defendant appealed to this court claiming that he was denied his right to counsel of choice because the state did not demonstrate a compelling need for M's testimony in the separate criminal proceeding. This court agreed with the defendant, reversed the trial court's judgment of conviction, and remanded the case for a new trial. On remand, the defendant filed a motion asking the trial court either to require the state to provide funding for M's fee or, in the alternative, to dismiss the charges against him. At a hearing on the defendant's motion, the trial court determined that the defendant was indigent, that the state would not agree to pay M's private fee rates, and that M would not accept the rates provided to assigned counsel. The trial court subsequently denied the defendant's motion, concluding that this court's previous decision reversing the defendant's conviction did not require public funding of M's fee. Following a second trial at which S again represented the defendant, the jury returned a verdict finding the defendant guilty on all counts, and the trial court rendered a judgment of conviction in accordance with that verdict. On the defendant's subsequent appeal to this court, *held* that the defendant could not prevail on his claim that the trial court violated his constitutional right to counsel of choice by denying his motion for public funding of M's fee, the defendant having been entitled on remand to only a new trial where his options for legal representation were determined by the conditions existing at the time, and the trial court here having properly protected the defendant's right to counsel of choice by considering the extent to which M was willing and able to represent the defendant on remand: at a new trial to remedy a violation of a criminal defendant's right to counsel of choice, the trial court is required to consider whether it is feasible to allow the defendant the attorney of his choice; if the defendant wishes to engage the services of the attorney who previously had been unable to represent him due to the counsel of choice violation, and that attorney is willing and able to represent that defendant at his new trial under a mutually acceptable fee arrangement, including by assignment if the defendant has become indigent, the trial court should have that attorney represent the defendant; if that attorney is unwilling or unable to represent the defendant at the new trial at a mutually agreeable fee, the defendant's sole relief lies in the new trial itself and the hiring or appointment of new counsel.

Argued December 14, 2015—officially released March 8, 2016

Procedural History

Substitute information, in one case, charging the defendant with one count of the crime of attempt to commit murder and two counts of the crime of risk of injury to a child, and substitute information, in a second case, charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield, where the cases were consolidated; thereafter, the court, *Ford*, *J.*, granted the state's motion to disqualify defense counsel and appointed assigned counsel, and the matter was tried to the jury before *Ford*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which reversed the trial court's judgment and remanded the case for a new trial; subsequently, the court, *Devlin*, *J.*, denied the defendant's motion for funding for the counsel of his choice or to dismiss; thereafter, the case was retried to the jury before *Kavanewsky*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Emily D. Trudeau, deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Joseph Corradino*, senior assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. This appeal requires us to consider the extent to which a criminal defendant is entitled to representation by a particular attorney at a new trial ordered in accordance with *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), as the remedy for the violation of his right to counsel of choice under the sixth amendment to the United States constitution, when that defendant has

become indigent and cannot afford to retain that attorney's services for the new trial. The defendant, Russell Peeler, appeals[1] from the judgment of the trial court in two consolidated cases, rendered after a jury trial conducted on remand from this court's decision in *State* v. *Peeler*, 265 Conn. 460, 828 A.2d 1216 (2003), cert. denied, 541 U.S. 1029, 124 S. Ct. 2094, 158 L. Ed. 2d 710 (2004) (*Peeler I*), convicting him of attempted murder in violation of General Statutes § 53a-49 (a) and General Statutes (Rev. to 1997) § 53a-54a (a), two counts of risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21 (1), and murder in violation of General Statutes (Rev. to 1997) § 53a-54a (a). On appeal, the defendant claims that the trial court improperly failed to effectuate the remedy ordered by this court in *Peeler I* for the improper disqualification of his chosen attorney, Gary Mastronardi, when it denied his motion to require the state to pay Mastronardi's private fee rates, because he had become indigent and Mastronardi would not represent him at the new trial at the rate paid to assigned counsel by the Division of Public Defender Services (division).[2] We disagree and, accordingly, we affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history regarding the two consolidated cases underlying the present appeal. "In the first case, the state alleged that, on September 2, 1997, in the vicinity of 500 Lindley Street in Bridgeport, the defendant had attempted to murder Rudolph Snead, Jr., his partner in a crack cocaine operation, by shooting at [him] while in his car, and that the defendant thereby

[1] The defendant appeals directly to this court pursuant to General Statutes § 51-199 (b) (3).

[2] As the parties observe, the division now refers to attorneys in private practice appointed to represent indigent criminal defendants as "assigned counsel"; it previously had referred to them as "special public defenders." In this opinion, we refer to such attorneys as assigned counsel unless quoting from judicial opinions or transcripts using the former parlance.

had committed risk of injury to the two minor children, Leroy Brown, Jr., and Tyree Snead, both seven years of age, who were in the backseat of [Rudolph] Snead's car during the shooting. All three of the victims were identified by name in the police arrest warrant affidavit dated September 11, 1997, and in the second substitute information filed January 20, 1998. In the second case, the state alleged that on May 29, 1998, while he was free on bond following his arrest for the drive-by shooting in the first case, the defendant, who had covered his face to conceal his identity, murdered [Rudolph] Snead at the Boston Avenue Barbershop in Bridgeport. The defendant was represented initially by Frank Riccio in connection with the first case and, thereafter, by . . . Mastronardi, who filed his appearance on July 23, 1998, in connection with both cases.

"Following the consolidation of the two cases, on August 11, 1998, the state filed a motion for a protective order to preclude disclosure to the defense of the identity of certain witnesses, including the two minor victims, Brown and Tyree Snead. At the hearing on that motion, held on October 6, 1998, the trial court, *Ronan*, *J.*, provided Mastronardi with two alternatives: (1) the court would order disclosure of the names and addresses of the state's witnesses to Mastronardi, but would prohibit him from disclosing that information to the defendant; or (2) the court would grant the defendant's discovery motion with the names and addresses redacted. The court assured Mastronardi that, prior to trial, he would be able to share the information with the defendant to prepare his defense. Mastronardi advised the court that he knew that there were two minors involved in the drive-by shooting and that he and the defendant already knew their names. On December 9, 1998, the court nevertheless issued an order precluding Mastronardi from disclosing to the defendant the names and addresses of any witnesses

who had given statements to the police. Pursuant to that court order, on or about December 23, 1998, [S]enior [A]ssistant [S]tate's [A]ttorney C. Robert Satti, Jr., provided Mastronardi with the statement by Brown regarding the drive-by shooting and filed with the clerk of the court notice of service of disclosure with an attached supplemental disclosure listing, inter alia, the statement given by Brown.

"Tragically, on January 7, 1999, Brown and his mother, Karen Clarke, were brutally murdered in their apartment on Earl Avenue in Bridgeport, where they recently had moved. The state thereafter charged the defendant and his brother, Adrian Peeler, in a third case with those murders, and John Walkley filed an appearance as a special public defender for the defendant in connection with the Brown and Clarke murders.[3]

[3] With respect to the Brown and Clarke murders, "the defendant was convicted of one count of murder in violation of General Statutes [Rev. to 1999] § 53a-54a (a), two counts of capital felony in violation of General Statutes (Rev. to 1999) § 53a-54b (8) and (9), respectively, and one count of conspiracy to commit murder in violation of [General Statutes (Rev. to 1999) § 53a-54a (a) and General Statutes § 53a-48 (a)]." (Footnotes omitted.) *State* v. *Peeler*, 271 Conn. 338, 343–44, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005) (*Peeler II*). In convicting the defendant of these charges, the jury found that the defendant had arranged for Adrian to kill Brown and Clarke, with the aid of two other people. Id., 352–55. The state sought the death penalty, and following a penalty phase hearing, the jury deadlocked on whether to sentence the defendant to death. Id., 355–56. The trial court then denied the state's motion for a mistrial, "subsequently dismissed the penalty phase proceedings, rendered a judgment of guilty in accordance with the verdict and, merging the two capital felony counts and the murder count, sentenced the defendant to a total effective sentence of life imprisonment without the possibility of release." Id., 356–57. Following appeals by the state and the defendant from this judgment, this court affirmed the defendant's convictions in *Peeler II*, but reversed the sentence of life imprisonment without the possibility of release, and remanded the case for a new penalty phase hearing. Id., 456; see also id., 422–23 (agreeing with state's claim that trial court improperly denied its motion for mistrial and improperly instructed jury that deadlock would result in sentence of life imprisonment without parole). After a new penalty phase hearing was held on remand from *Peeler II*, a jury unanimously concluded that a death sentence was appropriate, and the trial court ren-

"On June 9, 1999, the state moved to disqualify Mastronardi from representing the defendant in the two cases involving [Rudolph] Snead on the ground that the state intended to call Mastronardi as a witness in the defendant's capital felony case for the murder of Brown and Clarke." (Footnote altered.) Id., 463–65. After a hearing, the trial court, *Thim*, *J.*, granted the state's motion to disqualify Mastronardi, concluding that " 'one of the core issues in the case is . . . [what] knowledge [the defendant] had about Brown's potential testimony and when and how he obtained that knowledge.' " Id., 467. Mastronardi then returned the unearned balance of his retainer to the defendant, and the trial court then appointed Attorney Robert Sullivan as assigned counsel to represent the defendant. Id.

"Following a jury trial, the defendant was convicted of all four charges in connection with [the two] cases [involving Rudolph Snead] and sentenced to a total effective sentence of 105 years incarceration after the sentence enhancement pursuant to General Statutes § 53-202k was imposed."[4] Id., 468. The defendant appealed from the judgment of conviction directly to this court, claiming that, "in the absence of a compelling need for Mastronardi's testimony at the trial involving the Brown and Clarke homicides, the trial court improperly granted the state's motion to disqualify Mastronardi in the [two] cases [involving Rudolph Snead]. The defendant contend[ed] that he was denied his constitutional

dered judgment in accordance with the jury's verdict, from which the defendant again appealed to this court. That appeal remains pending before this court under Docket No. SC 18125.

[4] "Additionally, the court, [*Thim*, *J.*] pursuant to a motion by the state, consolidated all of the cases against the defendant with the case against his brother, Adrian Peeler, in connection with the Brown and Clarke homicides. Later, the trial court, *Ford*, *J.*, granted the defendant's motion to sever the cases against him involving [Rudolph] Snead from the capital felony cases against the defendant and his brother involving Brown and Clarke." *Peeler I*, supra, 265 Conn. 468.

right to counsel of choice under the state and federal constitutions because the state did not demonstrate a compelling need for Mastronardi's testimony." Id., 469; see also *Wheat* v. *United States*, 486 U.S. 153, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *Ullmann* v. *State*, 230 Conn. 698, 716–17, 647 A.2d 324 (1994). This court agreed with the defendant and reversed the judgment of conviction, concluding that the improper disqualification of Mastronardi was structural error requiring a new trial. *Peeler I*, supra, 265 Conn. 475, 478.

On remand, the trial court, *Devlin*, *J.*, convened a status conference to determine which attorney would represent the defendant at his new trial, observing that this case was now the oldest matter pending on the judicial district's docket. Sullivan again entered an appearance on behalf of the defendant as assigned counsel, and appeared with him at that conference, at which Mastronardi also was present. The trial court stated that the defendant now appeared indigent, insofar as the division was representing him, either directly or through assigned counsel, in other pending appeals and habeas corpus matters. In response to the court's inquiry, Mastronardi stated that he did not "believe that [he] would be able" to represent the defendant, explaining that the defendant had made "substantial payments toward the trial," and that "after my disqualification, I returned all of that money to designated members of his family. So, therefore . . . I'm not holding any trial fee at all anymore, so I would not be in a position at this time to represent [the defendant]."[5] Sullivan advised the court that the defendant no longer could afford to pay Mastronardi's private rates because of his indigency, and that Sullivan did not expect the division

[5] Mastronardi advised the court that he and the defendant had entered into a fee arrangement requiring the payment of separate pretrial and trial fees. He stated that he had refunded the trial portion of the fee to the defendant.

to be willing to pay for Mastronardi to represent the defendant at those rates. Mastronardi, in turn, stated that he would not represent the defendant at the division's assigned counsel fee rates. Sullivan then stated that the defendant intended to file a motion asking the court to order the state to fund Mastronardi's private fee, or, alternatively, to dismiss the charges against the defendant.

The defendant subsequently filed that motion, asking the court either to require the state to provide funding for his counsel of choice, or, alternatively, to dismiss the charges against him.[6] At a hearing on that motion, the parties established that the defendant was now indigent and that the division would not pay Mastronardi's private fee rates for the defendant's representation.[7] The trial court clarified its understanding that Mastronardi would not accept assigned counsel rates to represent the defendant, and stated that it would not compel him to do so. The trial court then disagreed with the defendant's claim that he was entitled to have the state pay for Mastronardi to represent him at his retrial, rejecting his argument that not doing so would render the constitutional remedy in this court's decision in *Peeler I* "meaningless" because it would mean that this court "is basically sending [the case] back to have another trial with another counsel not of his choice."[8]

[6] The defendant also sought, and the trial court denied, dismissal on double jeopardy grounds. The defendant does not challenge that aspect of the trial court's ruling in the present appeal.

[7] There was some discussion about the amount of trial fees that Mastronardi had returned to the defendant, with the defendant arguing through Sullivan that the fee Mastronardi had negotiated at the defendant's first trial was based on dramatically different circumstances, insofar as the new trial presented far more significant discovery and trial preparation obligations.

[8] The defendant argued that the state was obligated to pay Mastronardi to represent him because the state had created the problem by filing the original motion to disqualify Mastronardi, emphasizing that the defendant had the ability to pay Mastronardi at the time of the original motion. The defendant also argued that not paying Mastronardi to represent him would require dismissal of the charges against him because it would mean that the violation of his right to counsel of choice could not be remedied.

The trial court denied the defendant's motion, relying on *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989), to conclude that his argument "focus[ed] in on one phrase in [*Peeler I*, supra, 265 Conn. 476] to the exclusion of really a much broader context supported by a lot of law, around the country, that the right to . . . private counsel means the right to privately compensated counsel. That's our history in America. . . . [U]ntil we had public defenders, that's how people got [attorneys], they paid for them. And so I do not see the fact that [the defendant's] economic circumstances have now changed to the point where he's unable to afford counsel to be a justification for either dismissing—basically not putting him to trial on . . . this case." The trial court further denied the defendant's request for "public funding of . . . Mastronardi's fee," concluding that *Peeler I* did not require it. Accordingly, the trial court scheduled the matter for a trial at which Sullivan would represent the defendant.[9]

Subsequently, the case was tried to a jury, which returned a verdict finding the defendant guilty on all counts. The trial court, *Kavanewsky, J.*, then rendered a judgment of conviction in accordance with the jury's verdict, and sentenced the defendant to a total effective sentence of 105 years imprisonment to be served consecutive to any sentence that the defendant was currently serving. This direct appeal followed.

On appeal, the defendant argues that the trial court improperly denied his motion to require the state to

[9] Acknowledging the defendant's expressed intention to file an interlocutory appeal from this decision, the trial court stated that the trial date would be subject to any appellate stays. The defendant did not, however, file an interlocutory appeal; he observes in his brief in this appeal that: "In general, an order disqualifying counsel is not immediately appealable." But see footnote 18 of this opinion.

pay Mastronardi's fees to represent him at his new trial, or in the alternative, to dismiss the charges against him. He contends that to "deprive him again of Mastronardi's services at retrial violates the spirit and the letter" of *Peeler I*, asking rhetorically: "What would be the point of remanding the case for a new trial because of an erroneous deprivation of his choice of counsel if [the defendant] would be represented in that trial by the same attorney who replaced his choice of counsel in the first trial?" Although the defendant acknowledges that, "if [he] had never been able to afford private counsel, he could not reject the public defender's services and insist that public funds be used to retain a specific private attorney"; see, e.g., *Caplin & Drysdale, Chartered* v. *United States*, supra, 491 U.S. 624–25; *Wheat* v. *United States*, supra, 486 U.S. 159; he nevertheless argues that the order of this court in *Peeler I* remanding the case for a new trial because of the improper disqualification of Mastronardi, consistent with *United States* v. *Gonzalez-Lopez*, supra, 548 U.S. 150, renders this case distinguishable from that of a "typical . . . indigent defendant dissatisfied with his assigned attorney."

In response, the state contends that the defendant's requested remedy in this appeal, namely, a third trial at which Mastronardi would be paid to represent him, "goes well beyond the relief ordered" in *Peeler I*, and that the sole remedy for the violation of a criminal defendant's right to counsel of choice is a new trial, with the defendant's financial resources at that point dictating the breadth of his choice of counsel. To this end, the state emphasizes that the court's order of a new trial in *Peeler I* already afforded the defendant a "significant benefit" in the form of a "mulligan." Describing the right to counsel of choice as a "legal concept, not an individual attorney who could be dead, disbarred, retired, or simply unwilling to take on the defendant's case," the state posits that it would be

"impossible to go further and guarantee the defendant [that] he would be represented by . . . Mastronardi at the retrial." Noting the lack of directly on point authority, the state relies on *United States* v. *Childress*, 58 F.3d 693 (D.C. Cir. 1995) (per curiam), cert. denied, 516 U.S. 1098, 116 S. Ct. 825, 133 L. Ed. 2d 768 (1996), for the proposition that the trial court has no duty to do anything on remand beyond inquire about whether "the previously disqualified counsel is willing to resume representation at a rate the defendant can afford, and, if the disqualified counsel is unwilling to do so, there is no error when the trial court assigns a different attorney and proceeds to trial." We agree with the state and conclude that the defendant was not entitled to anything more than a new trial on remand, with his options for legal representation determined by the conditions existing at the time of his new trial, including whether Mastronardi was willing and able to represent him at a mutually agreeable fee.

We begin with the applicable standard of review. Whether an indigent defendant is entitled to the services of a particular attorney at a new trial ordered by an appellate court, as a remedy for the violation of his right to counsel of choice, is a question of constitutional law over which our review is plenary. See, e.g., *H. P. T.* v. *Commissioner of Correction*, 310 Conn. 606, 612–13, 79 A.3d 54 (2013).

Our analysis is guided by the following general principles concerning the right to counsel of choice under the sixth amendment to the United States constitution, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his [defense]. We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. . . . [T]he [s]ixth [a]mendment guarantees a defendant the right to be represented

by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds."[10] (Citations omitted; internal quotation marks omitted.) *United States* v. *Gonzalez-Lopez*, supra, 548 U.S. 144, quoting *Caplin & Drysdale, Chartered* v. *United States*, supra, 491 U.S. 624–25; *Wheat* v. *United States*, supra, 486 U.S. 159; see also, e.g., *Peeler I*, supra, 265 Conn. 471–72.

"To be sure, the right to counsel of choice is circumscribed in several important respects." (Internal quotation marks omitted.) *United States* v. *Gonzalez-Lopez*, supra, 548 U.S. 144. Significantly, "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." *Wheat* v. *United States*, supra, 486 U.S. 159. "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them. . . . Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. . . . We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar . . . . The court has, moreover, an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." (Citations omitted; internal quotation marks omitted.) *United States* v. *Gonzalez-Lopez*, supra, 151–52, citing *Caplin & Drysdale, Chartered* v.

[10] In his brief, the defendant also relies on the state constitutional right to counsel. See Conn. Const., art. I, § 8. Because he does not provide any independent analysis asserting greater protections under the state constitution; see, e.g., *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992); "we deem abandoned any state constitutional . . . claim. . . . Accordingly, we analyze the defendant's . . . claim under the federal constitution only." (Citation omitted.) *State* v. *Skok*, 318 Conn. 699, 701–702 n.3, 122 A.3d 608 (2015).

United States, supra, 491 U.S. 624–26; *Wheat* v. *United States*, supra, 159–60; *Morris* v. *Slappy*, 461 U.S. 1, 11–12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983).

In *Gonzalez-Lopez*, the United States Supreme Court held that "erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error."[11] (Internal quotation marks omitted.) *United States* v. *Gonzalez-Lopez*, supra, 548 U.S. 150. The Supreme Court was, however, silent about whether the defendant is constitutionally entitled to representation by his previously disqualified attorney at that new trial, regardless of any change in circumstances at that time, such as the defendant becoming indigent. See id., 152. Our rescript in *Peeler I* is similarly silent, directing remand for a "new trial" with no further qualification after concluding that, "[u]nder the particular circumstances of this case, because the state did not demonstrate the compelling need for Mastronardi's testimony . . . the appropriate remedy for this court is to order a new trial."[12] (Citation omitted.) *Peeler I*,

[11] In so concluding, the Supreme Court observed that: "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds . . . or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. [Harmless error] analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (Citation omitted; internal quotation marks omitted.) *United States* v. *Gonzalez-Lopez*, supra, 548 U.S. 150.

[12] As the defendant recognized in arguing this case to the trial court, this court stated in the body of its opinion in *Peeler I* that, "if the trial court in the present case improperly disqualified Mastronardi, the appropriate remedy is

supra, 265 Conn. 478. Indeed, as both parties recognize, this case appears to present a question of first impression nationally, as neither the parties' briefs, nor our independent research, reveals any case law directly on point.[13]

The most persuasive authority we have found in this context is the decision of the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Childress*, supra, 58 F.3d 693, on which the state relies heavily to support its argument that a defendant is not guaranteed representation by a particular attorney at a new trial ordered to remedy an earlier

to reverse the judgment of conviction and grant the defendant a new trial with his counsel of choice." *Peeler I*, supra, 265 Conn. 476. This court did not, however, provide in *Peeler I*: (1) any citation to support the proposition that the defendant is guaranteed the right to representation by his counsel of choice at his new trial, regardless of any change in circumstance; or (2) guidance with respect to what would happen if the defendant's chosen counsel were not available, willing, or able to represent him on remand.

[13] Our independent research reveals several decisions from other state courts with language similar to *Peeler I*, supra, 265 Conn. 476, in the body or rescript portions of opinions, stating that remand for a new trial with counsel of choice is the appropriate remedy for choice of counsel violations. See *State* v. *Roberts*, 569 So. 2d 671, 677 (La. App. 1990) (stating that remedy for improper denial of continuance to engage new attorney "is to reverse [the defendant's] conviction and sentence and remand the case for a new trial with counsel of his choice"); *People* v. *Johnson*, 215 Mich. App. 658, 670, 673, 547 N.W.2d 65 (1996) (reversing conviction and remanding case "for a new trial before a different judge in accordance with this opinion," at which "defendant may be represented by [improperly disqualified public defender] if he requests such representation"), appeal dismissed, 560 N.W.2d 638 (Mich. 1997); *Commonwealth* v. *Rucker*, 563 Pa. 347, 352, 761 A.2d 541 (2000) (stating that "[a]ppellant is entitled to a new trial with representation to be provided by his privately-retained counsel," with rescript stating that "[j]udgment of sentence [is] reversed, and a new trial [is] granted"); *Commonwealth* v. *Prysock*, 972 A.2d 539, 545 (Pa. Super. 2009) (reversing denial of motion for continuance to allow defendant to substitute retained counsel for public defender, with rescript remanding case "for a new trial with retained counsel"). Like *Peeler I*, however, none of these cases provide any guidance, either directly or through their subsequent history, with respect to further remedies should the defendant no longer be able to retain his choice of counsel on retrial.

counsel of choice violation. *Childress* was a complex appeal that arose from three trials at which twenty-nine defendants were charged with narcotics, murder, and conspiracy charges. Id., 733–34. One of the defendants in that case, Columbus Daniels, was convicted of, inter alia, conspiracy to distribute cocaine and murder in the second and third trials, respectively, and sought reversal of his convictions on the ground that the trial court violated his right to counsel of choice by sua sponte disqualifying his retained attorney, R. Kenneth Mundy. Id. The court concluded that Mundy had been properly disqualified at the second trial, but agreed with Daniels' argument that the trial court had improperly failed to consider whether Mundy could represent him at the third trial because the possibility of the conflict was no longer present by the time of that trial. Id., 734–35. A gap in the record with respect to whether Mundy "would have been willing and able to represent Daniels [at the third] trial," however, left the court unable to determine whether the trial court had actually violated Daniels' right to choice of counsel at the third trial. Id., 735. Accordingly, the District of Columbia Circuit remanded the case to the trial court "for an inquiry into whether Mundy would have been willing and able to reenter the case," with direction to order a new trial "[*i*]*f*, after a hearing, the [trial] court concludes that Mundy would have reentered the case on financial terms that Daniels could have met . . . ."[14] (Emphasis added.) Id., 736.

The remedies ordered by the District of Columbia Circuit in *Childress* provide strong support for the state's argument that a defendant is not guaranteed

[14] Alternatively, the District of Columbia Circuit stated: "If, on remand, the district court concludes that Mundy would not have reentered the case on terms that Daniels could have met, we hold that Daniels was not denied counsel of choice and that his murder . . . [conviction] must stand." *United States* v. *Childress*, supra, 58 F.3d 736.

representation by his previously disqualified attorney at his new trial. First, the court contemplated a new trial as a remedy for any counsel of choice violation, despite the fact that Mundy, the improperly disqualified attorney, had died during the pendency of Daniels' appeal and, therefore, would not be able to represent him at that new trial.[15] See id. ("Mundy's death . . . does not moot this issue because the deprivation of his counsel of choice would entitle Daniels to a reversal of his conviction as a matter of constitutional right. . . . Mundy's death does not deprive the [trial] court of its power to grant Daniels the relief to which he would be entitled." [Citation omitted.]). Second, the court emphasized that Daniels' right to counsel of choice at a new trial would depend on his resources available at that time, stating: "Should the government elect to retry Daniels on these charges, Daniels must be afforded a reasonable opportunity to retain new counsel of choice *with his own resources* and be provided with court-appointed counsel if he proves unable to do so." (Emphasis added.) Id. Thus, *Childress* pro-

[15] We note that one member of the panel in *Childress* disagreed with the majority's conclusion that Mundy's death did not moot Daniels' appeal. *United States* v. *Childress*, supra, 58 F.3d 736–37 (Williams, J., dissenting in part). The dissenting judge stated that this aspect of Daniels' appeal was moot insofar as a retrial was not an appropriate remedy because, "[o]n any retrial, there are only two possibilities for [Daniels'] representation. First, Daniels may be as unable as he was before to find someone who will represent him for what he could pay, so that he might again receive appointed counsel. In that case, the retrial would be an exact duplicate of the first one in all matters relevant to this issue. On the other hand, Daniels may now be able to arrange for paid counsel. But Daniels never claimed he was forbidden from using paid counsel other than Mundy, and a retrial under these circumstances would be responsive only to an error never claimed and give Daniels something completely different from what (by hypothesis) the trial court erroneously denied. Against the very slight value of this relief—relief that is at best only marginally responsive to the error made—stand the costs of requiring a new trial." (Emphasis omitted.) Id., 737. Thus, the dissenting judge concluded that "it would be better to let the error go uncorrected than to force the system to incur the burdens of another trial, welcome as the prospect of such a windfall may be to Daniels." Id.

vides strong support for the proposition that the sole remedy for the violation of the defendant's right to counsel of choice is a new trial, with the defendant's entitlement to counsel of choice at that proceeding determined by conditions, financial and otherwise, existing at the time of remand.[16]

Beyond *Childress*, courts have acknowledged in other contexts that a defendant's choice of counsel at a new trial is determined by circumstances existing at that time, even when the new trial is ordered to remedy an earlier choice of counsel violation. For example, in holding that a pretrial ruling denying a criminal defendant the right to retained counsel of choice is subject to interlocutory appeal under the Ohio statute providing for appellate review in criminal cases, the Ohio Supreme Court observed that "postconviction reversal of the trial court's judgment would not be automatically effective. *A criminal defendant might exhaust his or her resources* during the first trial, thereby denying that defendant the counsel of his or her choice." (Emphasis added.) *State* v. *Chambliss*, 128 Ohio St. 3d 507, 511, 947 N.E.2d 651 (2011); see also *State ex rel. Keenan* v. *Calabrese*, 69 Ohio St. 3d 176, 180, 631 N.E.2d 119 (1994) (Wright, J., concurring) (joining decision holding that order disqualifying criminal defense counsel is not appealable final judgment, but expressing concern that "the solution in this case that a [postconviction] appeal is an adequate remedy at law may well be illusory"), superseded by statute as stated

[16] In a footnote in his reply brief, the defendant appears to acknowledge that his right to representation by Mastronardi at his new trial is not absolute, positing that the substitution of assigned counsel would be appropriate if Mastronardi had become "incapacitated, disbarred, or no longer willing to represent" him on remand—just as that measure would be appropriate had those events happened at the time of the first trial. See Practice Book § 3-10 (c). This concession, however, belies the weakness in the defendant's constitutional argument, which seeks the sixth amendment equivalent of time travel with respect to the restoration of his right of counsel of choice.

in *State* v. *Chambliss*, supra, 510–11. Similarly, in dissenting from a decision concluding that orders disqualifying criminal defense counsel are not immediately appealable, Justice Zappala of the Pennsylvania Supreme Court described numerous "consequences of forcing a defendant to wait until after judgment to appeal a disqualification order," including that "the defendant's chosen counsel may not be available for a second trial due to illness, relocation, or other work that prevents him or her from representing the defendant in a new trial. If this is the case, then the defendant's right will have been irreparably lost. *There is also the possibility that a defendant may not have the financial resources to obtain the originally chosen attorney a second time.* Additionally, the defendant might be hesitant to confide in the new attorney after having been stripped of his or her first attorney."[17] (Emphasis added.) *Commonwealth* v. *Johnson*, 550 Pa. 298, 310, 705 A.2d 830 (1998); see also id., 309 (deeming it "fundamentally unfair to require a defendant to proceed to trial without counsel of choice and incur the attendant counsel fees in order to vindicate on appeal the right to be represented by the attorney initially retained"). In our view, these cases concerning the efficacy of waiting until a postjudgment appeal to address potential choice of counsel violations support the state's position that the defendant's right to representation by his counsel of choice may change over time, namely, between his first trial and a new trial ordered after a successful appeal.[18]

[17] The majority in *Commonwealth* v. *Johnson*, 550 Pa. 298, 305–306, 705 A.2d 830 (1998), did not respond to these points, stating only that: "Like the denial of a suppression motion, an order disqualifying counsel is reviewable after [a] judgment of sentence. If a judgment is obtained and it is determined on appeal that the trial court improperly removed counsel, the right to counsel of choice is not lost. There will be a new trial and the defendant will have his counsel of choice."

[18] We note that whether the granting of a motion to disqualify counsel in a criminal case is an appealable final judgment under *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983), appears to be an open question under

Moreover, we agree with the state that the fact of a new trial by itself generally inures to the benefit of the defendant, regardless of who represents him at that trial. See *Morris* v. *Slappy*, supra, 461 U.S. 15 ("[t]he spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources"); accord *State* v. *Payne*, 260 Conn. 446, 464–66, 797 A.2d 1088 (2002) (discussing "institutional costs" of ordering new trial as sanction for deliberate prosecutorial improprieties, including witnesses' potential unavailability and memory loss). Thus, the new trial itself serves as a sanction for the violation of the

this court's case law. See *State* v. *Vumback*, 247 Conn. 929, 932–33, 719 A.2d 1172 (1998) (*Berdon*, *J.*, dissenting from denial of certification) (concluding that *Burger & Burger*, *Inc.* v. *Murren*, 202 Conn. 660, 669–70, 522 A.2d 812 [1987], which held that disqualification of attorney in civil case is not appealable final judgment, did not overrule, in criminal cases, that aspect of *State* v. *Rapuano*, 192 Conn. 228, 229 n.1, 471 A.2d 240 [1984], which held to contrary, and that majority's decision not to grant certification "threatens the fundamental right of an accused to counsel of his choice"); but see *Peeler I*, supra, 265 Conn. 469 n.7 (discussing *Flanagan* v. *United States*, 465 U.S. 259, 269, 104 S. Ct. 1051, 79 L. Ed. 2d 288 [1984], which held that disqualification order is not appealable final judgment in federal appellate courts); *State* v. *Lantz*, 120 Conn. App. 817, 820–21, 993 A.2d 1013 (2010) (disqualification of counsel in violation of probation proceeding, which is civil matter, is not appealable final judgment). We note that the federal courts and our sister state courts are split on this question. Compare, e.g., *Flanagan* v. *United States*, supra, 269 (disqualification of criminal defense counsel is not appealable final judgment), and *Commonwealth* v. *Johnson*, supra, 550 Pa. 305–306 (same), with, e.g., *Stearnes* v. *Clinton*, 780 S.W.2d 216, 225 (Tex. Crim. App. 1989) (An interlocutory appeal is appropriate to challenge a removal of appointed counsel because "a criminal defendant should not be subjected to a trial and appeal process without the appointed counsel he had grown to accept and gain confidence in. The utilization of the appellate process in this situation to correct this particular ill would be too burdensome and would only aggravate the harm and most likely would result in a new trial compelling relator to again endure a trip through the system, creating in turn needless additional cost to the taxpayers of this state." [Footnote omitted.]), and *State* v. *Chambliss*, supra, 128 Ohio St. 3d 511 ("a pretrial ruling removing a criminal defendant's retained counsel of choice is a final order, subject to immediate appeal").

defendant's right to counsel of choice, in addition to affording the defendant another opportunity to exercise that right.

Accordingly, we conclude that, on remand for a new trial to remedy the violation of a criminal defendant's right to counsel of choice; see *United States* v. *Gonzalez-Lopez*, supra, 548 U.S. 150; the trial court is required to consider whether it is feasible to allow the defendant the attorney of his choice at that new trial. If the defendant wishes to engage the services of the attorney who previously had been unable to represent him because of the choice of counsel violation, and that attorney is willing and able to represent that defendant at his new trial under a mutually acceptable fee arrangement, including by assignment if the defendant has become indigent, the trial court should have that attorney represent the defendant at the new trial.[19] If, however, that attorney is unwilling or unable to represent the defendant at the new trial at a mutually agreeable fee, the defendant's sole relief lies in the new trial itself and the hiring or appointment of new counsel.[20] See *United*

[19] We note that the defendant expressly disclaims any argument that the trial court should have compelled Mastronardi to represent him at the assigned counsel rate. We do, however, agree with the defendant that, had Mastronardi been willing to accept assigned counsel rates, the trial court could have exercised its discretion to appoint Mastronardi to represent the defendant at his new trial—regardless of whether Mastronardi is on the assigned counsel list maintained by the Chief Public Defender pursuant to General Statutes § 51-291 (11). See General Statutes § 51-293 (a) (2) (judges to appoint assigned counsel in "an appropriate case" "[w]henever possible" from Chief Public Defender's list).

[20] We note that the defendant considers it "iron[ic]" that he was represented by Sullivan at his new trial, despite the fact that Sullivan was appointed to represent him at his first trial after the trial court had improperly disqualified Mastronardi. To this end, the defendant posits in a footnote in his reply brief that, in "light of the remand, it might be appropriate to permit [him] to request a different assigned counsel if he could find one willing to represent him who might make different strategic and tactical choices than the attorney who represented him" at the first trial. Because the defendant fails to point to anything in the record indicating his dissatisfaction with representation by Sullivan at the second trial—beyond the fact that Sullivan

States v. *Childress*, supra, 58 F.3d 736; see also *Caplin & Drysdale, Chartered* v. *United States*, supra, 491 U.S. 624–25; *Wheat* v. *United States*, supra, 486 U.S. 159.

Turning to the record in the present case, the trial court properly protected the defendant's right to counsel of choice by considering the extent to which Mastronardi was willing and able to represent the defendant at his new trial on remand from *Peeler I*. Given the court's determination that Mastronardi was not available to represent the defendant because the defendant was indigent and Mastronardi would not accept assigned counsel rates to represent him,[21] we conclude that the trial court did not violate the defendant's right to counsel of choice at his new trial by denying his funding motion.[22]

is not Mastronardi—we decline to consider the extent to which the defendant was entitled to different assigned counsel on remand in connection with the remedy for his counsel of choice violation.

[21] Because we conclude that the defendant was not entitled to state paid representation by Mastronardi on remand given his changed financial circumstances, we need not consider his arguments that the mechanics of such payments would be governed by *State* v. *Wang*, 312 Conn. 222, 92 A.3d 220 (2014).

[22] We briefly address the defendant's claim that he is entitled to dismissal as a remedy for the violation of his right to counsel of choice. Acknowledging that dismissal is "a harsh sanction," he posits that "it may be the only available sanction if this court rejects having his chosen counsel paid at public expense." The defendant contends that not utilizing dismissal in cases like this one "leaves the defendant without remedy and provides little disincentive for the state to attempt to disqualify counsel—if the motion is successful, by the time the case is appealed and remanded, many defendants will have exhausted their resources and be unable to exercise their right to chosen counsel on remand. The prospect of dismissal in such rare circumstances provides an alternative sanction to a violation otherwise without practical remedy." The defendant further emphasizes that dismissal is appropriate in this "unique" case because "it would not have any practical effect on the length of [his] incarceration," as he already is serving a life sentence on federal charges, and faces either the death penalty or life without parole as a result of the convictions pertaining to the murder of Brown and Clarke. See footnote 3 of this opinion. We disagree with the defendant's arguments in support of dismissal.

First, the defendant's entreaty aside, we do not have the luxury of ignoring the precedential effect of our decisions, even in apparently "unique" cases

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* KENNETH JAMISON (SC 19409)

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

Syllabus

Convicted of the crimes of illegal possession of a narcotic substance, illegal possession of an explosive, and manufacturing a bomb, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court had committed plain error when it failed to give the jury a specific instruction, which defense counsel did not request, regarding the credibility of the defendant's alleged accomplice, C, who testified for the

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like this one. See, e.g., *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010). Second, we acknowledge that dismissal may well be an appropriate sanction for counsel of choice violations that result from severe prosecutorial impropriety. See *United States* v. *Stein*, 495 F. Supp. 2d 390, 427–28 (S.D.N.Y. 2007) (dismissing indictments against defendants, who were employees of accounting firm, because federal prosecutors "deliberately" and "callously" took actions, pursuant to cooperation policy outlined in Department of Justice "Thompson Memorandum," to coerce, via threat of indictment, accounting firm to change its policy of paying attorney's fees for personnel, which had effect of depriving defendants of their counsel of choice in complex tax fraud case); accord *State* v. *Lenarz*, 301 Conn. 417, 451, 22 A.3d 536 (2011) (ordering dismissal to avert "miscarriage of justice" when "prosecutor clearly invaded privileged communications that contained a detailed, explicit road map of the defendant's trial strategy" and failed to disclose invasion before trying "case to conclusion more than one year after the invasion occurred"), cert. denied, 565 U.S. 1156, 132 S. Ct. 1095, 181 L. Ed. 2d 977 (2012). Although a majority of this court determined in *Peeler I* that the trial court had abused its discretion in ruling on the state's disqualification motion, the record in this case does not disclose even a colorable claim of egregious and severe prosecutorial interference with the defendant's right to choice of counsel that would warrant dismissal, insofar as the state's disqualification motion was consistent with the prosecutor's duty to act in good faith to "protect the case against conflicts of interest"—the discharge of which requires the prosecutor to notify the court of the existence of "potential conflicts of interest" that affect defense counsel's representation of the defendant. *United States* v. *McKeighan*, 685 F.3d 956, 969 (10th Cir.), cert. denied, 568 U.S. 1019, 133 S. Ct. 632, 184 L. Ed. 2d 411 (2012).

state at the defendant's trial. The charges arose from the execution of a search warrant at C's apartment, where the defendant occasionally stayed. C testified, inter alia, that she had purchased the explosive device that the defendant was convicted of possessing and that both she and the defendant had glued pennies to its exterior. The prosecutor also stipulated during trial that, although C initially was charged with illegal possession of an explosive, that charge subsequently was dropped after she told the police that the device belonged to the defendant. The Appellate Court concluded that the trial court's failure to give an accomplice credibility instruction was a patent and readily discernible error in light of case law mandating that such an instruction be given when a person who had aided in the commission of an offense with which the accused is charged testifies against the accused at trial. The Appellate Court also concluded that the error was sufficiently harmful so as to require reversal of the defendant's conviction of illegal possession of an explosive and manufacturing a bomb. The state, on the granting of certification, appealed to this court, claiming, inter alia, that the Appellate Court incorrectly concluded that the trial court had committed plain error by not providing the jury with such an instruction sua sponte. *Held*:

1. The Appellate Court incorrectly determined that the trial court had committed plain error by failing to give the jury an accomplice credibility instruction regarding C's testimony because, although the failure to give such an instruction was an obvious and readily discernible error, this court could not conclude that such an omission was so harmful that a failure to reverse the defendant's conviction would result in a manifest injustice; contrary to the Appellate Court's conclusion, C's trial testimony was not inconsistent, which is a factor weighing against a finding that the defendant was denied a fair trial, and this court previously has held that, when, as in the present case, the trial court has instructed the jury on the credibility of witnesses generally and the jury is made aware of a particular witness' motivation for testifying, the court's failure to instruct the jury specifically regarding that witness' credibility does not rise to the level of reversible plain error.

2. The defendant could not prevail on his claim that the Appellate Court's judgment could be affirmed on the alternative ground that the trial court had violated his right against self-incrimination under the state constitution by compelling him to provide a handwriting exemplar because, even if the state constitution prohibited compulsory handwriting exemplars, the evidence did not have any effect on the outcome of his trial; the jury was instructed that it could consider the testimony of the state's handwriting expert regarding the exemplar only as evidence of the defendant's consciousness of guilt with respect to a firearm charge of which the defendant was acquitted, and the evidence derived from the handwriting exemplar merely served as additional evidence connecting the defendant to C's apartment, which could not have affected the

jury's verdict on the charges that he illegally possessed an explosive and manufactured a bomb.

Argued October 15, 2015—officially released March 15, 2016

Procedural History

Substitute information charging the defendant with the crimes of illegal possession of a narcotic substance, illegal possession of an explosive, manufacturing a bomb, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *McKeever*, *J.*; verdict and judgment of guilty of illegal possession of a narcotic substance, illegal possession of an explosive, and manufacturing a bomb, from which the defendant appealed to the Appellate Court, *Beach*, *Mullins* and *Bear*, *Js.*, which reversed in part the trial court's judgment and remanded the case for a new trial on the charges of illegal possession of an explosive and manufacturing a bomb, and the state, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Richard L. Palombo*, *Jr.*, senior assistant state's attorney, for the appellant (state).

John L. Cordani, *Jr.*, assigned counsel, for the appellee (defendant).

Opinion

PALMER, J. The state appeals, following our grant of certification, from the judgment of the Appellate Court, which reversed in part the judgment of the trial court convicting the defendant, Kenneth Jamison, following a jury trial, of, inter alia, illegal possession of an explosive in violation of General Statutes § 29-348, and manufacturing a bomb in violation of General Stat-

utes § 53-80a.[1] See *State* v. *Jamison*, 152 Conn. App. 753, 755, 780, 99 A.3d 1273 (2014). The state claims that the Appellate Court incorrectly concluded that, although the defendant did not request an accomplice credibility instruction, the trial court committed plain error by not providing one, sua sponte, to the jury. The defendant disputes the state's contention and also argues that, even if we agree with the state's claim, the Appellate Court's judgment can be affirmed on the alternative ground that the trial court had violated his rights under the Connecticut constitution by compelling him to provide a handwriting exemplar. We agree with the state that the trial court's failure to give an accomplice credibility instruction did not constitute plain error, and we also reject the defendant's alternative ground for affirmance. Accordingly, we reverse in part the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts, which the jury reasonably could have found, and procedural history. In 1995, "Maria Caban lived in a third floor apartment [at 400 Wood Avenue] in [the city of] Bridgeport. The defendant, her boyfriend at the time, would stay with her on occasion. On October 12, 1995, at approximately 8:40 p.m., eight police officers executed a search warrant [for] the apartment, which had front and rear entrances. One group of officers entered the rear of the apartment using a battering ram while the second group entered through the front. The group entering from the front encountered the defendant, dressed only in boxer shorts, on the stairs leading up to the apartment. The defendant was brought up into the apartment and read his *Miranda*[2] rights. . . .

[1] The defendant also was convicted of illegal possession of a narcotic substance in violation of General Statutes (Rev. to 1995) § 21a-279 (a). The defendant's narcotics conviction is not the subject of this appeal.

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

"The police searched the premises and found a pair of sneakers that contained a straw and [a] folded dollar bill. Inside of the bill was a white powdery substance that later was revealed through testing to be cocaine. When questioned, the defendant admitted that the sneakers belonged to him. The search also produced an M-1000 explosive device [M-1000] with pennies glued to its exterior,[3] a loaded firearm, an additional small amount of cocaine,[4] a weighing scale, an electric heat sealer for sealing plastic bags, and a notebook with references to drug trafficking. The police also discovered a safe containing business documents signed by the defendant. [Subsequently, Caban turned over to the police handwritten letters that the defendant had written to her during their relationship.]

"The defendant was arrested and charged with two counts of possession of narcotics with [the] intent to sell, manufacturing a bomb, [illegal] possession of an explosive, and criminal possession of a firearm. Prior to trial, the defendant was ordered by the court to submit a handwriting exemplar for comparison with [writing in] the notebook found in the apartment. In October, 1996, the defendant was tried before a jury. [At trial, Caban testified that, although she was the one who had purchased the M-1000, she and the defendant both had glued the pennies to its exterior after watching a television program about 'how . . . [to] make explosives out of things in your house and fireworks.' Caban further testified that she had testified as a state's witness in other criminal cases.] After the state [concluded its case-in-chief], the [defense] moved for a judgment

[3] At trial, the state's explosives expert, David Bland, described the M-1000 as a hollow cardboard tube filled with gunpowder that is sealed at both ends, with "a hobby fuse . . . used as a wick" protruding from one end. Bland further testified that affixing pennies to the M-1000's exterior creates "an improvised explosive antipersonnel device" that is capable of causing serious injury upon detonation.

[4] The total amount of cocaine found in the apartment was 2.94 grams.

of acquittal on all charges. The court granted the motion with respect to the two counts of possession of narcotics with [the] intent to sell and directed the state to file an amended information charging the defendant with [illegal] possession of [a narcotic substance]. The court denied the motion as to all other charges.

"The jury found the defendant guilty of [illegal] possession of [a narcotic substance], manufacturing a bomb, and [illegal] possession of an explosive . . . [but not guilty] on the charge of criminal possession of a firearm. The court sentenced the defendant to a total effective term of thirty-seven years of incarceration, execution suspended after thirty-two years, [and] five years of probation." (Footnotes altered.) *State* v. *Jamison*, supra, 152 Conn. App. 756–57.

The defendant appealed to the Appellate Court, claiming, inter alia, that, although the defense did not request an accomplice credibility instruction regarding Caban's testimony, it was plain error for the trial court not to have provided one, sua sponte, to the jury. Id., 755, 760. The Appellate Court agreed, concluding, first, that, because Caban had testified that she purchased the M-1000 and helped the defendant attach pennies to it, the trial court's failure to provide an accomplice credibility instruction was "a patent and readily discernible error"; id., 762; in light of decades of case law mandating that such an instruction be given when, as in the present case, a person who aided in the commission of the offense with which the accused is charged testifies against the accused at trial. Id., 766 n.5.

The Appellate Court further concluded that the trial court's error was sufficiently harmful as to require reversal of the defendant's conviction of manufacturing a bomb and the illegal possession of an explosive. See id., 765–66. In reaching its determination, the Appellate Court considered the several factors first identified by

this court in *State* v. *Ruth*, 181 Conn. 187, 199–200, 435 A.2d 3 (1980)—a case involving a *preserved* claim of instructional error—for determining whether the harm caused by the omission of an accomplice credibility instruction warranted a new trial. See *State* v. *Jamison*, supra, 152 Conn. App. 763–64. According to the Appellate Court, those considerations favored the defendant because Caban's testimony was the only evidence linking the defendant to the explosive device, Caban provided inconsistent testimony regarding the gun found in her apartment, and the trial court did not instruct the jury to consider Caban's potential bias in assessing her credibility. Id.

We granted the state's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly reverse the defendant's convictions under the plain error doctrine where the trial court failed to give an accomplice credibility instruction?" *State* v. *Jamison*, 314 Conn. 943, 102 A.3d 1117 (2014). Because we answer the certified question in the negative, we must consider the defendant's alternative ground for affirmance, namely, that the trial court violated his rights under the Connecticut constitution when it required him to provide a handwriting exemplar. We need not address the merits of that claim, however, because we conclude that the use of the compelled handwriting exemplar at the defendant's trial was harmless.

I

We begin our analysis of the state's claim by setting forth the legal principles that govern our review of the claim. It is well established that the plain error doctrine, codified at Practice Book § 60-5, "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental

proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party.[5] [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless

[5] Of course, unpreserved claims of constitutional magnitude are reviewed if the four part test set forth by this court in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), is satisfied.

it has demonstrated that the failure to grant relief will result in manifest injustice. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007)], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citation omitted; emphasis in original; footnote added; internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 76–78, 60 A.3d 271 (2013); see also *State* v. *Coward*, 292 Conn. 296, 307, 972 A.2d 691 (2009) ("[I]t is not enough for the [party seeking plain error review] simply to demonstrate that his position is correct. Rather, [he] . . . must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . . [U]nder the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust." [Citations omitted.]). Finally, our review of the Appellate Court's conclusion with respect to plain error is plenary. See, e.g., *State* v. *Sanchez*, supra, 80.

With regard to individualized credibility instructions, we consistently have held that "a defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely. . . . An exception to this rule, however, involves the credibility of accomplice witnesses. . . . [When] it is warranted by the evidence, it is the court's duty to caution the jury to scrutinize carefully the testimony if the jury finds that the witness intentionally assisted in the commission, or if [he or she] assisted or aided or abetted in the commission, of the offense with which the defendant is charged. . . . [I]n order for one to be an accomplice there must be

mutuality of intent and community of unlawful purpose. . . . With respect to the credibility of accomplices, we have observed that the inherent unreliability of accomplice testimony ordinarily requires a particular caution to the jury . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Moore*, 293 Conn. 781, 823–24, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010); see also *State* v. *Diaz*, 302 Conn. 93, 115–16, 25 A.3d 594 (2011) ("the rationale underlying the requirement of a special credibility instruction in cases involving accomplice or complainant testimony . . . [is] that the accomplice or complaining witness has a powerful motive to falsify his or her testimony" [internal quotation marks omitted]); *State* v. *Stebbins*, 29 Conn. 463, 473 (1861) (court's failure to caution jury regarding accomplice testimony was "a clear omission of judicial duty"). The trial court's duty to caution the jury "is implicated only [when] the trial court has before it sufficient evidence to make a determination that there is evidence that [a] witness was in fact an accomplice." (Internal quotation marks omitted.) *State* v. *Gentile*, 75 Conn. App. 839, 855, 818 A.2d 88, cert. denied, 263 Conn. 926, 823 A.2d 1218 (2003). With these principles in mind, we turn to the state's claim.

With respect to the first prong of the plain error test, we agree with the defendant that the trial court's failure to give an accomplice credibility instruction was an obvious and readily discernible error.[6] As we have

[6] The state contends that the defendant has not satisfied this first prong of the plain error test because it appears that defense counsel may have decided not to seek an accomplice credibility instruction as a matter of trial strategy, and that it cannot be said that the court committed any error, let alone a clear or obvious one, by failing to give an instruction that defense counsel did not want. See *State* v. *Burke*, 182 Conn. 330, 332 n.3, 438 A.2d 93 (1980) (explaining that this court would have rejected defendant's claim that trial court committed plain error in failing to instruct jury that, in accordance with General Statutes § 54-84 [b], no adverse inference could be drawn from defendant's failure to testify, if there had been indication that defense counsel had made strategic decision not to seek that instruction).

explained, however, the defendant also must demonstrate, under the second prong of the plain error test, that the omission was so harmful or prejudicial that it resulted in manifest injustice. *State* v. *Sanchez*, supra, 308 Conn. 77, 78. This stringent standard will be met only upon a showing that, as a result of the obvious impropriety, the defendant has suffered harm so grievous that fundamental fairness requires a new trial.

In *State* v. *Ruth*, supra, 181 Conn. 187, this court first identified the following four factors that an appellate court should consider when evaluating whether the trial court's decision not to give an accomplice credibility instruction deprived the defendant of a fair trial: "whether (1) the accomplice testimony was corroborated by substantial independent evidence of guilt, (2) the accomplice testimony was consistent, (3) the accomplices' potential motives for falsifying their testimony were brought to the jury's attention, and (4) the

In support of this claim, the state argues that defense counsel may not have requested an accomplice credibility instruction out of concern that it would undermine any claim that Caban had acted alone. The state also maintains that defense counsel may not have wanted such an instruction because some of Caban's testimony relating to the charges of possession of narcotics with the intent to sell, which were not dismissed until after the state's case-in-chief, was actually helpful to the defendant insofar as Caban testified that the defendant never stored drugs in or sold drugs out of her apartment. Even if we accept the state's characterization of Caban's testimony as favorable to the defendant with respect to those narcotics charges, those charges were dismissed and, consequently, any reason that the defendant may have had, based on Caban's testimony pertaining to those charges, for not requesting an accomplice credibility instruction would have ceased to exist at that time. We also disagree with the state's contention that defense counsel may have elected not to request the instruction because it might have suggested to the jury that Caban actually *had* an accomplice, namely, the defendant. As we explain more fully hereinafter, the defendant's primary claim at trial was that Caban had falsely implicated him with respect to the charged offenses to avoid being prosecuted for those crimes herself. In light of that defense strategy, we see no reason why defense counsel would believe that it would have been advantageous not to have the jury instructed that it should scrutinize Caban's testimony closely in view of her obvious motive to falsely implicate the defendant in the charged offenses.

court's instructions to the jury suggested that the witnesses might have an interest in coloring their testimony." *State* v. *Moore*, supra, 293 Conn. 825; see *State* v. *Ruth*, supra, 199–200. As we explained in *Moore*, however, although we apply the *Ruth* factors to preserved and unpreserved claims alike, the standard of review is significantly more demanding when a claim is brought pursuant to the plain error doctrine. *State* v. *Moore*, supra, 828 (defendant's burden when claim was preserved is "not as demanding because the court [is] not required to conclude that the error was so clear and harmful that reversal [is] required to avoid manifest injustice"). Indeed, as the defendant recognizes, prior to the Appellate Court's decision in this case, no court of this state ever had reversed a criminal conviction under the plain error doctrine on the basis of a trial court's failure to give an accomplice credibility instruction. This is no doubt attributable to the fact that, "[i]n order to prevail under the plain error doctrine, the defendant [is] required to establish not only that his conviction . . . affects the fairness and integrity of and public confidence in the judicial proceedings . . . but that it is more probable than not that the jury was misled by the trial court's . . . error into [finding] him [guilty of the charged offenses]." (Citation omitted; internal quotation marks omitted.) *State* v. *Kulmac*, 230 Conn. 43, 74 n.19, 644 A.2d 887 (1994).

On appeal, the state argues that the Appellate Court failed to apply this heightened standard of review in concluding that the defendant had met his burden of establishing a manifest injustice simply by demonstrating that three of the four *Ruth* factors weighed in his favor. The state first contends that only two of the four relevant factors support the defendant's claim. The state further argues that, in any event, to prevail under the plain error doctrine, the defendant was required to establish, at a minimum, that the trial court's omission

likely resulted in the defendant's conviction, which, the state claims, the defendant has failed to do. The state also maintains that the Appellate Court, in evaluating harm solely on the basis of the *Ruth* factors, failed to explain why the trial court's omission so undermines public confidence in the verdict and in the judicial proceeding as a whole that a failure to reverse the defendant's conviction would result in manifest injustice. Finally, the state argues that this court previously has determined, in *State* v. *Diaz*, supra, 302 Conn. 103–106, and *State* v. *Ebron*, 292 Conn. 656, 675–76, 975 A.2d 17 (2009), overruled in part on other grounds by *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), that, when the substantive concerns underlying a special credibility instruction are brought to the jury's attention and the jury is given a general credibility instruction, it is unlikely that the omission of a special credibility instruction could be so grievous an error as to constitute plain error.

With respect to the state's first contention, we agree that the Appellate Court incorrectly determined that three of the four *Ruth* factors favored the defendant when, in fact, only two of them weigh in his favor. Specifically, the state argues, with respect to the second *Ruth* factor, that the Appellate Court incorrectly concluded that it favored the defendant because Caban's testimony was inconsistent. More specifically, the state takes issue with the Appellate Court's statement that, "[o]n direct examination, [Caban] indicated that the gun belonged to the defendant but, later, on cross-examination, stated that it belonged to another person." *State* v. *Jamison*, supra, 152 Conn. App. 763. A review of Caban's testimony indicates that, on direct examination, the assistant state's attorney (prosecutor) showed Caban a photograph of the gun found in her apartment and asked her whether she recognized it. Caban responded that it was "[the defendant's] gun . . . .

Well, the gun he was carrying." Later, on cross-examination, Caban testified that she had seen the defendant with the gun in her apartment. In response, defense counsel stated, "as a matter of fact, that gun is not [the defendant's] but is really [another man's] gun, isn't that true?" Caban replied, "Yeah." On redirect examination, Caban clarified that, although the gun belonged to another person, the defendant was the person who was carrying it at the time of his arrest. As the state maintains, when read in context, it is clear that Caban's cross-examination testimony regarding the gun was not inconsistent with her direct examination testimony; her testimony on cross-examination reflects the fact, rather, that, as the questions pertaining to the ownership of the gun became more specific, her answers became more specific. Indeed, even on direct examination, when asked whether she recognized the gun, Caban, after initially stating that it was the defendant's gun, immediately clarified, "[w]ell, the gun he was carrying."

More important, however, we agree with the state that this claim is governed by this court's recent decisions in *Ebron* and *Diaz*, in which we rejected claims that the trial court committed plain error by failing to give, in accordance with *State* v. *Patterson*, 276 Conn. 452, 469–70, 886 A.2d 777 (2005), a special credibility instruction regarding the testimony of a jailhouse informant. In *Patterson*, this court concluded that "an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused. Consequently, the testimony of such an informant, like that of an accomplice, is inevitably suspect." Id., 469. We also concluded that, "[b]ecause the testimony of an informant who expects to receive a benefit from the state in exchange for his or her cooperation is no less suspect than the testimony of an accomplice who expects leniency from the state"; id., 470; the trial court

must instruct the jury that an informant's testimony "[should] be reviewed with particular scrutiny and weighed . . . with greater care than the testimony of an ordinary witness." (Internal quotation marks omitted.) Id., 465.

In rejecting the defendant's claim of plain error in *Diaz*, we explained that, in *Ebron*, this court concluded that "the trial court's failure to give, sua sponte, a jailhouse informant instruction pursuant to *Patterson* does not constitute plain error when the trial court has instructed the jury on the credibility of witnesses [generally] and the jury is aware of the witness' motivation for testifying [falsely]." *State* v. *Diaz*, supra, 302 Conn. 103, citing *State* v. *Ebron*, supra, 292 Conn. 675–76. In light of *Ebron*, we concluded in *Diaz* that, even though the trial court had a duty to caution the jury regarding the informant's testimony, "the court's failure to do so sua sponte did not rise to the level of reversible plain error . . . because the trial court gave a general credibility instruction and the jury was made aware of [the informant's] motivation for testifying." *State* v. *Diaz*, supra, 105.

As in *Diaz* and *Ebron*, the jury in the present case was well aware of Caban's motivation for testifying against the defendant. Indeed, the central theme of defense counsel's cross-examination of Caban and closing argument was that Caban had falsely implicated the defendant in order to avoid being prosecuted for the offenses with which the defendant was charged. With respect to that cross-examination, defense counsel questioned Caban in relevant part:

"[Defense Counsel]: And you're claiming that you're not receiving any special treatment for your testimony here today?

"[Caban]: I'm not.

"[Defense Counsel]: You're not, okay. But, at the time of your arrest, you were found to have a gun in your apartment, correct?

"[Caban]: Yes.

"[Defense Counsel]: That explosive [was] in your apartment, correct?

"[Caban]: Yes.

"[Defense Counsel]: And you were never charged with either one of those [possession] crimes, were you? You weren't charged with possession of a gun, were you?

"[Caban]: No.

"[Defense Counsel]: Okay. And you weren't charged with possession of a bomb, were you?

"[Caban]: It was brought up, yeah.

"[Defense Counsel]: But were you ever charged with it?

"[Caban]: I'm not sure. You'll have to ask my public defender.

"[Defense Counsel]: You're not sure what you're charged with?

"[Caban]: I'm not sure if I was charged with [possession of] the explosive or not. I know I was brought up with it. It was a charge, and I'm not sure.

"[Defense Counsel]: Okay."

Following this colloquy, the prosecutor agreed to stipulate that, although Caban initially had been charged with possession of an explosive device, that charge was subsequently dropped in light of Caban's statement to the police that the device belonged to the defendant. Specifically, the prosecutor stipulated that

"right now, as of today, she's not charged with possession of an explosive . . . ." Thereafter, during closing argument, defense counsel argued to the jury that Caban had a powerful motive to testify against the defendant. Specifically, defense counsel stated: "We know that it's her apartment, okay? It's her apartment in which they found the gun, but she wasn't charged with possession of a gun, was she? Oh, that's right, she was at first, but then later [the charge was dropped].

"What else do we know? We know that she wasn't charged with possession of a bomb, even though it was in her apartment.

* * *

"She stated she bought this. She helped make it, but she's not charged with manufacturing . . . a bomb. We know that, originally, she might have been or she was, but she was not [charged at the time of her testimony], but she claims that she did not get anything for her testimony. . . . How could you have all of this evidence found in your apartment and not possess it? And, as a jury, you can say to yourself, that doesn't make sense, and I don't believe it.

* * *

"Caban is an admitted drug dealer. . . . She bagged up cocaine for sale, yet she's pointing to [the defendant], he's the one, not me. It's not my drugs, guns or bombs. I don't know anything. It's him."

Thus, defense counsel argued to the jury that it was highly suspicious that Caban could admit to purchasing, possessing and manufacturing an explosive device but not be charged with any crime in connection with those acts. Her motive to testify, he concluded, "stands for itself . . . and you can take [her motive] into account and say, well, of course she's going to say . . . none

of it is hers. What do you think she's going to say, it's all mine?"

Thereafter, in its final charge, the court instructed the jury that "[t]he credibility of witnesses and the weight to be given their testimon[y] are matters which are especially within your [province] to determine. I suggest, however, that you consider some guidelines. No fact is to be determined merely by the number of witnesses testifying for or against it. It is the quality and not the quantity of testimony that controls. There is no such thing as legal equality of credibility. The testimony of every witness is to be weighed for what it seems to you to be worth in light of its character, the demeanor of the witness as it bears on credibility, the substance of the testimony, the probability or improbability that what the witness says is true. The jury is the sole arbiter of what testimony is to be believed and what testimony is to be rejected. This includes the right to [believe] part of the testimony of a particular witness and to reject the remainder. Conversely, you have the right to conclude that you cannot accept any of the testimony of a witness whom you believe has intentionally lied to you.

* * *

"In weighing the testimony of an expert, you apply to him the same general rules that you apply to all witnesses, such as bias and interest in the case."

In light of the foregoing, we cannot conclude that the omission of the accomplice credibility instruction was so harmful that a failure to reverse the defendant's conviction of possession of an explosive device and manufacturing a bomb would result in a manifest injustice. As we have explained, the fundamental purpose of an accomplice credibility instruction is to impress on the jury that an accomplice's testimony should be closely scrutinized because he or she may be testifying

in the hope or upon a promise of leniency from the state. When that concern is brought to the jury's attention, however, as it clearly was in the present case, and the jury is given a general credibility instruction that it is presumed to have followed, we see no reason to conclude that the trial court's failure to give an accomplice credibility instruction likely was so harmful that reversal is the only way to avoid manifest injustice to the defendant and to preserve public confidence in the fairness of the judicial proceeding.

We disagree with the defendant that "Caban's motives for lying were only weakly brought to the jury's attention" and, therefore, that the present case is distinguishable from *Ebron* and *Diaz*. Although defense counsel might have done a better job impeaching Caban's credibility, the jury must be credited with the intelligence to understand the central premise of defense counsel's commonsense argument, namely, that Caban's testimony was not worthy of belief because she was testifying in the hope of receiving leniency—indeed, immunity—from the state. This argument was strongly reinforced by the fact that Caban was not being charged with *any* offense at the time of the defendant's trial, even though she freely admitted to purchasing, possessing and manufacturing the explosive device. We also disagree with the defendant's contention that, because the trial court did not specifically instruct the jury that it could consider the bias and potential interest of lay witnesses, "the court did not give the jury any legal basis to use . . . defense [counsel's] arguments," and, therefore, that the jury would have felt compelled to disregard those arguments "as legally irrelevant." First, contrary to the defendant's contention, the trial court did instruct the jury that it could consider the bias and interest of lay witnesses. Specifically, the court stated that, "[i]n weighing the testimony of an expert, *you apply to him the same general rules that you apply*

to all witnesses, such as bias and interest in the case." (Emphasis added.) Similarly, by instructing the jury that it was the sole arbiter of credibility and could reject all or part of a witness' testimony for any reason if it believed that the witness was lying, the court necessarily provided the jury with a sound basis for rejecting Caban's testimony if it was persuaded by defense counsel's argument that her testimony was motivated by a desire to save herself from prosecution. Accordingly, we agree with the state that the Appellate Court incorrectly determined that the trial court had committed plain error by failing to give the jury an accomplice credibility instruction regarding Caban's testimony.

II

We next address the defendant's claim that the judgment of the Appellate Court, which reversed his conviction of illegal possession of an explosive device and of manufacturing a bomb, can be affirmed on the alternative ground that the trial court violated his right against self-incrimination under article first, § 8, of the Connecticut constitution by compelling him to provide a handwriting exemplar. We conclude that it is unnecessary to reach the merits of this claim because, even if we assume, for the sake of argument, that the state constitution prohibits compulsory handwriting exemplars, we are not persuaded that that evidence had any effect on the outcome of the defendant's trial.

The following additional facts and procedural history are relevant to our disposition of this claim. Following the defendant's arrest, but prior to the commencement of trial, the trial court granted the state's motion to compel the defendant to produce an exemplar of his handwriting for comparison with handwriting contained both in the notebook found in Caban's apartment and with a letter that, according to Caban, the defendant had sent to her. At trial, the state's handwriting expert,

James Streeter, testified that the handwriting in the letter matched that in the notebook. He also testified that, on the basis of the significant "variations in the letter construction," it was his expert opinion that "the person [who] authored [the exemplar] was in all probability attempting to disguise his writing." Thereafter, in its final charge, the trial court instructed the jury that it could "consider the opinion testimony of . . . Streeter concerning the possibility [that] the defendant may have been attempting to disguise his handwriting when providing the [exemplar solely] in conjunction with the phrase from [the notebook], 'no guns are to stay in the house overnight, none at all, even my own,' as evidence of consciousness of guilt *with regard to the charge of criminal possession of a firearm*." (Emphasis added.) The jury subsequently returned a verdict of not guilty on the firearm charge.

On appeal to the Appellate Court, the defendant claimed that the state had violated his rights under the Connecticut constitution when it compelled him to provide a handwriting exemplar.[7] *State* v. *Jamison*, supra, 152 Conn. App. 777. Although the defendant conceded "that such protection is not inherent in the right against self-incrimination contained in the fifth amendment to the federal constitution,[8] he argue[d] that the

[7] The defendant sought review of his unpreserved claim under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). See *State* v. *Jamison*, supra, 152 Conn. App. 778. Under *Golding*, as currently interpreted by this court, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation exists and deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. *State* v. *Golding*, supra, 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

[8] The fifth amendment privilege against self-incrimination is applicable to state prosecutions through the due process clause of the fourteenth amendment to the United States constitution. *Malloy* v. *Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

Connecticut constitution's analogous provision affords greater protection than its federal counterpart." Id., 778. The Appellate Court rejected the defendant's claim, concluding, consistent with fifth amendment jurisprudence, that a handwriting exemplar is not testimonial in nature.[9] Id., 778–80.

As we previously indicated, even if it is assumed that the Appellate Court incorrectly determined that article first, § 8, is coextensive with the fifth amendment for present purposes, the defendant makes no attempt to explain, and we cannot perceive, how Streeter's testimony concerning the exemplar prejudiced the defendant with respect to the charges that he illegally possessed an explosive and manufactured a bomb. Indeed, it is clear that Streeter's testimony was not prejudicial even with respect to the firearm charge in view of the fact that the jury found the defendant not guilty of that offense. Moreover, it is axiomatic that, in the absence of any evidence to the contrary, we must presume that the jury followed the trial court's instruction that it could consider Streeter's testimony only as evidence of consciousness of guilt with respect to the firearm charge. See, e.g., *State* v. *O'Neil*, 261 Conn. 49, 82, 801 A.2d 730 (2002) (jury is presumed to follow limiting instructions). Finally, as the state maintains, even without the handwriting exemplar, the state established that the handwriting in the notebook belonged to the defendant on the basis of Streeter's testimony that the handwriting in the letter matched that in the notebook. Accordingly, the evidence derived from the handwriting exemplar was at most additional evidence connecting the defendant to the apartment, and, as such, it could not have affected the jury's verdict on the charges that

[9] See, e.g., *Gilbert* v. *California*, 388 U.S. 263, 266–67, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967) ("[a] mere handwriting exemplar, in contrast to the content of what is written . . . is an identifying physical characteristic outside [of the] protection [of the fifth amendment]").

the defendant illegally possessed an explosive and manufactured a bomb.

The judgment of the Appellate Court is reversed only with respect to that court's reversal of the defendant's conviction of the crimes of illegal possession of an explosive and manufacturing a bomb, and the case is remanded to that court with direction to affirm the judgment of the trial court; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

STANDARD OIL OF CONNECTICUT, INC. *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT
(SC 19493)

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

Syllabus

Pursuant to the provision (§ 31-222 [a] [1] [B] [ii]) of the Unemployment Compensation Act (§ 31-222 et seq.) setting forth the three-pronged "ABC" test for determining whether an individual is an employee or an independent contractor for purposes of the act, service performed by the individual shall be deemed to be employment unless it is shown that such individual is "free from control and direction in connection with the performance of such service" (part A) or unless it is shown that such service "is performed outside of all the places of business of the enterprise for which the service is performed" (part B).

The plaintiff, S Co., appealed from the trial court's judgment dismissing its appeal from the decision of the Board of Review of the Employment Security Appeals Division, which concluded that certain individuals who had worked for S Co. as installers of security systems and heating and cooling systems, or as service technicians, were S Co.'s employees under the Unemployment Compensation Act. S Co. made installation and service appointments with its customers, with whom S Co. contracted directly, and then sought an installer or technician who would be willing to perform the service or installation. The appeals stemmed from a determination by the defendant, the administrator of the Unemployment Compensation Act, that S Co. had misclassified the installers and technicians as independent contractors rather than as employees and that S

Co. therefore owed more than $41,000 in unemployment contribution taxes plus interest for 2007 and 2008. An appeals referee upheld the defendant's determination, and S Co. appealed to the Board of Review, which determined, consistent with the appeals referee, that the installers and technicians were employees of S Co. The Board of Review concluded that, although S Co. had established that the installers and technicians were independent contractors for purposes of part C of the ABC test, S Co. failed to demonstrate that they were independent contractors under parts A and B. S Co. then appealed to the trial court, which dismissed its appeal. On S Co.'s appeal from the trial court's judgment, in which S Co. challenged the determination with respect to parts A and B of the ABC test, *held* that the trial court improperly determined that the installers and technicians were S Co.'s employees under parts A and B of the ABC test, and, therefore, the trial court's judgment was reversed and the case was remanded to that court with direction to sustain S Co.'s appeal:

1. S Co. satisfied its burden of demonstrating that the installers and technicians were free from its control and direction under part A of the ABC test and, therefore, were independent contractors for purposes of that part of the test; the contracts between S Co. and its installers and technicians provided that they would exercise independent judgment and control in the execution of any work they performed for S Co., S Co. did not train or instruct the installers and technicians, the installers and technicians were not supervised by S Co. at the customers' homes, S Co. did not inspect their work or have a representative on the customers' premises when the installers and technicians were working, the installers and technicians were free to accept or reject any assignment offered to them by S Co., they could realize a profit or a loss depending on the difficulty of the particular job, they used their own equipment and tools to complete each project, they were permitted to hire assistants whom they could supervise, they were not required to display S Co.'s name on their work clothing or utility vehicles, and, although S Co. imposed certain limitations on the installers and technicians, those limitations did not have any bearing on whether S Co. exercised control and direction over the manner in which they performed their work at the homes of S Co.'s customers.

2. Contrary to the trial court's conclusion, the homes of S Co.'s customers at which the installers and technicians worked were not places of business under the ABC test when S Co. did not supervise their work there, and, therefore, the installers and technicians were independent contractors for purposes of part B of the ABC test; this court concluded, on the basis of its review of case law and its examination of the broader statutory scheme, that the trial court's interpretation of the term "places of business" in part B of the ABC test as including the homes of S Co.'s customers was unreasonably broad and inconsistent with the purpose of the act and that a reviewing court should consider the extent to

which a purported employer exercises control over the location where the individual performs the work in determining whether that location constitutes a place of business for purposes of part B of the ABC test.
(*Three justices dissenting in one opinion*)

Argued October 15, 2015—officially released March 15, 2016

Procedural History

Appeal from the decision of the Employment Security Appeals Division, Board of Review, upholding the decision of an appeals referee, which affirmed the determination of the defendant that certain persons who had performed services for the plaintiff were the plaintiff's employees, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Richard P. Gilardi*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dismissing the plaintiff's appeal, from which the plaintiff appealed. *Reversed*; *judgment directed*.

Glenn A. Duhl, with whom was *Angelica M. Wilson*, for the appellant (plaintiff).

Thomas P. Clifford III, assistant attorney general, with whom were *Krista Dotson O'Brien*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, and *Phillip M. Schulz*, assistant attorney general, for the appellee (defendant).

Michael C. Harrington and *Jennifer A. Corvo* filed a brief for the Connecticut Business and Industry Association, Inc., as amicus curiae.

Opinion

ZARELLA, J. The plaintiff, Standard Oil of Connecticut, Inc., appeals from the judgment of the trial court dismissing its appeal from the decision of the Employment Security Appeals Division, Board of Review (board). The board denied in part the plaintiff's motion to correct findings of fact made by the appeals referee and concluded that the workers at issue are the plain-

tiff's employees under the test set forth in the Connecticut Unemployment Compensation Act (act), General Statutes § 31-222 et seq. On appeal, the plaintiff claims that the trial court applied the wrong legal standard in reviewing its motion to correct. The plaintiff also claims that the trial court improperly concluded that the workers were the plaintiff's employees under § 31-222 (a) (1) (B) (ii) because they were subject to the plaintiff's control and direction in the performance of their services and they performed their services at the plaintiff's places of business. The defendant, the Unemployment Compensation Act Administrator, responds that the trial court applied the proper legal standard in reviewing the plaintiff's motion to correct and properly concluded that the workers were the plaintiff's employees under the test set forth in the act. We reverse the judgment of the trial court.

The following relevant facts and procedural history are set forth in the trial court's memorandum of decision. "The plaintiff . . . [is in the business of selling and delivering home heating oil and also] provides home heating and alarm systems to residential customers. In doing so, it utilizes the services of certain individuals who [clean, service and install] heating/air conditioning systems or who [install] security systems (installers/technicians). In June of 2008, the . . . Department of Labor conducted an audit of the plaintiff. Following the audit, the [defendant] determined that the installers/technicians were misclassified as independent contractors rather than as employees. The [defendant] further concluded that, due to this misclassification, the plaintiff owed $41,501.38 in unemployment contribution taxes, plus interest, for 2007 and 2008.

"The plaintiff appealed [from] the [defendant's] decision to the [appeals referee], who conducted an evidentiary hearing. Following this hearing, the appeals referee issued a decision with findings of fact, affirming

the [defendant's] decision. The plaintiff then appealed to the [board]. The board modified the appeals referee's findings of fact and made additional findings in a decision on March 21, 2012. It determined that the plaintiff had met part C (General Statutes § 31-222 [a] [1] [B] [ii] [III]) of the test set out in . . . § 31-222 (a) (1) (B) (ii) (the ABC test) for determining whether the installers/technicians were independent contractors, but also determined that the plaintiff had failed to demonstrate that the installers/technicians were independent contractors under part A (General Statutes § 31-222 [a] [1] [B] [ii] [I]) and part B (General Statutes § 31-222 [a] [1] [B] [ii] [II]). The plaintiff . . . appeal[ed] [to the trial court] on April 19, 2012, was granted an extension of time to file a motion to correct findings on May 18, 2012, and filed a motion to correct findings on August 30, 2012. The board issued a decision on the motion to correct findings on March 4, 2013, granting the motion in part and denying it in part. The board maintained its earlier decision as to the plaintiff's failure to meet parts A and B."

The plaintiff filed claims of error and an appeal with the trial court. Following oral argument, the court dismissed the appeal on March 24, 2014. The court rejected the plaintiff's claim seeking to correct the board's factual findings and upheld the board's determination that the plaintiff had failed to satisfy parts A and B of the ABC test. This appeal followed.

Section 31-222 (a) (1) (B) (ii) defines "employment" in relevant part as any service performed by "any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is

shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . .'' Because the provision is in the conjunctive, the party claiming the exception to the rule that the service is employment must show that all three prongs of the test have been satisfied. E.g., *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, 265 Conn. 413, 419, 828 A.2d 609 (2003).

''[W]hen interpreting provisions of the act, we take as our starting point the fact that the act is remedial and, consequently, should be liberally construed in favor of its beneficiaries. . . . Indeed, the legislature underscored its intent by expressly mandating that the act shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases. General Statutes § 31-274 (c).'' (Internal quotation marks omitted.) *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, 309 Conn. 412, 423, 72 A.3d 13 (2013). We also note that ''exemptions to statutes are to be strictly construed.'' *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, 42 Conn. Supp. 376, 389, 622 A.2d 622 (1992), aff'd, 225 Conn. 99, 622 A.2d 518 (1993). Nevertheless, the act ''should not be construed unrealistically in order to distort its purpose.'' *F.A.S. International, Inc.* v. *Reilly*, 179 Conn. 507, 516, 427 A.2d 392 (1980). ''While it may be difficult for a situation to exist

where an employer sustains his burden of proof under the ABC test . . . it is important to consider that [t]he exemption [under the act] becomes meaningless if it does not exempt anything from the statutory provisions . . . where the law and the facts merit the exemption in a given case." (Citation omitted; internal quotation marks omitted.) *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 389–90. Rather, "statutes are to be construed so that they carry out the intent of the legislature. . . . We must construe the act as we find it . . . ." (Citations omitted; internal quotation marks omitted.) *Johnson* v. *Manson*, 196 Conn. 309, 314–15, 493 A.2d 846 (1985), cert. denied, 474 U.S. 1063, 106 S. Ct. 813, 88 L. Ed. 2d 787 (1986).

Having conducted a comprehensive review of the board's modified findings of fact, we conclude that the trial court improperly determined that the installers/technicians were the plaintiff's employees under the first two prongs of the ABC test.[1]

I

We begin with the plaintiff's claim that the installers/technicians were free from its control and direction under part A of the ABC test. The plaintiff contends that the uncontroverted evidence establishes that the installers/technicians retained control and direction over the method and means of their work. The defendant responds that the installers/technicians performed their work subject to the plaintiff's control and direction. We agree with the plaintiff.

The following additional facts are relevant to our resolution of this claim. Although the board modified

[1] Because we reach our conclusions on the basis of the board's modified factual findings, we need not consider the plaintiff's claim that the trial court applied the wrong legal standard in deciding the motion to correct.

its findings of fact[2] following a review of the plaintiff's

[2] The board's modified findings are as follows:

"1. [The plaintiff] is primarily in the business of home heating oil delivery. It also advertises and sells heating and cooling equipment, and the installation, maintenance and repair of such equipment. For example, [the plaintiff] advertises its twenty-four hour or 'no heat' call service. In addition, [the plaintiff] advertises and sells home security alarm systems, and the installation, maintenance, and monitoring of such systems. [The plaintiff] specifically advertises the sale of installed heating and cooling equipment and security systems, and it contracts directly with its customers regarding that installation.

"2. Approximately 90 [percent] of [the plaintiff's] business is generated from its home heating oil delivery service. The remaining [10 percent] of the business results from its heating and cooling system installation and repair, home alarm system installation and maintenance and its service work, which is routinely part of the service contracts it offers its customers. The [plaintiff] advertises home heating oil delivery, heating and cooling installation, monitoring and maintenance, tank removal, service work and home alarm system installation to its customers and potential customers in the yellow pages.

"3. [The plaintiff] does not own or operate the tools, machinery or heavy duty vehicles required to install heating systems, tank removal or home alarm installation. As a result, it 'contracts' the work [out] to individuals who routinely perform such work either for their own business or self employment. The vast majority of the heating and cooling equipment and security systems sold by [the plaintiff] are installed by the installers on behalf of [the plaintiff]. After installation, [the plaintiff] has long-term arrangements with its customers to service the heating and cooling equipment and to provide monitoring of the security systems.

"4. Heating and cooling installation, home alarm installation, and tank removal are performed by a variety of individuals who either own their own business and/or are self-employed (installers). Service and maintenance work on the heating and cooling systems are performed by a variety of individuals who either own their own business and/or are self-employed (service technicians). The installers and technicians are licensed or certified to perform their services in accordance with state law.

"5. Installers are neither supervised by [the plaintiff] nor does [the plaintiff] inspect their work. There is no representative of [the plaintiff] on the premises at any time during the installation project while it is in progress [or] upon its completion. The same is applicable to the technicians.

"6. [The plaintiff] determines the equipment to be installed for each project and requires the installer to use the parts supplied by [the plaintiff]. On occasion, the installer may supplement with its own/other parts as deemed necessary to be reimbursed or replaced by [the plaintiff]. Installers use their own equipment and tools to complete each project. The installer does not pay for the equipment installed on the project, which is provided by [the

plaintiff]. The same is applicable to the technicians. The installers and technicians also provide and pay for their own transportation without reimbursement by [the plaintiff]. The boiler installers [supply] piping, tubing, fittings and cement as necessary for boiler installations, in addition to the parts that [the plaintiff] supplies and requires the installers to use. [The plaintiff] provided nozzles and strainers to individuals who serviced customers who had no heat or needed their furnaces cleaned. The security system installers receive from [the plaintiff] wires and 'everything down to the screws,' and they supply no parts at all.

"7. The installers and technicians are free to accept or reject any assignment which is offered to them, and can determine [on what] days they will perform services for [the plaintiff].

"8. [The plaintiff] bills each customer and accepts payment to [the plaintiff] for installation and service work. Neither the installers nor the technicians bill or accept payment from the customer.

"9. Installers and technicians are encouraged to display [the plaintiff's] name on their clothing (shirts, hats), and the utility vehicles they use to perform their work. [The plaintiff] requires the security system installers to display photo badges which identify them as subcontractors of [the plaintiff]. The installers and technicians are not required to display the [plaintiff's] name on their apparel or vehicles, and security system installers are required to display photographic identification badges identifying themselves as subcontractors for [the plaintiff]. [The plaintiff] provides the installers and technicians with shirts and hats labeled 'Standard Oil' with the understanding that wearing these items could alleviate any customer concern or confusion when they appear at a customer's residence.

"10. Installers and technicians are limited to provide the installation/service, which [the plaintiff] has sent them to perform. If a customer requests additional work/services, the installer/technician must direct the customer to contact [the plaintiff] directly. Installers/technicians are not allowed to perform additional work/services for said customers without permission and/or direction from [the plaintiff].

"11. The installers and technicians are required to provide the services personally. They are not permitted to subcontract, although they may hire assistants to help them perform the work and may supervise their employees as they see fit. The installers and technicians are not allowed to use casual, pickup or day laborers when providing services in customers' homes.

"12. Each of the installers and technicians has an independent business which provides the same types of services that [the installers and technicians] perform on behalf of [the plaintiff]. Many of the installers and technicians have business cards and advertise their businesses. The heating and cooling equipment installers are required to have box trucks, which are capable of transporting large equipment, such as boilers and oil burners. In addition, many of the installers and technicians earned at least some of their income from sources other than [the plaintiff] during the years in question.

that the plaintiff had failed to satisfy part A of the ABC

"13. [The plaintiff] makes arrangements directly with the customer regarding all installation and service. It schedules installation and service appointments with all the customers, and then finds an installer or technician who can take the assignment. If they accept an assignment from [the plaintiff], the installers and technicians must perform their work within a designated timeframe which was set by [the plaintiff] and the customer.

"14. Installers and technicians are required to sign . . . contract agreements which [have] been drafted by [the plaintiff]. The agreement requires installers and technicians to maintain a current license and specific insurance coverage(s). The agreements state that the installers/technicians shall at all times exercise independent judgment and control in the execution of any work, job or project they accept.

"15. The installers and technicians are paid a set rate per piece of work. They cannot negotiate the pay rate, which is established by [the plaintiff]. [The plaintiff] requires the installers and technicians to submit their invoices for payment no later than Friday of the week in which they satisfactorily complete their assignments.

"16. Installers and technicians generate a percentage of [the plaintiff's] revenues. This portion of [the plaintiff's] business and profitability is dependent on the installation/service work provided by the installers/technicians.

"17. [The plaintiff] sells service contracts to its customers, which is central and core to its home heating oil delivery service. While [the plaintiff] maintains a staff of employees to perform such services, it 'contracts' with the technicians to perform the same/similar services to its customers. These technicians are subject to the same terms and conditions as the installers in regard to appointments, billing, clothing, work performed and licensing and insurance requirement[s].

"18. The [defendant] previously identified Walter Camp as an employee in a prior audit. [The plaintiff] [reported Camp] as an employee at the time of the [appeals] referee's hearing(s).

"19. The parties stipulated that [§] A-19 in the contract, Right to Fire, would not be a factor in the adjudication of this case.

"20. The contracts contain a restrictive covenant which prohibits the installers from soliciting work from or doing business with any of [the plaintiff's] customers for whom they have performed services.

"21. Five of the installers/technicians, Brian Borchert, Walter Camp, Edward Chickos, Jr., William Parks and Gary Vannart, responded 'yes' to a question on the [defendant's] questionnaire asking if [the plaintiff] has the right to direct how they perform their work. None of the installers or technicians responded 'no' to that question.

"22. [The plaintiff] has instructed the security installers to run an extra wire through its keypads and to use a certain type of conductor. Moreover, the installers can only install the equipment which has been provided by [the plaintiff]. [The plaintiff] provides the technicians with nozzles, strainers, and filters for cleaning oil burners.

test. Thereafter, in upholding the board's conclusion, the trial court noted the board's findings that "the plaintiff advertises installed heating, cooling, and security systems; it makes appointments with customers, then finds an installer or technician who can take the assignment; it does not permit installers or technicians to subcontract; it encourages them to wear apparel bearing the plaintiff's name; it can send an installer or technician back to correct a deficient installation; it pays the installers or technicians a set rate per piece; and it requires them to submit payment invoices no later than the Friday after they complete the work. The board stated that five installers/technicians [indicated] that the plaintiff has the right to direct how they perform their work in a questionnaire. The board did not credit later statements by two of the installers/technicians that

"23. Any problems arising between a customer and the installer/technician must be referred to [the plaintiff]. If a customer complains about an installation or service during the warranty period set forth in [the plaintiff's] contract with the installer/technician, [the plaintiff] has the right to send the installer/technician back to the customer site to fix the problem or require the installer/technician to pay for the repair.

"24. [The plaintiff] does not provide the installers and technicians with an employee handbook, and it does not pay for their training or require any specific type of training [with respect to] its products.

"25. The installers and technicians can realize a profit or a loss from their provision of services to [the plaintiff].

"26. While [the plaintiff] has no installers on payroll, it has on occasion used a company employee to install equipment when no installers were available. [The plaintiff] has employees who clean and service its heating and cooling equipment, in addition to the technicians who are at issue in this case.

"27. In his payroll audit report dated July 23, 2009, the [defendant] agreed with [the plaintiff's] classification of certain individuals as independent contractors.

"28. The technicians and installers performed all work outside of the offices of [the plaintiff].

"29. The installers and technicians are free to accept or reject assignments offered to them without adverse consequences.

"30. The installers and technicians were required to return to correct problems found with their work. [The plaintiff] warrants the installed equipment, including parts and labor." (Emphasis omitted.)

the plaintiff did not have [that] right. The board also stated that the installers can only install equipment provided by the plaintiff and that the technicians use nozzles, filters, and strainers which are provided by the plaintiff for cleaning oil burners. In addition, the board also initially listed the right to terminate without liability as a strong indication of an employer-employee relationship, but, in its decision on the plaintiff's motion to correct findings, removed this as a factor, amending finding [nineteen] to say that the parties stipulated that right to fire would not be a factor."

The court further observed, however, that the board had acknowledged certain factors indicating that "the plaintiff did not exercise control and direction. These included that the installers/technicians signed independent contractor agreements stating they would exercise independence; that they were free to accept or reject assignments, [could] determine the days on which they [would] work, [were] not supervised while performing their work; that the plaintiff [did] not check on their work; that they [were] licensed and certified, that the plaintiff [did] not provide them with an employee handbook and [did] not pay them for training or require training; that the installers/technicians [could] hire employees to assist them and [were] free to supervise their employees; that the installers/technicians [could] realize a profit or a loss; and that they provide[d] their own tools, transportation, and insurance." The court nonetheless concluded that, although the plaintiff had made a "compelling case" that it lacked control and direction, the court was "not convinced that the board lack[ed] substantial evidence for its decision."

We begin by setting forth the standard of review. It is well established that "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact

and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts." (Citation omitted; internal quotation marks omitted.) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 417–18.

With respect to the governing legal principles, we have stated that "[t]he fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work. . . . The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. . . . An employer-employee relationship does not depend upon the actual exercise of the right to control. The right to control is sufficient. . . . The decisive test is who has the right to direct what shall be done and when and how it shall be done? Who has the right of general control?" (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Latimer* v. *Administrator, Unemployment Compensation Act*, 216 Conn. 237, 248, 579 A.2d 497 (1990). Under this test, we have stated that "[a]n independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his or her employer, except as to the result of his work." (Internal quotation marks

omitted.) *Darling* v. *Burrone Bros., Inc.*, 162 Conn. 187, 195, 292 A.2d 912 (1972); accord *Alexander* v. *R. A. Sherman's Sons Co.*, 86 Conn. 292, 297, 85 A. 514 (1912). The plaintiff bears the burden of showing that the workers hired as independent contractors "[have] been and will continue to be free from control and direction in connection with the performance of . . . service[s], both under [their] contract for the performance of service[s] and in fact . . . ." (Internal quotation marks omitted.) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 418.

Part A of the ABC test provides that "[s]ervice performed by an individual shall be deemed to be employment . . . unless and until it is shown to the satisfaction of the administrator that . . . such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact . . . ." General Statutes § 31-222 (a) (1) (B) (ii) (I). Although the meaning of this language may seem clear, past agency interpretations of part A have been highly fact specific and not uniformly upheld on appeal to the Superior Court. See *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, Superior Court, judicial district of Hartford, Docket No. CV-97-0575801 (April 2, 2002) (reversing board's decision that product demonstrators hired to work at supermarkets were under plaintiff's control and direction), rev'd, 265 Conn. 413, 828 A.2d 609 (2003); *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 384–85, 412 (reversing board's decision that nurses hired to work at health-care facilities and hospitals on as needed basis were under plaintiff's control and direction). Accordingly, we seek guidance from several appellate decisions in which this

court and the Superior Court[3] discussed the conditions necessary to satisfy part A of the ABC test.

We initially addressed the issue of control and direction in *F.A.S. International, Inc.* v. *Reilly*, supra, 179 Conn. 507. In that case, we concluded that the trial court properly had sustained the plaintiff's appeal from the administrator's determination that the professional artists, writers and photographers employed in the plaintiff's correspondence schools to analyze and critique students' lessons were employees of the plaintiff rather than independent contractors. See id., 513, 516. We explained that the professionals "employed different techniques or approaches in their criticism and analysis of student work. The plaintiff's only concern was with the result or end product of their efforts. [The plaintiff] exercised no control over the means and method of their performance. Although it is true, as claimed by the administrator, that [the plaintiff] would not permit its professionals to hire others to evaluate student work which had been given to them for review, this prohibition is not significant because contracts for personal services cannot be assigned without consent. . . . It is obvious that [the plaintiff] depended upon the skill and reputation of the artists, writers and photographers it selected to produce a product of quality. The [plaintiff] did not rely on rote correction of objective examinations."[4] (Citation omitted.) Id., 513.

[3] We rely in part on the Superior Court decisions because the court acted as an appellate tribunal in those cases and the decisions were not appealed. They thus provide helpful guidance regarding the factors necessary to establish control and direction.

[4] We also noted previously in the decision that the professionals "were utilized only on an as needed, individual lesson analysis basis. There were no regularly scheduled hours of employment. No office space, equipment or supplies were provided by [the plaintiff], with the sole exception of stationery. All work was taken by the artists, writers and photographers to their homes, offices or studios and returned to [the plaintiff] when completed. They had no minimum daily output and were given only one or two assignments at a time. At no time did [the plaintiff] make any promises or commitments concerning the number of lessons to be submitted for their

We next considered the issue of control and direction in *Latimer*. See *Latimer* v. *Administrator, Unemployment Compensation Act*, supra, 216 Conn. 247–49. Unlike in *F.A.S. International, Inc.*, we concluded in *Latimer* that the trial court properly had sustained the administrator's determination that several personal care aides placed in the plaintiff's home by the Litchfield Hills Nurses Registry (registry) were the plaintiff's employees rather than independent contractors, in part because the plaintiff had failed to show that the aides were free from the plaintiff's control and direction. Id., 243–44, 252. We specifically concluded that among the factors militating in favor of finding control and direction were that the plaintiff retained the right to discharge any aide without liability, although this factor was not considered conclusive, paid aides an hourly rate, established the hours when the aides were to work after the aides made known their hours of availability, directed the aides to perform personal errands and to be cognizant of instructions concerning the plaintiff's care, expected the services to be rendered personally by particular aides selected by the registry on the basis of the plaintiff's needs and instructions conveyed to the registry, and furnished the equipment and materials required for the aides to perform their work. See id., 249–50. We also noted that the aides did not realize a profit or suffer a loss based on the services they rendered. Id., 250. Even more important than the foregoing factors, however, was that the aides reported their daily activities to the plaintiff's attorney, to whom the plain-

analysis. They were compensated only on the basis of the number of lesson analyses completed. They received no paid holidays or vacations, no overtime pay, and no sick leave or fringe benefits. No social security or federal income taxes were withheld from [the plaintiff's] payments to them. For tax purposes, they received only informational statements ([Internal Revenue Service] Form 1099) showing income received from [the plaintiff]. The amount paid for each lesson analysis . . . was established by [the plaintiff]." *F.A.S. International, Inc.* v. *Reilly*, supra, 179 Conn. 509–10.

tiff had granted a general power of attorney, and that the attorney personally monitored the level of care given to the plaintiff. Id. We explained that this finding embodied "the logical inference that the reporting and monitoring had a purpose and that, if the care given [to] the plaintiff [had been] unsatisfactory, [the attorney] could, and would, intervene and take corrective measures. That right of intervention . . . evinces a right to control and direct the [aides] by the recipient of their services." Id., 251. We added that "[t]he fact that the [aides] placed with the plaintiff by the registry signed an agreement that they were independent contractors [was] of no moment. Language in a contract that characterizes an individual as an independent contractor [rather than an employee] is not controlling. The primary concern is what is done under the contract and not what it says. . . . Such provisions in a contract are not effective to keep an employer outside the purview of the act when the established facts bring [the employer] within it. We look beyond the plain language of the contract to the actual status in which the parties are placed." (Citations omitted; internal quotation marks omitted.) Id., 251–52.

Shortly thereafter, in *Stone Hill Remodeling* v. *Administrator, Unemployment Compensation Act*, Superior Court, judicial district of Waterbury, Docket No. 089398 (February 21, 1991) (3 Conn. L. Rptr. 829), the Superior Court cited *Latimer* in concluding that the administrator reasonably could have found that a worker who performed plumbing, electrical, carpentry and siding work at a construction site for the plaintiff, who was a home improvement contractor, was under the plaintiff's general control and direction, at least with respect to the carpentry work that he had performed for the plaintiff. Id., 830. The court cited the board's findings that the worker "at times work[ed] side by side with the [plaintiff on the carpentry work]. The [plaintiff] furnished the worker with tools and materials, indicat-

ing an element of control . . . . The carpentry work performed by the [worker] was under the supervision of the [plaintiff]." Id., 829. The plaintiff thus failed to sustain its burden of demonstrating that the worker was free from its control and direction. See id., 830.

Stone Hill Remodeling was followed by *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 376, whose reasoning we adopted one year later in upholding that decision. See *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 225 Conn. 102 ("we adopt the trial court's well reasoned decision as a statement of the facts and the applicable law on [the] issue [of the employer-employee relationship under the ABC test]"). In *Daw's Critical Care Registry, Inc.*, the Superior Court relied heavily on the factors discussed in *Latimer* in reversing the decision of the Employment Security Division of the Department of Labor that nurses hired by the plaintiff to work at health-care facilities and hospitals on an as needed basis and at an hourly rate were the plaintiff's employees under the first prong of the ABC test. *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 378, 384–85, 393–400. In concluding that the nurses in that case were not under the plaintiff's control and direction, the court relied on almost all of the factors we identified in *Latimer*. See id., 393–400. The court noted that, although the plaintiff retained the right to terminate an assignment without liability, other factors, including a lack of control and direction over the means and methods of the nurses' work at the medical facilities, meaning the right to direct what should be done and when and how it should be done, were more important. Id., 393–94. The court stated that "[the plaintiff's] function, after satisfying itself that a nurse was competent, was fairly limited to arranging times mutually convenient for the nurse and the particular medical facility where the nurse's services were to be rendered and examining a

nurse's pay invoices when submitted to it for payment and in making payment. . . . Once the assignment to a particular medical facility was offered by [the plaintiff] and undertaken by . . . [the] nurse, the nurse went there and, subject to the protocol of that facility, rendered her professional services under that facility's direction. The . . . nurses could trade shifts after an assignment at a medical facility that [the plaintiff] serviced. This was done without the nurse being required to report such shift trades to [the plaintiff] . . . ." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 394–95. Furthermore, unlike in *Latimer*, the plaintiff did not establish the hours when the nurses were to work and did not furnish the tools, equipment or materials necessary to do their job. See id., 395. In addition, the plaintiff did not send a representative to visit the medical facility to check on the nurses' work, did not conduct orientations for the nurses and did not issue the nurses a manual of instructions. Id., 396. Also weighing in favor of the plaintiff were that the name tags the nurses were required to wear in some facilities were not required by the plaintiff but by the facilities in which they worked. Id., 397.

The court acknowledged that other factors tended to indicate control and direction, including that the nurses submitted payment invoices to the plaintiff indicating the time and location of their work, the invoices were on forms provided by the plaintiff, the times indicated on the invoice forms needed to be certified by the facility before being processed by the plaintiff, and the nurses were paid at an hourly rate. Id. The court determined, however, that the manner of remuneration was " 'not decisive or controlling' " because of the "reality" that the plaintiff "served in the nature of [a] conduit for payment." Id., 398. The court finally observed, citing *Latimer*, that the characterization of the nurses in their employment agreement with the plaintiff as indepen-

dent contractors who were not subject to the plaintiff's control and direction was "entitled to some consideration . . . ." Id., 399.

This court again considered the issue of control and direction in *Tianti* v. *William Raveis Real Estate, Inc.*, 231 Conn. 690, 651 A.2d 1286 (1995). Although the plaintiff in *Tianti* brought the action pursuant to General Statutes § 31-72[5] on behalf of two real estate salespersons seeking to collect unpaid wages from the defendant, and not in the context of unemployment compensation; see id., 691–92; we stated that the ABC test was applicable in determining the existence of an employment relationship between the salespersons and the defendant. Id., 697. We then concluded that the defendant had the right to control its salespersons on the basis of findings that they "were required to attend mandatory office meetings . . . did business under the defendant's name . . . used the company letterhead, business cards and supplies . . . were required to attend training sessions . . . and . . . were threatened with discharge if they did not comply with these requirements. The right to terminate [an employment] relationship without liability is not consistent with the concept of an independent contract. . . . [One of the salespersons also] was required to put in specified hours of floor time and [the other salesperson] was required to work forty hours per week plus put in an office appearance on weekends." (Citation omitted; internal quotation marks omitted.) Id., 698; see also *AAD Vantage of South Central Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*,

[5] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive . . . [t]he Labor Commissioner may collect the full amount of any such unpaid wages . . . . In addition, the Labor Commissioner may bring any legal action necessary to recover twice the full amount of unpaid wages . . . and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. . . ."

Superior Court, judicial district of New Haven, Docket No. CV-96-0382334 (September 16, 1998) (plaintiff exercised right to control salespersons because it provided them with equipment or materials necessary to perform job, including business cards, order forms, desk space and telephone service, plaintiff provided training prior to assigning territory to salespersons, plaintiff conducted sales meetings and provided salespersons with customer lists, plaintiff's income was dependent on salespersons securing sales, commissions were set by plaintiff according to fee structure it established, commissions were not paid until salespersons' clients paid plaintiff, salespersons could not bind plaintiff in contract or agreement without plaintiff's approval, salespersons were required to utilize plaintiff's order forms and submit forms to plaintiff, salespersons were not authorized to collect money from clients they secured, and, most important, plaintiff retained right to terminate salesperson who did not use best efforts to secure customers and could establish criteria to determine what constituted salesperson's best efforts).

The Superior Court addressed the issue more recently in *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, Superior Court, Docket No. CV-97-0575801. In reversing the board's decision and concluding that product demonstrators hired to work at supermarkets were not the plaintiff's employees, the court cited *Daw's Critical Care Registry, Inc.*, for the proposition that, because the plaintiff had served "as a mere conduit of information to enable the demonstrator to know what service to provide, what products were to be demonstrated, what equipment the demonstrator had to supply, where and what time the demonstrations were to be performed . . . [e]ven 'quality control' of the demonstrations was out of the plaintiff's hands—in that regard, it took its orders from the supermarket, which would make the judgment whether a

particular demonstrator's work was satisfactory or not." Id. The court also observed that the demonstrator's contract allowed the demonstrator to assign work to be performed to other qualified demonstrators with notice to the plaintiff, which plainly meant that "the plaintiff [did] not even retain control over *who* [would] perform the demonstration service on any given job." (Emphasis in original.) Id.

Applying the foregoing principles, we conclude that the board's modified findings of fact did not reasonably support its conclusion that the plaintiff in the present case had the right to control the means and methods of the work performed by the installers/technicians during the years in question.[6] The plaintiff did not own or operate the tools, machinery or heavy duty vehicles required for the installation of heating systems, tank removal or home alarm installation. It thus contracted with the installers/technicians, who were licensed and certified to perform their services in accordance with state law and who routinely performed such work for their own businesses or through self-employment. The contracts between the plaintiff and the installers/technicians provided that the installers/technicians shall exercise independent judgment and control in the execution of any work they conduct for the plaintiff. See *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 399 (plaintiff's characterization of nurses in employment agreement between them as not subject to plaintiff's control and direction was "entitled to some consideration," although not controlling). Consistent with this contract provision, the plaintiff did not supervise the installers/technicians and did not inspect their work. In fact, there was no representative of the plaintiff

[6] In accordance with the board's finding that "[t]he parties stipulated that [§] A-19 in the contract, Right to Fire, would not be a factor in the adjudication of this case"; footnote 2 of this opinion; we do not consider this factor, as the courts in *Latimer* and *Daw's Critical Care Registry, Inc.*, did.

on a customer's premises at any time during an installation project, either while it was in progress or upon its completion. The same was true for the technicians. See id., 394–96 (rendering of nurses' services under facilities' direction and plaintiff's practice of not sending representative to check on nurses' work indicated absence of control and direction); cf. *Latimer* v. *Administrator, Unemployment Compensation Act*, supra, 216 Conn. 250–51 (reporting by personal care assistants of daily activities to plaintiff's attorney, who personally monitored level of care given to plaintiff, indicated control and direction).

In addition, the installers/technicians were free to accept or reject any assignment offered to them without adverse consequences. Although an assignment, once accepted, had to be performed within a designated timeframe set by the plaintiff and the customer, the installers/technicians chose the days on which it was convenient for them to work. See *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 394–95 (arranging times mutually convenient for nurses and medical facilities instead of establishing hours when nurses must work indicated absence of control and direction); cf. *Tianti* v. *William Raveis Real Estate, Inc.*, supra, 231 Conn. 698 (requiring salespersons to work specified hours indicated control and direction); *Latimer* v. *Administrator, Unemployment Compensation Act*, supra, 216 Conn. 250 (establishing hours when personal care assistants must work after they made hours of availability known to plaintiff indicated control and direction). Each of the installers/technicians also had an independent business that provided the same type of services that they provided for the plaintiff. As a consequence, many installers/technicians had their own business cards, advertised their businesses and earned an undetermined amount of their income from sources other than the plaintiff.

Furthermore, after an assignment was accepted, the installers/technicians used their own equipment and tools to complete each project. See *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 395 (failing to furnish tools, equipment or materials necessary for nurses to perform their work indicated absence of control and direction); cf. *Tianti* v. *William Raveis Real Estate, Inc.*, supra, 231 Conn. 698 (furnishing equipment or materials to perform work indicated control and direction); *Latimer* v. *Administrator, Unemployment Compensation Act*, supra, 216 Conn. 250 (same). Although the installers/technicians were required to provide their services personally and were not permitted to subcontract or hire casual, pickup or day laborers, they could hire assistants to help them perform their work and could supervise the assistants as they saw fit. See *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 394–95 (nurses' practice of trading shifts following assignment to facility without being required to report trades to plaintiff indicated absence of control and direction). Complaints regarding installation or other technical services and problems that arose during the warranty period originated with the customers and were referred to the plaintiff, who served as a conduit in reporting them to the installers/technicians and arranged for repairs or for payments by the installers/technicians to cover the cost of repairs by others. Cf. *Latimer* v. *Administrator, Unemployment Compensation Act*, supra, 250–51 (direct monitoring by plaintiff's attorney of care given to plaintiff indicated control and direction).

On matters of training and attire, the plaintiff did not provide the installers/technicians with an employee handbook and did not pay for their training or require any specific training relating to its products. Installers were encouraged, but not required, to display the plaintiff's name on their clothing and utility vehicles. Security

system installers were required to display photographic identification badges that described them as subcontractors, not as the plaintiff's employees. The plaintiff provided the installers/technicians with shirts and hats labeled "Standard Oil," but only because wearing these items might alleviate customer concern or confusion when the installers/technicians appeared at a customer's residence. Wearing the clothing was not required. See *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 396–97 (failing to conduct orientation for nurses or to require name tags while nurses worked at facilities indicated absence of control and direction); cf. *Tianti* v. *William Raveis Real Estate, Inc.*, supra, 231 Conn. 698 (requiring salespersons to attend training sessions and to use company letterhead and business cards indicated control and direction).

The installers/technicians received compensation on the basis of a set rate per piece of work, rather than an hourly rate, could realize a profit or loss from the services rendered, and paid for their own transportation without reimbursement by the plaintiff. Cf. *Latimer* v. *Administrator, Unemployment Compensation Act*, supra, 216 Conn. 250 (paying personal care assistants hourly rate and fact that they did not realize profit or suffer loss based on services indicated control and direction).

Although the installers/technicians remitted invoices to the plaintiff, we do not agree with the court in *Daw's Critical Care Registry, Inc.*, that this is indicative of control and direction. It is independent contractors, rather than employees, who typically submit invoices for their work. Neither the legal nor the ordinary definition of the term suggests that an employee is paid on the basis of an invoice. See Black's Law Dictionary (10th Ed. 2014) p. 956 (defining "invoice" as "[a]n itemized list of goods or services furnished by a seller to a buyer, usu[ally] specifying the price and terms of sale; a bill

of costs"); Webster's Third New International Dictionary (2002) p. 1190 ("an itemized statement furnished to a purchaser by a seller and usu[ally] specifying the price of goods or services and the terms of sale"). Moreover, references in Connecticut case law to the payment of invoices consistently appear in connection with payments made to contractors rather than to employees. See, e.g., *Campisano* v. *Nardi*, 212 Conn. 282, 286, 562 A.2d 1 (1989) (referring to money applied to payment of subcontractors based on invoices submitted and shown to plaintiffs); *Ray Weiner, LLC* v. *Connery*, 146 Conn. App. 1, 4, 75 A.3d 771 (2013) (referring to "invoices and moneys charged by subcontractors"); *D'Angelo Development & Construction Corp.* v. *Cordovano*, 121 Conn. App. 165, 189, 995 A.2d 79 (referring to invoices substantiating amounts claimed to be owed to subcontractors), cert. denied, 297 Conn. 923, 998 A.2d 167 (2010). The submission of invoices in this case is therefore indicative of the absence of control and direction.

We acknowledge the board's finding that five installers/technicians indicated in a questionnaire that the plaintiff had the right to direct how they performed their work. Although the board did not credit subsequent testimony by two of the five installers/technicians that the plaintiff had no such right, the statements in the questionnaires do not outweigh the board's numerous other findings in support of the conclusion that the plaintiff did not exercise control and direction over the installers/technicians.

The defendant argues that the plaintiff made arrangements with its customers regarding all of the installations and services, scheduled installation and service appointments with its customers and, *in the event the installers/technicians accepted assignments*, required them to perform their work within a designated timeframe set by the plaintiff and its customers. This argu-

ment, however, ignores the board's finding that the installers/technicians could accept or reject assignments simply on the basis of convenience and, as a consequence, had full control over how much work they did and when they did it. See *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 394 (plaintiff had no control over nurse's assignment because plaintiff's function, "after satisfying itself that a nurse was 'competent,' was fairly limited to arranging times mutually convenient for the nurse and the particular medical facility [at which] the nurse's services were to be rendered"); cf. *Latimer* v. *Administrator, Unemployment Compensation Act*, supra, 216 Conn. 250 (plaintiff had control over personal care assistants because "[they] made known their hours of availability, [and] the plaintiff . . . established the hours when they were to work").

The defendant also refers to evidence that the installers/technicians were limited to providing the installation or service they were sent by the plaintiff to perform, were not allowed to perform additional services without permission or direction from the plaintiff, and were required to perform the services personally insofar as they were not permitted to subcontract or use casual, pickup or day laborers when working in customers' homes. We disagree that these findings constitute evidence of control and direction. The fact that the installers/technicians were limited to performing only those services they were sent to perform and were not permitted to provide additional services without the plaintiff's permission has no bearing on whether the plaintiff exercised control and direction over the manner in which they performed the services they were contracted to perform. The contracts between the plaintiff and the installers/technicians defined their legal relationship, and it is the work that was required under the contractual relationship that must be examined to determine

whether the installers/technicians were employees or independent contractors under the act. As for the plaintiff's restriction on the use of subcontractors or possibly unqualified workers to assist in performing the work, this restriction was more than overcome by the board's related finding that the installers/technicians were free to hire other presumably qualified workers to assist them in completing the project and could supervise these workers *as they saw fit*. Thus, given that the plaintiff never visited its customers' homes, it very likely never knew when the installers/technicians hired assistants or what the assistants did.

The defendant finally contends that the plaintiff supplied the installers/technicians with the means to do their work because the plaintiff determined the equipment to be installed for each project, required the installer to use parts supplied by the plaintiff, replaced some of the parts provided by the installers/technicians or reimbursed them for the parts. These parts included nozzles and strainers provided to the installers/technicians who serviced customers lacking heat or who needed their furnaces cleaned, and wires and "everything down to the screws" provided to security system installers. We do not agree that these facts constitute evidence of control and direction. The defendant blurs the line between the product that requires installation and the tools and equipment necessary to perform the installation. The board specifically found that the installers used their own equipment and tools to complete each project and that the installer did not pay for the product to be installed, which was provided by the plaintiff. The same was true for the technicians. Thus, insofar as the plaintiff supplied specialized parts such as nozzles and strainers in the case of heating equipment, or the special wires and screws required for the installation of security systems, those parts were more accurately understood as part of the product, especially

in the case of security systems that required special wiring. The only exception appears to be the piping, tubing, fittings and cement necessary for boiler installation, which the board found were supplied by the boiler installers.

In sum, the defendant focuses on almost everything except the board's findings regarding the relevant provisions of the contract agreements between the plaintiff and the installers/technicians, and the means and methods used by the installers/technicians in performing their actual work. With respect to the former, the contract agreement provided that the installers/technicians "shall at all times exercise independent judgment and control in the execution of any work, job or project they accept." With respect to the latter, the board found that the installers/technicians, who were licensed and certified in accordance with state law, were not trained by the plaintiff. In addition, they did not operate under an instruction manual provided by the plaintiff, they were not supervised by the plaintiff at the customers' homes, their work was not inspected by the plaintiff, there was no representative of the plaintiff on the customers' premises at any time during the installation projects, either while they were in progress or upon their completion, they were free to accept or reject any assignment and thus could choose the days on which they worked, they were paid on the basis of a set rate per project, they could realize a profit or loss depending on the difficulty of the particular job, they used their own equipment and tools to complete each project, and they were permitted to hire assistants whom they could supervise. Although the plaintiff imposed certain limitations on the installers/technicians, these limitations did not affect the manner in which they performed their work at the homes of the plaintiff's customers. In fact, the installers/technicians appeared to be in full control of their work at the customers' homes, and, to the extent

the installers/technicians were monitored, they were not monitored by the plaintiff but by the customers, who were responsible for informing the plaintiff regarding any problems that arose in connection with an installation. Accordingly, we conclude that the plaintiff satisfied its burden of showing that the installers/technicians were free from its control and direction under part A of the ABC test.[7]

II

The plaintiff next claims that the trial court improperly interpreted the term "places of business" under part B of the ABC test. The plaintiff specifically contends that the trial court's interpretation of the phrase as including the sites of service, that is, the homes of its residential customers, was unreasonably broad, inconsistent with the purpose of the act, and would have the practical effect of preventing the plaintiff or any other Connecticut business from ever utilizing the services of an independent contractor. The defendant responds that the court properly agreed with the board that the plaintiff's place of business was not only the plaintiff's office, but the individual homes at which the plaintiff contracted to provide services to its customers. We agree with the plaintiff.

[7] To the extent one might argue that our conclusion is not sufficiently deferential to the board's determination that the installers/technicians worked under the plaintiff's control and direction, we disagree. As noted previously in this opinion, our duty is to determine "whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Internal quotation marks omitted.) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 417. In the present case, we have concluded that, although some of the board's modified findings are indicative of control and direction, they are greatly outweighed by other findings indicating the absence of control and direction. Accordingly, we do not defer to the board's conclusion under part A of the ABC test because we regard it as unreasonable in light of these findings and persuasive Connecticut precedent to the contrary.

The following additional facts are relevant to our resolution of this claim. In concluding that the services of the installers/technicians were not performed outside the plaintiff's places of business, the board explained: "The [plaintiff] contracts directly with its customers to provide installation of its heating and cooling equipment and security systems in the customers' homes and to continue to service the equipment and monitor the security systems. . . . [T]he [plaintiff's] customer's homes have, by contract, become places of business of the [plaintiff] for purposes of part B of the ABC test. . . . [T]he [installers/technicians] represent the [plaintiff's] interest[s] when they are in the homes of the [plaintiff's] customers, and the [plaintiff] profits from the services that are performed in its customers' homes. . . . [T]he [plaintiff] does not merely broker contractor services but, rather, offers installation and servicing of heating and cooling equipment and security systems to the public. Moreover . . . the [plaintiff] contracts directly with the customers whose homes are the situs for the installers' and technicians' services."

In responding to the plaintiff's claim that it would be impossible to utilize the services of an independent contractor under the board's interpretation of part B, the board further explained: "[T]he [plaintiff] advertises and sells installed heating and cooling equipment and security systems. It rarely sells equipment without also selling the installation of that equipment. Moreover, the [plaintiff] has long-term contracts with its customers to service its heating and cooling equipment and monitor its security systems. Therefore . . . the [plaintiff] . . . conducts an integral part of its business in [the] customers' homes."

Following a review of the board's decision, the trial court examined the case law of other jurisdictions and concluded that "the board properly determined that the customers' locations were . . . place[s] of business of

the plaintiff. The plaintiff engages the installers/[technicians] to perform certain tasks as part of a continuing provision of services at the customers' locations. Some of these tasks overlap with those performed by employees. Others are performed predominantly, and possibly exclusively, by putative independent contractors, but, nonetheless, the tasks are part of ongoing activity at the [customers'] location[s]." (Emphasis omitted.)

Whether the homes of the plaintiff's customers are "places of business" within the meaning of § 31-222 (a) (1) (B) (ii) (II) presents an issue of statutory interpretation. "The proper construction of this statute is a question of law over which we exercise plenary review. . . . When interpreting a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. General Statutes § 1-2z. . . . However, [w]hen a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation. . . .

"We recently have elaborated on the role of agency interpretations in cases involving questions of statutory construction. In such cases, the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute

. . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Conversely, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable. . . . Deference is warranted in such circumstances because a time-tested interpretation, like judicial review, provides an opportunity for aggrieved parties to contest that interpretation. Moreover, in certain circumstances, the legislature's failure to make changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute. . . . For these reasons, this court long has adhered to the principle that when a governmental agency's time-tested interpretation [of a statute] is reasonable it should be accorded great weight by the courts." (Citations omitted; internal quotation marks omitted.) *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 309 Conn. 421–23.

Part B of the ABC test provides that "[s]ervice performed by an individual shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the administrator that . . . such service . . . is performed outside of all the places of business of the enterprise for which the service is performed . . . ." General Statutes § 31-222 (a) (1) (B) (ii) (II). Although the statute makes clear that individual job sites are not necessarily synonymous with "the places of business of the enterprise for which the service is performed"; General Statutes § 31-222 (a) (1) (B) (ii) (II); there is no definition of "places of business" in the act to assist in understanding this distinction. We thus seek guidance from the statute's legislative history.

Section 31-222 (a) (1) (B) (ii) and several other amendments to the act were adopted by the legislature

in 1971 to ensure compliance with the federal Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695. See 14 H.R. Proc., Pt. 9, 1971 Sess., p. 4054, remarks of Representative Dominic J. Badolato. In fact, the legislature adopted language in § 31-222 (a) (1) (B) (ii) (II) that was "suggested by the United States Department of Labor . . . ." Conn. Joint Standing Committee Hearings, Labor and Industrial Relations, 1971 Sess., p. 293. Other than a few fleeting references to this detail in the committee hearings and the legislative debate, however, there is no other discussion of the statutory language in the legislative history.

A related provision on the nonvoluntary liability of employers under the act, however, is contained in General Statutes § 31-223. That statute provides that, to determine whether an employer has a particular number of employees at any point in time for purposes of the act, any contractor or subcontractor who performs work for an employer shall be considered an employee under the act if the work "is part of [the] employer's usual trade, occupation, profession or business, and . . . is performed in, on or about the premises under such employer's control, [even] if such contractor or subcontractor shall not be subject to [the act] . . . ." General Statutes § 31-223 (a) (9) (B). The two principal criteria used to determine whether an independent contractor or subcontractor may be deemed an employee under this provision, namely, whether the contractor's or subcontractor's work is (1) in furtherance of the employer's usual course of business, and (2) is performed in, on or around premises "under such employer's control," are nearly identical to the two prongs described in part B of the ABC test in § 31-222 (a) (1) (B) (ii) (II).

The importance of this confluence of language pertaining to the places where independent contractors perform their work cannot be underestimated. In con-

struing multiple statutes on the same subject, "we are guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law . . . . Legislation never is written on a clean slate, nor is it ever read in isolation or applied in a vacuum. Every new act takes its place as a component of an extensive and elaborate system of written laws. . . . Construing statutes by reference to others advances [the values of harmony and consistency within the law]. In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done. . . . Moreover, statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Citations omitted; internal quotation marks omitted.) *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 157–58, 788 A.2d 1158 (2002). Thus, the most harmonious reading of the two provisions would be to construe "places of business," as used in § 31-222 (a) (1) (B) (ii) (II), in light of the more specific definition provided in § 31-223 (a).

Nevertheless, because of the difference in language, we do not deem § 31-223 (a) (9) (B) to be dispositive at this early stage of our analysis but also consider other interpretive tools. It is well established that "[w]here a statute does not define a term it is appropriate to look to the common understanding expressed in the law and in dictionaries." *Caldor, Inc.* v. *Heffernan*, 183 Conn. 566, 570–71, 440 A.2d 767 (1981). Common dictionaries contain no definition of the term "place of business." Black's Law Dictionary, however, defines "place of business" as "[a] location at which one carries on a business." Black's Law Dictionary, supra, p. 1334. A "business" is further defined as "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." Id.,

p. 239. Both of these definitions, however, lack the specificity required to be of value in the present context.

There is likewise no long-standing agency interpretation of the phrase to assist in determining when services are performed outside the places of business of the enterprise. Rather, the board has reached different conclusions based on the facts and circumstances of individual cases. See, e.g., *Benitz* v. *Administrator*, *Unemployment Compensation Act*, Employment Security Appeals Division, Board of Review, Case No. 9004-BR-10 (October 7, 2010) (customers' homes were not considered places of business for purposes of antenna dish installation because, even though enterprise controlled scheduling, performance and financial aspects of installers' services, customers entered into contracts for installation with enterprise contractor rather than enterprise); *Alward* v. *Administrator*, *Unemployment Compensation Act*, Employment Security Appeals Division, Board of Review, Case No. 9008-BR-93 (June 20, 1995) (party and entertainment sites were not considered places of business because enterprise planned and coordinated parties and events by telephone from home office and did not manage or control performance of services at party or entertainment sites); *Greatorex* v. *Administrator*, *Unemployment Compensation Act*, Employment Security Appeals Division, Board of Review, Case No. 1169-BR-88 (January 9, 1989) (construction sites secured by contract were considered places of business because enterprise was licensed as home improvement contractor and subcontractors performed electrical and plumbing services at same sites at which enterprise's employees performed carpentry services).[8] As a consequence, it is difficult to derive any

[8] Both parties also cite *Feshler* v. *Administrator*, *Unemployment Compensation Act*, Employment Security Appeals Division, Board of Review, Case No. 995-BR-88 (December 27, 1988), in which the board concluded that Hartford Hospital was the place of business of the enterprise because the nurses engaged by the enterprise provided services to hemodialysis patients on the hospital's premises. *Feshler*, however, is inapposite because the board

general principles from the agency's interpretations that would be helpful in the present case.

We thus turn to two Superior Court cases that have interpreted "places of business" under part B of the ABC test.[9] In *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, Superior Court, Docket No. CV-97-0575801, the court concluded that the services of product demonstrators, who entered into contracts with the plaintiff to work in supermarkets, were performed outside the plaintiff's place of business. The court stated that the supermarkets were entirely separate enterprises from that of the plaintiff and that the plaintiff's business was "essentially to serve as a broker or intermediary between the supermarkets, the manufacturers, and the demonstrators. . . . As such, [the plaintiff's] place of business is not the supermarkets where the demonstrators work but, rather, where the plaintiff does its own work, that is, in its own office." Id. Similarly, in *Daw's Critical Care Registry, Inc.*, the court concluded that nurses who contracted with the plaintiff to provide nursing care on a temporary basis to various health-care facilities did not work at the plaintiff's place of business following assignment to the client's location because the plaintiff was not in the business of providing patient care but of brokering nursing personnel. *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 402. The court explained that nursing services were a function beyond what the plaintiff held itself out as

found that the enterprise's bookkeeper, clerical and other administrative staff also worked on the hospital premises, thus shedding no light on the question before this court of whether services performed at sites separate and apart from the office locations of the enterprise are places of business under § 31-222 (a) (1) (B) (ii) (II).

[9] In *Stone Hill Remodeling* v. *Administrator, Unemployment Compensation Act*, supra, Superior Court, Docket No. 089398, the trial court upheld the board's decision in *Greatorex* on the ground that the appellant had failed to satisfy parts A and C of the ABC test, and thus did not address part B.

performing, and, therefore, the client locations where services were performed were not within the plaintiff's business enterprise. Id., 403. These two decisions, however, like the agency's decisions, are highly fact specific and do not purport to define "places of business" in a manner that would be generally applicable in other contexts.

In the absence of a time-tested agency interpretation or any clear agreement on a defining principle in the Superior Court decisions, it has been our practice to examine the case law of other jurisdictions that have adopted the ABC test. See *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 421–22. A review of these cases, however, reveals a similar lack of consensus. Some courts have concluded that services performed at sites other than the office locations of the enterprise or its physical plant are not places of business because the business functions as a broker and the services performed at the sites are not an integral part of the enterprise or because treating them as places of business would have unacceptable economic consequences, such as higher business costs. See, e.g., *Sinclair Builders, Inc.* v. *Unemployment Ins. Commission*, 73 A.3d 1061, 1065, 1067, 1072–73 (Me. 2013) (job sites at which workers performed carpentry, plumbing, heating, electrical and other services for construction company were not places of business because, although employer's place of business may include location where employer has significant and business-related presence, extending places of business to construction job sites would preclude construction companies from satisfying part B of ABC test when hiring independent contractors and thus have negative economic effects on construction industry, which would be inconsistent with legislature's intent); *Athol Daily News* v. *Board of Review*, 439 Mass. 171, 179, 786 N.E.2d 365 (2003) (geographic areas cov-

ered by carriers for newspaper delivery enterprise were not places of business because, although carriers picked up newspapers at company's distribution center, delivery locations such as homes, stores, bundle drops and vending machines were "outside of premises owned by the [enterprise] or which could fairly be deemed its 'places of business' "); *Commissioner of the Division of Unemployment Assistance* v. *Town Taxi of Cape Cod, Inc.*, 68 Mass. App. 426, 431, 862 N.E.2d 430 (2007) (geographic area covered by drivers for taxicab enterprise were not places of business because, even though taxicabs were stored and dispatch system was operated at business premises, drivers "did not transport customers on those premises . . . were not confined to a specific geographical location and were free to choose locations where they would look for passengers" [citation omitted]); *Burns* v. *Labor & Industrial Relations Commission*, Missouri Court of Appeals, Docket No. WD 44749 (Mo. App. March 31, 1992) (job sites at which roofers worked for roofing enterprise were not places of business because only place of business was home of business owner), aff'd, 845 S.W.2d 553 (Mo. 1993); *Metro Renovation, Inc.* v. *Dept. of Labor*, 249 Neb. 337, 347, 543 N.W.2d 715 (1996) (rejecting rationale that job sites at which tradespeople performed construction work for remodeling and renovation enterprise were places of business because it would preclude any construction company from meeting requirements of law and render worksite "meaningless as a test to determine what constitutes an independent contractor in the construction industry"); *Carpet Remnant Warehouse, Inc.* v. *Dept. of Labor*, 125 N.J. 567, 592, 593 A.2d 1177 (1991) (homes where installers performed services for carpet company were not places of business because phrase "refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business"); *Barney* v. *Dept. of Employment Security*,

681 P.2d 1273, 1275 (Utah 1984) (construction sites at which nailers and finishers performed services for drywall contracting enterprise were not places of business because owner had home office, nailers and finishers could work at other locations during day, including private residential sites, and, "[i]f the job-site definition of 'places of business' were to be utilized for construction workers, any unemployment question involving a subcontractor on a construction site would result in coverage under the [Utah Employment Security Act, which] is not the intent of [that] act").

In contrast, other courts have extended the meaning of "places of business" beyond headquarters, office premises or physical plants to locations such as homes, roadways, transportation routes, or logging and construction sites because they have concluded that representation of the interest of the enterprise by workers at these locations renders them places of business. Under this broad interpretation, places of business may include the entire area in which the enterprise's business is conducted. See, e.g., *Clayton* v. *State*, 598 P.2d 84, 86 (Alaska 1979) (state owned parcel where workers harvested timber for enterprise involved in processing lumber was place of business because enterprise had contract to harvest timber on logging site); *Mamo Transportation, Inc.* v. *Williams*, 375 Ark. 97, 101, 103, 289 S.W.3d 79 (2008) (roadways on which workers drove vehicles were places of business for enterprise that provided " 'drive-away' service" by transporting customers' vehicles from origin to destination throughout United States and Canada because place of business is "the place where the enterprise is performed," and enterprise for which service of transporting vehicles is performed takes place "in the vehicle itself between the point of origin and the point of destination"); *TNT Cable Contractors, Inc.* v. *Director, Dept. of Workforce Services*, Arkansas Court of Appeals, Docket No. E-14-

224 (Ark. App. February 11, 2015) (cable installation sites and connecting roadways were places of business for enterprise providing cable installation and other technical services because they were places where services were performed); *Home Care Professionals of Arkansas, Inc.* v. *Williams*, 95 Ark. App. 194, 199, 235 S.W.3d 536 (2006) (homes where workers took care of elderly clients for home care referral enterprise were places of business because "the representation of an entity's interest by an individual on a premises renders the premises a place of the employer's business," and caregivers represented enterprise's stated interests of providing home care for elderly while in client's homes, which resulted in profits for enterprise); *Carpetland U.S.A., Inc.* v. *Dept. of Employment Security*, 201 Ill. 2d 351, 391, 776 N.E.2d 166 (2002) (customers' homes where workers took measurements for floor covering enterprise were places of business because "place of business extends to any location where workers regularly represent its interest," and, thus, when measurers visit customers' premises to take measurements necessary for quoting prices and closing sales, they represent enterprise's interests); *L.A. McMahon Building Maintenance, Inc.* v. *Dept. of Employment Security*, 32 N.E.3d 131, 142 (Ill. App. 2015) (customers' homes where workers washed windows for enterprise providing window washing services were places of business because "[a]n employing unit's place of business extends to any location where workers regularly represent its interests," and window washers represented enterprise interests when they worked at customers' homes); *Chicago Messenger Service* v. *Jordan*, 356 Ill. App. 3d 101, 115–16, 825 N.E.2d 315 (roadways on which workers drove vehicles were places of business for enterprise providing courier service involving pick up and delivery of packages from one location to another), appeal denied, 215 Ill. 2d 594, 833 N.E.2d 1 (2005);

McPherson Timberlands, Inc. v. *Unemployment Ins. Commission*, 714 A.2d 818, 823 (Me. 1998) (logging sites at which worker harvested timber for timber management and marketing enterprise were places of business because enterprise had "significant and business-related presence at the location" due to its "contractual relationship with the landowner, its interest in the timber on the property, and its physical presence on the property," and, accordingly, "the property was within [the] business territory [of the enterprise]"); *Vermont Institute of Community Involvement, Inc.* v. *Dept. of Employment Security*, 140 Vt. 94, 99, 436 A.2d 765 (1981) (offsite locations where adjunct faculty taught courses for educational institution were places of business even though they were outside home office because places of business include "the entire area in which [the institution] conducts [its] business").

Even if we limit our review to cases in which services were performed at customers' homes, courts have reached different conclusions, with one jurisdiction concluding that homes were not places of business for the purpose of carpet installation; *Carpet Remnant Warehouse, Inc.* v. *Dept. of Labor*, supra, 125 N.J. 592; and two other jurisdictions concluding that homes were places of business for the purpose of providing home care to elderly clients; *Home Care Professionals of Arkansas, Inc.* v. *Williams*, supra, 95 Ark. App. 199; measuring the premises for floor covering; *Carpetland U.S.A., Inc.* v. *Dept. of Employment Security*, supra, 201 Ill. 2d 391; and window washing. *L.A. McMahon Building Maintenance, Inc.* v. *Dept. of Employment Security*, supra, 32 N.E.3d 142.

We conclude, on the basis of our review of the case law and our examination of the broader statutory scheme, that two principles should govern our construction of part B of the ABC test. The first principle relates to the harmonious construction of related stat-

utes. As previously discussed, the statutory scheme has provided for nearly eighty years, well before the legislature adopted the ABC test in 1971, that an independent contractor may be considered an employee under the act if the contractor worked "on or about the premises under such employer's control . . . ." General Statutes § 31-223 (a) (9) (B). Thus, in order to effect a harmonious interpretation of §§ 31-222 (a) (1) (B) (ii) (II) and 31-223 (a) (9) (B), a reviewing court should consider the extent to which the employer exercised control over the location where the independent contractor worked when construing part B of the ABC test. The fact that the language in the two provisions is not identical is of little import. The language used in the ABC test was adopted in order to comply with federal law and was suggested by the United States Department of Labor, and there is no evidence that the legislature understood that language as broadening the criteria under which an independent contractor could be considered an employee beyond the criteria that had existed for more than thirty years under § 31-223 (a).[10]

[10] The dissent disagrees with this conclusion because (1) neither the parties, the board nor the trial court relied on § 31-223 (a) in interpreting § 31-222 (a) (1) (B) (ii) (II), (2) the ABC test was crafted by the federal government instead of by the Connecticut legislature, and (3) the test was adopted to satisfy an extrajudicial requirement and not with the intention of creating a harmonious body of unemployment compensation laws in Connecticut. The plaintiff argued, however, that the meaning of a statute is to be ascertained not only from its text, but from its relationship to other statutes. It is thus entirely appropriate for this court to examine related provisions of the statutory scheme concerning employers and independent contractors. With respect to the fact that the ABC test was crafted by the federal government and adopted to satisfy federal requirements, these circumstances do not constrain the court's ability to examine related statutes but serve as an incentive to ensure that, in the absence of federal guidance, the court construes the test in a manner consistent with the underlying objective of Connecticut's existing statutory scheme.

Finally, to the extent the dissent concludes that, even if it accepted our interpretation of "places of business" as meaning " 'premises under [an] employer's control,' " the plaintiff in the present case still does not satisfy part B of the ABC test, we disagree. The dissent reasons that, because the plaintiff's customers have authorized the plaintiff to enter their homes to

The second principle relates to the conjunctive nature of the test, which suggests that no one part of the test should be construed so broadly—and, therefore, made so difficult or impossible to meet—that the other two parts of the test are rendered superfluous. Under this principle, we reject the broad interpretation adopted by some of our sister states that the meaning of "places of business" in the present context should extend to all locations where the installers/technicians performed their services; see *Mamo Transportation, Inc.* v. *Williams*, supra, 375 Ark. 101, 103; or regularly represented the interests of the plaintiff; see *Carpetland U.S.A., Inc.* v. *Dept. of Employment Security*, supra, 201 Ill. 2d 391; because doing so would make it far more difficult for employers to satisfy part B of the test when they hire independent contractors to work at locations apart from their offices or physical plants. See *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 389–90 ("[t]he exemption [under the act] becomes meaningless if it does not exempt anything from the statutory provisions . . . where the law and the facts merit the exemption in a given case" [citation omitted; internal quotation marks omitted]). The fact that part B provides a choice between two alternative criteria that may be satisfied by employers who seek

provide various services, including installation services, the plaintiff exerts dominion and control over the premises to the extent necessary to provide those services. This conclusion is incorrect. The plaintiff has no dominion, control, leasehold interest or any right other than a license to enter the premises for the purpose of performing the services. Customers thus may direct the plaintiff's employees or contractors to leave the premises at any time. See *State* v. *Allen*, 216 Conn. 367, 380, 579 A.2d 1066 (1990) ("A license in real property is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein. . . . Generally, a license to enter premises is revocable at any time by the licensor." [Citation omitted; emphasis omitted; internal quotation marks omitted.]). Consequently, the plaintiff cannot be said to have dominion and control over the premises when its independent contractors perform services at the homes of the plaintiff's customers.

to challenge application of the act does not resolve the problem created by an overly broad interpretation of the term "places of business." The choice is provided precisely because the burden of proof required under the test is so difficult to sustain. Adopting a broad interpretation of part B would deprive employers of that choice and, in some cases, could make the exemption provided under the ABC test meaningless by increasing this already heavy burden.

We therefore conclude that the meaning of "places of business" in the present context should not be extended to the homes in which the installers/technicians worked, unaccompanied by the plaintiff's employees and without the plaintiff's supervision. The homes of the plaintiff's customers, unlike the plaintiff's business offices, warehouses and other facilities, were under the homeowners' control. Regardless of whether the plaintiff "conduct[ed] an integral part of its business in customers' homes," as noted by the board, it was not the plaintiff but the homeowners who (1) determined when access to their homes was convenient, (2) brought the installers/technicians to locations inside their homes and elsewhere on their property where equipment was to be installed, and (3) identified problems with the installation process or with the newly installed equipment during the warranty period. Accordingly, we conclude that the homes of the plaintiff's customers were not "places of business" under part B of the ABC test.

This interpretation not only comports with our well established case law on the distinction between an employee and an independent contractor, and with the related statutory provision in § 31-223 (a) (9) (B), but is consistent with the defendant's published guidelines for determining the status of workers as independent contractors or employees under § 31-222 (a) (1) (B) (ii) (II). The Unemployment Compensation Tax Division,

which operates within the Department of Labor (department), publishes a document entitled "Self-Assessment of the Employer-Employee Relationship for CT Unemployment Taxes," which is "designed to allow [the enterprise] to perform a self-examination of the status of workers in [the enterprise] whom [it] consider[s] to be independent contractors." Unemployment Compensation Tax Division, Employment Security Division, "Self-Assessment of the Employer-Employee Relationship for CT Unemployment Taxes," p. 1, available at https://www.ctdol.state.ct.us/uitax/abctest.doc (last visited February 25, 2016). The section pertaining to part B of the ABC test instructs in capital letters and boldface type that "Answering Either of These Questions ['No'] Will Satisfy This Test." Id., p. 4. The second question, which is described as the factor relating to "Outside Employer's Premises," then asks: "Does the individual perform any of the work on the firm's premises?" Id. This language indicates not only that the department has traditionally understood places of business as premises controlled by the enterprise, but that business entities have been operating under the same understanding, and, therefore, any departure from this view in the present case would require a change in department practice.

We also avoid a broad interpretation of "places of business" in the present context because of certain undesirable, practical consequences that might follow, including the taxing of two different business entities for the same worker and the receipt of benefits by the unemployed worker from both entities, as when an enterprise hires an independent contractor who operates a sole proprietorship, partnership, limited liability company or corporation that also pays unemployment contribution taxes for workers it sends to perform services for another enterprise. Furthermore, it makes no sense for an individual's home to be considered a place

of business when the enterprise has no office in the home and the sanctity of the home and the privacy interests of its residents have long been recognized in our jurisprudence. See, e.g., *Simms* v. *Chaisson*, 277 Conn. 319, 334–35, 890 A.2d 548 (2006). Finally, as the Connecticut Business and Industry Association, Inc., argues in its amicus brief, a broad interpretation in this context could turn every Connecticut household into a place of business for any company that performs services at a customer's home, thus profoundly limiting an employer's ability to subcontract work.

The dissent's heavy reliance on the fact that we have declared the statute remedial in prior cases is insufficient reason to conclude that the homes of the plaintiff's customers are places of business under § 31-222 (a) (1) (B) (ii) (II). The United States Supreme Court has concluded that the term "remedial" is vastly overused and often is misunderstood because "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if the [United States Supreme] Court identified some subset of statutes as especially remedial, the [c]ourt has emphasized that no legislation pursues its purposes at all costs. *Rodriguez* v. *United States*, 480 U.S. 522, 525–26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) . . . . [Legislative] intent is discerned primarily from the statutory text." (Internal quotation marks omitted.) *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 12, 134 S. Ct. 2175, 189 L. Ed. 2d 62 (2014). In other words, "the plain meaning of the statute and the role of legislative compromise restrain the application of the remedial canon of statutory interpretation." *Waldburger* v. *CTS Corp.*, 723 F.3d 434, 452 (4th Cir. 2013) (Thacker, J., dissenting), rev'd, 573 U.S. 1, 134 S. Ct. 2175, 189 L. Ed. 2d 62 (2014). As one federal court has cogently noted, "[s]tatutes do more than point in a direction . . . . They achieve a particular amount of [their] objective,

at a particular cost in other interests. An agency cannot treat a statute as authorizing an indefinite march in a single direction. [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. *Rodriguez* v. *United States*, [supra, 525–26] . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Contract Courier Services, Inc.* v. *Research & Special Programs Administration*, 924 F.2d 112, 115 (7th Cir. 1991). Rather, "after [it is] determine[d] that a law favors some group, the question becomes: How much does it favor them? Knowing that a law is remedial does not tell a court how far to go. Every statute has a stopping point, beyond which, [the legislature has] concluded, the costs of doing more are excessive—or beyond which the interest groups opposed to the law were able to block further progress. A court must determine not only the direction in which a law points but also how far to go in that direction." (Emphasis omitted.) *Stomper* v. *Amalgamated Transit Union, Local 241*, 27 F.3d 316, 320 (7th Cir. 1994), citing *Rodriguez* v. *United States*, supra, 525–26. In the present case, the ABC test provides for such a stopping point, and the underlying remedial purpose of the act as a whole should not be invoked to interfere with the legislature's intent of exempting employers from their obligation to pay unemployment taxes when they hire independent contractors to perform work for the enterprise. In other words, because all portions of a statute are not intended to have a remedial effect, the application of the remedial canon of statutory interpretation should be restrained in order to effectuate the legislative compromise represented by the exemption provision in § 31-222 (a) (1)

(B) (ii) (II). See, e.g., *Waldburger* v. *CTS Corp.*, supra, 452 (Thacker, J., dissenting).

Having determined that the plaintiff's places of business did not extend to the homes of its residential customers, we conclude that the trial court improperly upheld the board's determination that the plaintiff failed to satisfy part B of the ABC test.[11]

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal.

In this opinion EVELEIGH, ESPINOSA and ROBINSON, Js., concurred.

ROGERS, C. J., with whom PALMER and McDONALD, Js., join, dissenting. I respectfully dissent from the majority opinion because I believe that its interpretation of the test set forth in General Statutes § 31-222 (a) (1) (B) (ii) for determining whether an employer-employee relationship existed (ABC test) effectively rewrites that test and fails to give one part of it the full significance that clearly is required. In so doing, the majority lowers the high, legislatively set bar that an enterprise must surmount in order to avoid making contributions to the state's unemployment compensation fund (fund) pursuant to General Statutes § 31-225.

More particularly, I disagree with the majority's determination that the trial court and the Employment Security Appeals Division, Board of Review (board), improperly concluded that the plaintiff, Standard Oil of Connecticut, Inc., was required to make contributions to the fund because it failed to prove all three parts of the ABC test as is necessary for a putative employer to be exempt from such contributions. My review of

[11] We thus need not address the plaintiff's claim under part B of the ABC test that the services of its independent contractors were performed outside the usual course of its business.

the record and the applicable law, considered with reference to the remedial purpose of the Unemployment Compensation Act (act); General Statutes § 31-222 et seq.; leads me to conclude that the plaintiff clearly failed to prove either subpart of part B of that test. See General Statutes § 31-222 (a) (1) (B) (ii) (II). Because the failure to prove any part of the ABC test is dispositive, I do not reach the question of whether the plaintiff also failed to prove part A of the test.[1]

[1] In concluding herein that the plaintiff failed to establish that part B of the ABC test was satisfied, I rely on the following factual findings of the board, to which this court must defer:

"1. The [plaintiff] is primarily in the business of home heating oil delivery. It also advertises and sells heating and cooling equipment, and the installation, maintenance and repair of such equipment. For example, the [plaintiff] advertises its twenty-four hour or 'no heat' call service. In addition, the [plaintiff] advertises and sells home security alarm systems, and the installation, maintenance, and monitoring of such systems. The [plaintiff] specifically advertises the sale of *installed* heating and cooling equipment and security systems, and it contracts directly with its customers regarding that installation.

"2. Approximately 90 [percent] of [the plaintiff's] business is generated from its home heating oil delivery service. The remaining [percentage] of the business results from its heating and cooling system installation and repair, home alarm system installation and maintenance and its service work which is routinely part of the service contracts it offers its customers. The [plaintiff] advertises home heating oil delivery, heating and cooling installation, monitoring and maintenance, tank removal, service work and home alarm system installation to its customers and potential customers in the yellow pages.

"3. The [plaintiff] does not own or operate the tools, machinery or heavy duty vehicles required to install heating systems, tank removal or home alarm installation. As a result, it 'contracts' the work to individuals who routinely perform such work either for their own business[es] or self employment. The vast majority of the heating and cooling equipment and security systems sold by the [plaintiff] are installed by the installers on behalf of the [plaintiff]. After installation, the [plaintiff] has long-term arrangements with its customers to service the heating and cooling equipment and to provide monitoring of the security systems. . . .

"16. Installers and technicians generate a percentage of [the plaintiff's] revenues. This portion of [the plaintiff's] business and profitability is dependent on the installation/service work provided by the installers/technicians.

"17. The [plaintiff] sells service contracts to its customers which is central and core to its home heating oil delivery service. While the [plaintiff] main-

The defendant, the administrator of the act, determined, and the board and trial court agreed, that the relationship between the plaintiff and the technicians and installers at issue was one of employment, as contemplated by § 31-222 (a) (1), thereby making the plaintiff liable for contributions to the fund pursuant to the act. Our review of that determination is largely deferential. In regard to factual findings, "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, 265 Conn. 413, 417, 828 A.2d 609 (2003). Rather, "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts."[2] (Internal quotation marks omitted.) Id., 417–18.

tains a staff of employees to perform such services, it 'contracts' with the technicians to perform the same/similar services to its customers. . . .

"28. The technicians and installers performed all work outside of the offices of [the plaintiff]." (Emphasis in original.)

The plaintiff filed a motion to correct with the board; see Practice Book § 22-4; in which it requested changes to, inter alia, findings sixteen and seventeen. The board denied those requests and, thereafter, the plaintiff raised a claim in the trial court that that denial was improper. See Practice Book § 22-8 (a). I have reviewed the trial court's decision in this regard and agree with its determination that correction of these findings was unwarranted because the plaintiff did not prove that the standard of Practice Book § 22-9 (b) had been satisfied.

[2] I disagree with the plaintiff's additional claim on appeal that, due to the plaintiff's filing of a motion to correct pursuant to Practice Book § 22-4; see footnote 1 of this opinion; a less deferential standard governed the trial court's review of the board's factual findings, thereby permitting it to consider all of the record evidence and to make its own findings and credibility determinations. As the relevant Practice Book provisions make clear, the motion to correct permits an appealing party to make specific challenges to the board's factual findings, and the board's decision on the motion

At the same time, however, if "the issue is one of law, the court has the broader responsibility of determining whether the administrative action resulted from an incorrect application of the law to the facts found or could not reasonably or logically have followed from such facts. Although the court may not substitute its own conclusions for those of the administrative board, it retains the ultimate obligation to determine whether the administrative action was unreasonable, arbitrary, illegal or an abuse of discretion." (Internal quotation marks omitted.) *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, 238 Conn. 273, 276, 679 A.2d 347 (1996).

The present matter requires an interpretation of § 31-222 (a) (1) (B) (ii) (II), part B of the ABC test, which has not been subject to much judicial or agency examination. In regard to issues of statutory construction, "[g]enerally, [o]ur review of an agency's decision on questions of law is limited by the traditional deference that we have accorded to that agency's interpretation of the acts it is charged with enforcing." (Internal quotation marks omitted.) *Church Homes, Inc.* v. *Administrator, Unemployment Compensation Act*, 250 Conn. 297, 303, 735 A.2d 805 (1999). Nevertheless, "[i]t is well settled . . . that we do not defer to the board's construction of a statute—a question of law—when, as in the present case, the [provision] at issue previously ha[s] not been subjected to judicial scrutiny or when the board's interpretation has not been time tested." (Internal quotation marks omitted.) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 418. In such a case, our review of the interpretation of that provision is plenary. Id.

thereafter is reviewable by the court pursuant to the standard articulated in Practice Book § 22-9 (b). The court may order the requested corrections if it concludes that that standard has been met, but otherwise must defer to the factual findings of the board pursuant to the general standard of review governing administrative agency decisions.

It is well established that the act is remedial legislation that was intended "to protect those who are at risk of unemployment [and its tragic consequences] if their relationship with a particular employer is terminated"; id., 420; see also *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, 42 Conn. Supp. 376, 411, 622 A.2d 622 (1992), aff'd, 225 Conn. 99, 622 A.2d 518 (1993); and, therefore, that the act should be liberally construed in favor of those whom it is intended to benefit. *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 411. The legislature expressly has mandated that the act "be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases." General Statutes § 31-274 (c).

Pursuant to the act, the existence of an employment relationship triggers the responsibility of employers to make contributions that fund unemployment benefits. The act "defines employment in . . . § 31-222 (a) (1). In addition to codifying the common-law rules applicable to determine the existence of an employer-employee relationship, the act was amended in 1971 to include the so-called 'ABC test,' now set forth in [subparts] I, II and III of § 31-222 (a) (1) (B) (ii)." *F.A.S. International, Inc.* v. *Reilly*, 179 Conn. 507, 511, 427 A.2d 392 (1980); see also Public Acts 1971, No. 835, §§ 1 through 3. Because the ABC test defines employment more broadly than the common law, in Connecticut and other jurisdictions using that test, "service may be employment and one may be an employee [for purposes of the act] even if the common-law relationship of master and servant does not exist . . . ." Id.; see also *L.A. McMahon Building Maintenance, Inc.* v. *Dept. of Employment Security*, 32 N.E.3d 131, 141 (Ill. App. 2015); *Athol Daily News* v. *Board of Review of the Division of Employment & Training*, 439 Mass. 171, 177 n.10, 786 N.E.2d 365 (2003); *Fleeman* v. *Nebraska Pork Partners*,

Docket No. S-08-0476, 2009 WL 6964983, *4 (Neb. January 22, 2009); *Fleece on Earth* v. *Dept. of Employment & Training*, 181 Vt. 458, 463, 923 A.2d 594 (2007).[3]

A business enterprise claiming exemption from payment of unemployment taxes pursuant to the ABC test has the burden of proving that it comes within that statutory exemption, which must be strictly construed. *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 389. "In order to demonstrate that [it] is not an employer and therefore has no liability for unemployment taxes under the act, a recipient of services must show that [it] has satisfied the criteria necessary to establish nonliability under all three prongs of the ABC test. . . . The test is conjunctive; all parts must be satisfied to exclude [a recipient of services] from the [a]ct." (Citations omitted; internal quotation marks omitted.) *Latimer* v. *Administrator, Unemployment Compensation Act*, 216 Conn. 237, 246–47, 579 A.2d 497 (1990). Stated otherwise, an enterprise's failure to establish any single part of the test is dispositive, and necessarily will result in a determination that the relationship at issue is one of employment.

Pursuant to the ABC test, an individual will *not* be considered an employee of an enterprise if the enterprise can prove that, "[A] such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; *and* [B] such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places

[3] See generally Office of Legislative Research, Report No. 2013-R-0027, "Unemployment Insurance Questions," (2013) p. 3 (comparing common-law and ABC tests for employment and explaining that, "[w]hile part A of the [ABC] test essentially codifies the common law test, parts B and C create additional requirements"), available at http://www.cga.ct.gov/2013/rpt/2013-R-0027.htm (last visited March 1, 2016).

of business of the enterprise for which the service is performed; *and* [C] such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . . General Statutes § 31-222 (a) (1) (B) (ii) (I) (II) and (III)." (Emphasis in original; internal quotation marks omitted.) *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 277–78.

Part B of the ABC test is stated in the disjunctive. Consequently, an enterprise such as the plaintiff may satisfy part B by establishing *either* that the workers at issue performed services outside of the usual course of the enterprise's business, *or* that they performed services outside of all of the enterprise's places of business. See General Statutes § 31-222 (a) (1) (B) (ii) (II). In my view, the board and the trial court correctly concluded that the plaintiff had failed to satisfy either of these alternatives.

In regard to the first subpart of part B, to decide whether the work at issue was within an enterprise's "usual course of business," a court should examine the specific business activities in which the enterprise engages and determine which of those activities are performed "on a regular or continuous basis." *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 279–80. If the activities performed by the workers at issue are "not performed [by the enterprise] on a regular or continuous basis, then the [enterprise] has satisfied [subpart one of part] B [by showing that] the activit[ies] [are] 'outside the usual course of the business' of the enterprise." Id., 280. An activity need not comprise the majority of an enterprise's business or its primary line of work in order to be within the enterprise's usual course of business, as long as it is performed with the requisite frequency. Thus, when an

activity is undertaken by an enterprise "as an isolated instance," the activity will not be held to be within the enterprise's " 'usual course of business,' " but when the enterprise engages in that activity "as a regular or continuous practice, the activity will constitute part of the enterprise's usual course of business irrespective of its substantiality in relation to the other activities engaged in by the enterprise." Id.

In determining what activities comprise an enterprise's usual course of business, a court should consider evidence of the actual conduct of the enterprise, as well as various indicators of what that enterprise holds itself out to the public to be. Such indicators may include the statements of the enterprise's owners or principals, as well as the enterprise's official business documents or promotional materials. See id., 282 (brochures offering art classes were evidence that classes were part of museum's usual course of business); *New Haven Country Club Corp.* v. *Administrator, Unemployment Compensation Act*, Superior Court, judicial district of New Haven, Docket No. CV-970404924-S (September 17, 1999) (golf equipment imagery on insignia and golf course map on restaurant menu were evidence that golf was part of country club's usual course of business); *Jori Enterprises, LLC* v. *Director, Dept. of Workforce Services*, 2015 Ark. App. 634, 474 S.W.3d 910, 914 (2015) (statements on website were evidence that in-home tutoring was company's normal course of business); *McPherson Timberlands, Inc.* v. *Unemployment Ins. Commission*, 714 A.2d 818, 819 (Me. 1998) (advertisements and contracts with landowners were evidence that timber harvesting was part of timber management and marketing company's usual course of business); *Appeal of Niadni, Inc.*, 166 N.H. 256, 257–58, 93 A.3d 728 (2014) (print and online advertisements were evidence that live entertainment was part of resort's usual course of business); *Bros. Construction Co.* v. *Employment Commission*, 26 Va. App. 286, 290–91, 494 S.E.2d 478

(1998) (company president's testimony was evidence that siding installation was part of usual course of business of company that installed siding, gutters and downspouts on residential and other buildings); but see *Carpetland, USA, Inc.* v. *Dept. of Employment Security*, 201 Ill. 2d 351, 355–56, 776 N.E.2d 166 (2002) (carpet installation not part of carpet seller's usual course of business where seller expressly limited its business to sales, making clear in sales agreements that installation with subcontractor needed to be arranged separately). In short, "a purported employer's own definition of its business is indicative of the usual course of that business." *Sebago* v. *Boston Cab Dispatch, Inc.*, 471 Mass. 321, 333, 28 N.E.3d 1139 (2015).

In *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 282, we concluded that instructors retained to teach art courses at an art museum were employees of the museum for purposes of the act because those art courses were part of the museum's " 'usual course of business,' " even though the museum "operate[d] largely as an exhibition hall for regional historic artifacts and art." Id., 274. The museum had utilized instructors to teach art courses for several years. Id., 282. Moreover, it had held itself out to the public as offering such courses by "distribut[ing] brochures announcing the courses, class hours, location, registration fees, and the instructors' names." Id. From those materials, "the general public could infer that the art courses were a regular part of the [museum's] business." Id.

In the present matter, it is not disputed that about 10 percent of the plaintiff's business is devoted to the installation, service and repair of heating and cooling equipment and security systems,[4] and that these ser-

[4] The plaintiff also performs monitoring of security systems.

vices have been performed routinely on an ongoing basis. As the board's decision explains: "[T]he [plaintiff] is an oil company which advertises and sells heating and cooling equipment and security systems. The vast majority of the heating and cooling equipment and security systems sold by the [plaintiff] are installed by the installers [at issue] on behalf of the [plaintiff]. The [plaintiff] specifically advertises the sale of *installed* heating and cooling equipment and security systems, and it contracts directly with its customers regarding that installation. The [plaintiff's] vice president, David Cohen, testified that the [plaintiff] sells security systems and heating and cooling equipment in the normal course of its business, and that it typically sells installation along with the equipment. Cohen testified that only 'rarely' will the [plaintiff] sell a security system or heating and cooling equipment and not sell the installation." (Emphasis in original.) The board also found that "the [plaintiff] has employees [on payroll] who clean and service its heating and cooling equipment, in addition to the [contract] technicians . . . ."[5]

In light of the foregoing, I can find no fault with the board's conclusion that the weight of the evidence compelled a conclusion that the services performed by the installers and technicians at issue were not outside the usual course of the plaintiff's business. The plaintiff did not provide the services at issue in isolated

[5] There is ample record support for the board's findings. Printouts from the plaintiff's website and its yellow page advertisements were in evidence in the administrative proceedings, and Cohen confirmed that the website advertised fully installed oil tanks, furnaces, air conditioning systems and security systems. Cohen explicitly and repeatedly agreed that selling, installing and servicing of heating, air conditioning and security systems were parts of the plaintiff's "product mix" and normal course of business. He estimated that the plaintiff performed $5 million worth of equipment installations annually. Cohen testified additionally that the plaintiff had fifty service technicians on its payroll, and that part of their work was the same type of work that the contract technicians performed.

instances, but rather, did so on a regular and continuous basis. It is of no moment that the work comprised a minority of the plaintiff's business activities overall. The plaintiff, through its public facing advertisements and dealings with its customers, held itself out as a seller *and* installer of heating and cooling equipment and security systems. Cohen, the plaintiff's vice president, essentially conceded that equipment installation services were part and parcel of the plaintiff's offerings. The presence of technicians on the plaintiff's payroll demonstrates further that service work is regularly performed by the plaintiff. I readily conclude, therefore, that the plaintiff failed to prove that subpart one of part B of the ABC test was satisfied as to both the installers and the technicians at issue.[6]

I turn next to the second subpart of part B of the ABC test, namely, whether the services at issue are "performed outside of all the places of business of the enterprise for which the service is performed . . . ." General Statutes § 31-222 (a) (1) (B) (ii) (II). Because it is beyond dispute that the plaintiff failed to prove subpart one of part B, it was crucial for it to prove subpart two to avoid liability for contributions to the fund pursuant to the act.

Hewing closely to the remedial purpose of unemployment compensation statutes and the concomitant requirement that they be construed liberally to effectuate their purpose, many courts have concluded that the

[6] The plaintiff's claim that the usual course of business prong is satisfied as to the installers because it does not have any employees on payroll that perform installation services is not supported by the governing law, which directs us to look at the services that *an enterprise itself* offers to the public and performs, and not merely to the activities of those individuals whom that enterprise already concedes to be its employees. Adopting the rationale suggested by the plaintiff would enable an enterprise to contract out the entirety of its workforce, and then claim that none of the contract workers were its employees because there is nobody on payroll who is performing the same tasks. The infirmity of such a proposed rule is apparent.

phrase "places of business" encompasses not just the office space or other premises that are an enterprise's base of operations, but also customer locations or other remote sites where the enterprise carries on a major portion of its business activities. Specifically, the phrase "places of business" has been construed to include: parcels of land owned by third parties, for harvesters of timber; *Clayton* v. *State*, 598 P.2d 84, 86 (Alaska 1979); *McPherson Timberlands, Inc.* v. *Unemployment Ins. Commission*, supra, 714 A.2d 823; *Miller* v. *Employment Security Dept.*, 3 Wn. App. 503, 506, 476 P.2d 138 (1970); roadways, for a transporter of large vehicles; *Mamo Transportation, Inc.* v. *Williams*, 375 Ark. 97, 103, 289 S.W.3d 79 (2008); a messenger service; *Chicago Messenger Service* v. *Jordan*, 356 Ill. App. 3d 101, 116, 825 N.E.2d 315 (2005); a vehicle repossessor; *Midwest Property Recovery, Inc.* v. *Job Service of North Dakota*, 475 N.W.2d 918, 924 (N.D. 1991); and a taxicab business;[7] *Employment Security Commission* v. *Laramie Cabs, Inc.*, 700 P.2d 399, 407 (Wyo. 1985); hotel meeting rooms, for a real estate association providing continuing education to its members; *Missouri Assn. of Realtors* v. *Division of Employment Security*, 761 S.W.2d 660, 664 (Mo. App. 1988); remote class sites, for a decentralized academic institution; *Vermont Institute of Community Involvement, Inc.* v. *Dept. of Employment Security*, 140 Vt. 94, 99, 436 A.2d 765 (1981); and customer homes, for providers of home health-care services; *Home Care Professionals of Arkansas, Inc.* v. *Williams*, 95 Ark. App. 194, 199, 235 S.W.3d 536 (2006); in-home tutoring services; *Jori Enterprises, LLC* v. *Director, Dept. of Workforce Services*, supra, 474 S.W.3d

[7] But see *Commissioner of the Division of Unemployment Assistance* v. *Town Taxi of Cape Cod, Inc.*, 68 Mass. App. 426, 430–31, 862 N.E.2d 430 (2007) (taxicab routes were not places of business of taxicab company); see also *Athol Daily News* v. *Board of Review of the Division of Employment & Training*, supra, 439 Mass. 179 (delivery routes were not places of business of newspaper).

914; cable television installation services; *TNT Cable Contractors, Inc.* v. *Director, Dept. of Workforce Services*, 2015 Ark. App. 79, *5, 2015 WL 590249 (2015); window washing services; *L.A. McMahon Building Maintenance, Inc.* v. *Dept. of Employment Security*, supra, 32 N.E.3d 143; carpet measuring services; *Carpetland U.S.A., Inc.* v. *Dept. of Employment Security*, supra, 201 Ill. 2d 391;[8] and siding installation services. *Brothers Construction Co.* v. *Employment Commission*, supra, 26 Va. App. 297.[9]

These decisions appear to recognize that there is nothing inherent in work carried on in disbursed locations that renders those who perform it less subject to unemployment, and the hardships that it causes, than those who work in fixed locations maintained by their employers. In determining that the locations at issue were the enterprises' places of business, the courts have

[8] But see *Carpet Remnant Warehouse, Inc.* v. *Dept. of Labor*, 125 N.J. 567, 592, 593 A.2d 1177 (1991) (customer homes where carpets installed were not places of business of carpet company).

[9] But see *Sinclair Builders, Inc.* v. *Unemployment Ins. Commission*, 73 A.3d 1061, 1072–73 (Me. 2013) (jobsites were not places of business of general construction company); *Burns* v. *Labor & Industrial Relations Commission*, Docket No. WC 44749, 1992 WL 59736, *3 (Mo. App. 1992) (jobsites were not places of business of roofing company); *Metro Renovation, Inc.* v. *State*, 249 Neb. 337, 347, 543 N.W.2d 715 (1996) (jobsites were not places of business of remodeling and renovation contractor), overruled on other grounds by *State* v. *Nelson*, 274 Neb. 304, 310, 739 N.W.2d 199 (2007); *Barney* v. *Dept. of Employment Security*, 681 P.2d 1273, 1275 (Utah 1984) (jobsites were not places of business of drywall contractor).

The part B analyses in these construction cases are abbreviated and appear to be driven, to some degree, by the reviewing courts' own sensibilities, particularly a concern that the common practice of subcontracting in the construction industry would be disrupted by a holding that a contractor's places of business include jobsites. The scope of coverage of unemployment compensation statutes, however, is a matter for legislative determination. Notably, Connecticut's detailed provisions specifically include, or exempt, a number of particular types of workers. See General Statutes § 31-222 (a) (1) and (5). If the administrator, the board or a reviewing court were to apply the ABC test too broadly, in the legislature's view, it easily could respond by enacting an overriding exemption.

invoked such considerations as: whether, realistically, the services offered by the enterprise were performed at the location in question; see *Mamo Transportation, Inc.* v. *Williams*, supra, 375 Ark. 103 (summarizing cases); whether workers regularly represent the enterprise's business interests at the location in question; see *Carpetland U.S.A., Inc.* v. *Dept. of Employment Security*, supra, 201 Ill. 2d 391; whether the enterprise has a significant and business related presence at the location in question; *McPherson Timberlands, Inc.* v. *Unemployment Ins. Commission*, supra, 714 A.2d 822–23; whether the enterprise has contracted with the owner of the premises at issue to perform work there; see *Clayton* v. *State*, supra, 598 P.2d 86; *McPherson Timberlands, Inc.* v. *Unemployment Ins. Commission*, supra, 823; and whether the very nature of the business activities in question dictated that they be performed in places outside the enterprise's own physical premises. See *L.A. McMahon Building Maintenance, Inc.* v. *Dept. of Employment Security*, supra, 32 N.E.2d 143; compare *O'Dell* v. *Director, Dept. of Workforce Services*, 2014 Ark. App. 504, 442 S.W.3d 897, 900 (2014) (where medical note transcriptionists could have performed transcription services at enterprise's business office, but instead did work wherever they chose, work sites were not enterprise's places of business).

Another line of cases makes clear that, where an enterprise itself does not provide a service, but rather, acts as a broker or referrer of individuals who will provide that service, the places where the service is performed are not "places of business" of the brokering or referring enterprise. See, e.g., *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, Superior Court, judicial district of Hartford, Docket No. CV-97-0575801 (April 3, 2002) (31 Conn. L. Rptr. 715, 719) (where enterprise's business was to serve as broker or intermediary between manufacturers and sellers

to provide product demonstrators, supermarkets where demonstrators worked were not enterprise's places of business), rev'd on other grounds, 265 Conn. 413, 828 A.2d 609 (2003); *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 402–403 (where enterprise's business was brokering nursing services, rather than performing patient care, medical facilities where nurses worked were not enterprise's places of business); *Dept. of Employment, Training & Rehabilitation* v. *Reliable Health Care Services of Southern Nevada, Inc.*, 115 Nev. 253, 259–60, 983 P.2d 414 (1999) (where enterprise's business was brokering health-care workers, sole place of business was its administrative office); *Koza* v. *Dept. of Labor*, 282 N.J. Super. 560, 563–64, 660 A.2d 1231 (1995) (where musician acted essentially as agent to assemble various groups to play shows, sites of performances were not his places of business).

In regard to the second subpart of part B, the board found as follows: "The [plaintiff] contracts directly with its customers to provide installation of its heating and cooling equipment and security systems in the customers' homes, and to continue to service the equipment and monitor the security systems. . . . [Accordingly, those] homes have, by contract, become places of business of the [plaintiff] . . . . [Moreover] the installers and technicians represent the [plaintiff's] interest when they are in the homes of the [plaintiff's] customers, and the [plaintiff] profits from the services that are performed in its customers' homes. . . . [Additionally] the [plaintiff] does not merely broker contractor services but, rather, offers installation and servicing of heating and cooling equipment and security systems to the public." The board also noted that the plaintiff rarely sold equipment without also selling its installation, and that the plaintiff had "long-term contracts with its cus-

tomers to service its heating and cooling equipment and monitor its security systems."

I agree with the board's conclusion that, consistent with the law outlined herein, the customers' homes were the plaintiff's "places of business" as contemplated by subpart two of part B of the ABC test. As is clear from the evidence discussed in my analysis of subpart one of part B, the plaintiff was not merely a broker of installation and repair services, but rather, a direct provider of such services. By their very nature, these services needed to be provided in customers' homes and could not occur at the plaintiff's physical plant. The plaintiff contracted directly with the homeowners for installation and ongoing services, thereby authorizing the plaintiff to have a significant, business related presence in the customers' homes. By installing the equipment that the plaintiff had sold to its customers, specifically on an installed basis, the installers represented and furthered the plaintiff's business interests. So too did the technicians, when they serviced and repaired the equipment. Thus, both the installers and the technicians supported the plaintiff's ongoing business relationships with the customers through their work in the homes. As the trial court explained, "[t]he plaintiff engages the [installers and the technicians] to perform certain tasks as part of a continuing provision of services at the customers' locations." For these reasons, I too, like the board and the trial court, conclude that the installers' and technicians' services were not performed outside of all of the plaintiff's places of business so as to satisfy subpart two of part B of the ABC test. Furthermore, because the plaintiff also failed to satisfy subpart one, part B in its entirety was unmet, thereby establishing that the technicians and installers were employees of the plaintiff for purposes of the act.

The majority appears to find insufficient guidance in the case law applying subpart two of part B and, there-

fore, invokes two general principles to govern the resolution of this case. Those principles are: (1) that related statutes should be construed harmoniously; and (2) the conjunctive nature of the ABC test, "which suggests that no one part of the test should be construed so broadly—and, therefore, made so difficult or impossible to meet—that the other two parts of the test are rendered superfluous." I am not persuaded that these considerations, rather than the most relevant case law from other jurisdictions, should inform our interpretation of subpart two of part B or, in any event, that they compel a different result.

The majority first looks to General Statutes § 31-223 (a), a provision upon which neither the parties, the board nor the trial court have relied in their construction of the ABC test. This subsection, which delineates the boundaries of employers' nonvoluntary liability under the act, dates to the act's inception in 1936; Public Acts 1936, Spec. Sess., November, 1936, c. 2, § 2; and the particular language cited by the majority was part of a 1939 amendment. Public Acts 1939, c. 310, § 3. Consequently, I am skeptical that § 31-223 (a) provides much insight into the meaning of "places of business" as used in § 31-222 (a) (1) (B) (ii) (II), a provision that was added more than thirty years later to comply with a federal mandate, specifically, by adopting a test using language suggested by the United States Department of Labor. See Public Acts 1971, No. 835, § 1. In short, (1) our legislators did not even craft the ABC test, and (2) their purpose in adopting that test was to meet an extrajurisdictional requirement, and not to provide what they otherwise believed was a necessary supplement to our preexisting state statutory scheme. Under those circumstances, it is simply unrealistic to presume, without question, that § 31-222 (a) (1) (B) (ii) (II) was drafted by our legislature with a keen eye toward creat-

ing a harmonious, interlocking body of unemployment compensation laws in Connecticut.

In any event, even accepting the majority's reasoning that "places of business," as used in § 31-222 (a) (1) (B) (ii) (II), necessarily means "premises under [an] employer's control," as used in § 31-223 (a), I still would reach the conclusion that the second subpart of part B of the ABC test is unsatisfied in the present matter. Again, the plaintiff contracts directly with its customers to install equipment in their homes, and to provide various continuing services in those homes thereafter. Accordingly, the customers have authorized the plaintiff, at the time installations and other services are being provided, to enter their homes and exert dominion and control over the premises to the extent it is necessary to provide those services. Even under the majority's construction of "places of business," therefore, the plaintiff failed to prove that the installers and technicians provided services outside of all of the plaintiff's places of business.[10]

Additionally, I disagree that interpreting "places of business" to include, in appropriate cases, customers' homes would make it prohibitively difficult for the plaintiff, or other similarly situated enterprises, to satisfy part B of the ABC test when hiring individuals to work at locations apart from their own central facilities. As I have explained, part B may be satisfied by showing *either* that the services at issue are outside the usual course of an enterprise's business, *or* that they are performed outside of all of the enterprise's places of business. See General Statutes § 31-222 (a) (1) (B) (ii) (II).

[10] Notably, neither § 31-222 (a) (1) (B) (ii) (II) nor § 31-223 (a) provide that a putative employer may be exempted from making contributions pursuant to the act when the workers at issue provide services outside of, for example, "the enterprise's offices or other facilities," or "premises owned or leased by the enterprise," as they easily could have done. Instead, both statutes used broader language that appears to encompass other locations in addition to the employer's own offices, facilities or premises.

Accordingly, an enterprise such as the plaintiff can retain individuals to do work in its customers' homes and still satisfy part B if it can show that those individuals are doing work that the enterprise does not regularly and consistently perform. Alternatively, if an enterprise can show that it is a mere broker of the services at issue, the locations where the services are performed will not be deemed the enterprise's places of business. In short, the two subparts of part B work together, and a court should not, like the majority, view one subpart in isolation.

In the present case, if the plaintiff had established that the services provided by the installers and technicians were not part of the plaintiff's usual course of business, or that it merely was referring customers to third-party workers instead of offering to do the work itself, it would be of no moment that the services were performed inside of the homes of the plaintiff's customers. In this sense, part B operates no differently than it does when all of an enterprise's business activities are performed in a central physical location. If the workers are engaged to perform some service that the enterprise does not typically provide, part B will be satisfied, regardless of the locale of the services.

Finally, to reiterate, the act is a remedial one, and we are bound to interpret it liberally in favor of those it is intended to benefit.[11] *Daw's Critical Care Registry*,

[11] I disagree with the suggestions of the majority that I rely inordinately on the remedial nature of the act, that the jurisprudential instruction to construe remedial statutory provisions in favor of their beneficiaries is, in essence, an overbroad platitude, and that the result I reach is contrary to the intent of the legislature. In short, the meaning of § 31-222 (a) (1) (B) (ii) (II) is far from clear from the text of the statute, and my consideration of the remedial nature of the act, in conjunction with numerous cases from other jurisdictions construing the very language at issue, is entirely appropriate. Additionally, as I noted previously herein, our legislature expressly has mandated that the act "be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases." General Statutes § 31-274 (c).

Inc. v. *Dept. of Labor*, supra, 42 Conn. Supp. 411; see General Statutes § 31-274 (c). Accordingly, to the extent this case presents a close question, we should decide it in a manner that will result in more, rather than less, coverage for workers who are involuntarily unemployed.[12]

For the foregoing reasons, I respectfully dissent.

STATE OF CONNECTICUT *v.* JOHN MAIETTA (SC 19524)

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

Syllabus

The defendant, following a trial to the court, was found to have violated the terms of his probation that prohibited him from possessing or having access to firearms. The defendant had been placed on two years probation as part of a plea agreement in which he had pleaded guilty to harassment in the second degree and criminal trespass in the first degree for his actions toward D, his former girlfriend. Under the terms and conditions of his probation, the defendant was required to submit to searches by his probation officer and to comply with a standing criminal protective order that prohibited him from contacting D and from possessing firearms. The defendant also was required to sign a firearms disclosure statement in which he acknowledged that he was ineligible to possess firearms and asserted that he did not currently possess or have access to any firearms. Shortly thereafter, D contacted M, the defendant's probation officer with adult probation services, and informed him that she believed the defendant was in possession of firearms, specifically certain guns that the defendant took possession of following his appointment as the conservator of his father. D also told M that the defendant had told her that he kept a gun in a garage he rented in Newington. After M verified certain of the information concerning the guns registered in the name of the defendant's father,

[12] The majority speculates that interpreting " 'places of business' " to include, in appropriate cases, customer homes could result in multiple entities being taxed for the services of the same worker(s). Notably, there is no claim in this case that any of the installers or technicians at issue made contributions to the fund in connection with their activities at the homes of the plaintiff's customers, nor is there any indication that the administrator has attempted to enforce the act in such a fashion.

including that one of the guns had been transferred to the defendant, M received approval from his superiors to undertake a search of the defendant's garage in Newington. In accordance with the policy of adult probation services, certain members of the police community were assigned to provide protection to M and other probation officers while they conducted the search. Prior to conducting the search, M, accompanied by a police detail, went to the defendant's apartment, where the defendant denied that he had any firearms at that location but allowed M and the other probation officers to search the immediate area for guns. When M asked the defendant if he possessed any of his father's firearms, the defendant stated that one gun might be found in a dresser drawer in the Newington garage. The defendant voluntarily accompanied M and the search team to the garage where one of his father's guns was found in a dresser drawer. During the defendant's probation revocation hearing, the trial court denied the defendant's motion to dismiss, rejecting his claim that the condition of his probation that prohibited him from possessing a firearm violated his constitutional right to bear arms. Thereafter, the trial court denied the defendant's motions to suppress the handgun and his verbal statements to M and other members of the search team, finding that the exclusionary rule was inapplicable to probation revocation hearings. The trial court found that the defendant had violated the conditions of his probation, and rendered judgment revoking his probation. On appeal to this court, the defendant claimed, inter alia, that the trial court improperly admitted evidence obtained in violation of the fourth and fourteenth amendments to the United States constitution because the searches of his apartment and the garage were conducted for law enforcement, not probationary, purposes, and that the trial court therefore erred in not applying the exclusionary rule to suppress evidence of his statements and the handgun. *Held*:

1. The trial court properly admitted the handgun found during the search of the defendant's garage and the statements the defendant made during the searches of his apartment and the garage: the exclusionary rule is inapplicable to probation revocation proceedings and, contrary to the defendant's characterization of the searches as law enforcement searches, the searches were planned probationary searches organized under the auspices of adult probation services to ensure the defendant's compliance with the terms of his probation and were conducted by M and other unarmed probation officers, not the law enforcement personnel who were present only for safety reasons and there was no egregious, shocking or harassing police misconduct warranting the application of the exclusionary rule to these probation proceedings; furthermore, the defendant's claim that the searches violated the separation of powers doctrine was unavailing, the record having demonstrated that although members of a shooting task force that was a coordinated effort between adult probation services and various members of the police community accompanied M during the searches, M was acting in his official capacity

as a probation officer and not as a member of the shooting task force at the time of the searches.

2. The defendant could not prevail on his claim that the evidence adduced at the probation revocation hearing was insufficient for the trial court to determine that the defendant violated the terms of his probation; following his guilty plea to the underlying criminal charges, the defendant acknowledged in writing that the terms of his probation included a provision that he could not possess or have access to any firearms and that he was required to comply with a standing criminal protective order that also barred him from possessing firearms, and despite being in possession of his father's handgun since before his conviction, he did not surrender that handgun, which was found during the search of the garage.

3. The trial court did not abuse its discretion by admitting certain hearsay testimony regarding the purported transfer of the handgun from the defendant's father to the defendant, or by not allowing into evidence a memorandum that the defendant sought to have admitted to rebut the hearsay testimony thereby depriving the defendant of his right to present a defense; the rules of evidence do not apply to probation revocation hearings and relevant hearsay evidence is admissible at the discretion of the trial court, the hearsay evidence here was corroborated by D's testimony that the defendant had received his father's guns and the physical evidence of the handgun itself, and the trial court, after having determined that the memorandum offered by the defendant was an internal memorandum made in connection with a case investigation and not subject to disclosure under the rules of practice and that the defendant's witness did not have sufficient familiarity with the document to introduce it and attest to its authenticity, disallowed the memorandum as a full exhibit but allowed the defendant to question his witness on the contents of the memorandum.

4. The defendant could not prevail on his claim that the condition of his probation barring him from possessing firearms contravenes his second amendment right to bear arms; the defendant waived his second amendment right when he voluntarily accepted the terms of his probation and manifested his assent on several occasions to the temporary restriction on the exercise of his second amendment right imposed by the condition that he could not possess firearms, and, had the defendant been fundamentally opposed to that particular condition, he was free to reject the offer of probation.

Argued December 16, 2015—officially released March 15, 2016

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Britain, geographical area number fif-

teen, where the court, *Baldini*, *J.*, denied the defendant's motions to suppress certain evidence; thereafter, the case was tried to the court, *Baldini*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed. *Affirmed.*

Sandra J. Crowell, senior assistant public defender, with whom, on the brief, were *Martin Zeldis*, former public defender, and *Jacob Pezzulo*, certified legal intern, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Christian Watson*, assistant state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. The defendant, John Maietta, appeals from the trial court's finding that he violated his probation pursuant to General Statutes § 53a-32. On appeal the defendant argues that: (1) the trial court improperly admitted evidence obtained in violation of the fourth and fourteenth amendments to the United States constitution and the separation of powers doctrine; (2) the evidence is insufficient to demonstrate that he violated his probation; (3) the trial court's evidentiary rulings on hearsay evidence were an abuse of discretion and deprived him of his due process rights to confront witnesses and to present a defense; and (4) the condition of his probation making him ineligible to possess firearms violates the second amendment to the United States constitution. We conclude that the defendant cannot prevail on any of his claims, and, accordingly, we affirm the judgment of the trial court.

The following facts, as found by the trial court, are relevant to the resolution of this appeal. Following a complaint to the police by the defendant's former girl-

friend, D,[1] the defendant was arrested in April, 2012, and charged with, inter alia, harassment in the second degree in violation of General Statutes § 53a-183 and criminal trespass in the first degree in violation of General Statutes § 53a-107. On September 26, 2012, the defendant, pursuant to a plea agreement, pleaded guilty to both of those charges and was sentenced to one year incarceration, execution suspended, and two years of probation. Under the terms and conditions of his probation, the defendant was required to submit to searches by his probation officer on reasonable suspicion and to comply with a standing criminal protective order that prohibited the defendant from contacting D and from possessing firearms. The defendant met with probation officers on both October 1 and 11, 2012, to review the conditions of his probation. At the first of these meetings, the defendant completed and signed a "Firearms Compliance Statement" in which he acknowledged that he was ineligible to possess firearms and asserted that he currently did not possess or have access to any firearms. A subsequent search of the state police firearms database (database) by the defendant's probation officer revealed that there were two firearms then registered in the defendant's name. The defendant had reported one firearm stolen to the New Britain Police Department and had surrendered the other firearm to the Newington Police Department two years prior to his arrest.

On October 25, 2012, D contacted Robert Moreau, a probation officer with the Court Support Services Division (adult probation services), and informed him that she was concerned for her personal safety because she believed that the defendant was in possession of

[1] In furtherance of our policy of protecting the privacy interests of the subject of a criminal protective order, we refer to the protected person only by her first initial. See *Wendy V.* v. *Santiago*, 319 Conn. 540, 125 A.3d 983 (2015).

firearms. D told Moreau that the defendant took possession of several of his father's guns when the defendant was appointed his father's conservator in 2009. The defendant's father died shortly thereafter. D also relayed to Moreau that the defendant had told her that he kept a gun in a garage he rented in Newington. After speaking with D, Moreau searched for the defendant's father's name in the database and discovered that there were three firearms still listed as registered to the defendant's father: a Smith & Wesson .38 caliber handgun, an Arcadia Machine & Tool .380 caliber handgun, and a Harrington & Richardson .22 caliber handgun (Harrington handgun).

Moreau contacted Detective Barbara Mattson of the state Department of Emergency Services and Public Protection (department) who confirmed that the three handguns were still registered in the name of the defendant's father. Mattson also informed Moreau that in 2009, when the defendant's father had been involuntarily conserved, the predecessor to the department had informed the defendant's father that he was ineligible to possess firearms. State police records confirmed that the defendant was appointed his father's conservator on March 16, 2009, and that the Harrington handgun had been transferred to the defendant. The records did not indicate that that particular gun was ever registered in the defendant's name. On this information, Moreau received approval from his superiors in adult probation services to undertake a planned probationary search of the defendant's garage in Newington. In accordance with the policy of adult probation services, Moreau received the assistance of Inspectors Michael Sullivan and Jay St. Jacques of the Office of the Chief State's Attorney, certain members of the Greater New Britain Shooting Task Force, and an officer with the Berlin Police Department (collectively, search team).

On November 1, 2012, Moreau, accompanied by three other probation officers and the other members of the search team, traveled to the defendant's apartment in New Britain to first locate the defendant prior to initiating the planned search of the Newington garage. Upon arriving at the defendant's apartment, Moreau rang the doorbell and asked the defendant whether he had any firearms at that location. The defendant denied possessing any firearms at his apartment and allowed the probation officers into his apartment to search the immediate area for guns. When Moreau asked the defendant if he possessed any of his father's firearms, he first indicated that he did not but later stated that there might be a gun stored within a dresser drawer at the Newington garage. The defendant agreed to a search of the garage and voluntarily accompanied Moreau to the site.

After arriving at the Newington garage, the defendant opened the building with his personal key and allowed Moreau and the other members of the search team inside. The defendant directed Moreau to a side room where the dresser allegedly containing the gun was located and indicated a particular dresser among several in the room. When the probation officers opened the drawer of the dresser that the defendant had identified, they located a Harrington & Richardson .22 caliber handgun. The serial number on that gun matched that of the Harrington handgun that was registered to the defendant's late father. The defendant was thereafter charged with criminal possession of a weapon pursuant to General Statutes (Rev. to 2011) § 53a-217 and with violation of a standing criminal protective order pursuant to General Statutes (Rev. to 2011) § 53a-223a. Subsequently, the defendant was charged with violating the conditions of his probation.

The defendant's violation of probation hearing was held on several days throughout August and November,

2013. On August 9, 2013, the trial court denied the defendant's motion to dismiss, rejecting his claim that a condition of his probation infringed on his second amendment right to bear arms. The defendant then moved to suppress the Harrington handgun and his verbal statements to Moreau and the other members of the search team. On November 7, 2013, the trial court denied the defendant's motions to suppress, finding that the exclusionary rule is inapplicable in probation revocation hearings and, that even if it were to apply in the defendant's case, he had consented to the search both at the time it was executed and when he agreed to the conditions of his probation. In regard to the defendant's verbal statements, the trial court reiterated that the exclusionary rule was inapplicable and that, even if it were applicable, the defendant was not in custody when he made the statements. On that same day, the trial court found that the defendant violated the conditions of his probation. On November 19, 2013, the trial court continued the defendant's probation and added new conditions. The defendant appealed to the Appellate Court, and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Additional facts will be set forth as necessary.

The defendant first argues that the searches of his apartment and garage were conducted for law enforcement, not probationary, purposes, and that the trial court therefore erred in not applying the exclusionary rule to suppress the evidence. Additionally, the defendant suggests that the presence of members of the Greater New Britain Shooting Task Force at the search violates the separation of powers doctrine. In response, the state notes that the exclusionary rule is inapplicable to probation revocation proceedings and that the defendant lacks standing to present a separation of powers claim, or alternatively, that the trial court's findings

preclude such a claim. As the exclusionary rule is indeed inapplicable to probation revocation proceedings and the record precludes the defendant's separation of powers claim, we conclude that the trial court properly admitted the Harrington handgun and the defendant's statements into evidence.

In reviewing a trial court's decision on a motion to suppress, "[a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary] . . . ." (Internal quotation marks omitted.) *State* v. *Kalphat*, 285 Conn. 367, 374, 939 A.2d 1165 (2008). It is a well settled tenet of our fourth amendment jurisprudence that "unlike criminal trials, in which the exclusionary rule typically applies, in probation revocation hearings, the exclusionary rule typically does not apply." *State* v. *Jacobs*, 229 Conn. 385, 392, 641 A.2d 1351 (1994); see also *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357, 364, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998); *State* v. *Foster*, 258 Conn. 501, 507, 782 A.2d 98 (2001). We have observed that the exclusionary rule would only provide a " 'marginal deterrent' " to illegal police activity in the probation context; *State* v. *Foster*, supra, 508; given that, in probation revocation proceedings "the government has an interest in accurate fact-finding that is likely to be impaired when otherwise reliable and relevant evidence is excluded from the proceeding." (Internal quotation marks omitted.) Id., 507–508. Likewise, we recognize that probationers have "a diminished expectation of privacy by virtue of [their probationary status] . . . ." *State* v. *Smith*, 207 Conn. 152, 166, 540 A.2d 679 (1988). Our bar on the application of the exclusionary rule to probation revocation proceedings is not absolute, however, as " 'egregious, shocking or harassing police misconduct' "

would warrant our application of the rule to such probation proceedings. *State* v. *Foster*, supra, 509.

In the present case, the defendant offers no compelling reasons as to why the exclusionary rule should apply under the circumstances of his case. The defendant attempts to circumvent the inapplicability of the exclusionary rule by claiming that the probation search conducted by Moreau and his search team was in actuality a thinly veiled law enforcement search orchestrated by the police. The trial court's findings, however, plainly belie the defendant's argument. The searches of the defendant's apartment and the garage were planned probationary searches organized under the auspices of adult probation services. Contrary to the defendant's characterization of the searches, the trial court specifically found that Moreau was "acting in his capacity as a probation officer" when he conducted the searches and questioned the defendant. The trial court specifically found that the searches were conducted by the probation officers and *not* the law enforcement personnel who were present. Indeed, nothing in the underlying record indicates that Moreau and the other probation officers were conducting the searches at the behest of the police or for reasons other than to ensure that the defendant was in compliance with the terms of his probation. As the trial court noted, because probation officers are unarmed, probation policy requires police officers to accompany probation officers on searches for safety reasons.

Furthermore, the present case contains no " 'egregious, shocking or harassing police misconduct' " that would merit the application of the exclusionary rule. *State* v. *Foster*, supra, 258 Conn. 509. The trial court found that there was "no evidence that the defendant was restrained in any way . . . [or] that force was used. There was no evidence of overbearing conduct, coercions or duress of any kind. There was no pushing,

arguing, or harassing the defendant." Rather, the record shows that the defendant voluntarily allowed Moreau and his search team into his apartment and the garage and cooperated with the searches. Accordingly, the defendant's argument that the exclusionary rule should apply to the present case is unpersuasive, and we conclude that the trial court properly admitted the Harrington handgun and the defendant's verbal statements into evidence.[2]

We briefly observe that the defendant's claim that the searches violated the separation of powers doctrine[3] is unavailing. Essentially, the defendant argues that the searches of his apartment and the garage run afoul of the separation of powers doctrine because Moreau and Sullivan are members of the Greater New Britain Shooting Task Force, a coordinated effort between adult probation services, a subset of the Judicial Branch, and various members of the police community, a subset of the executive branch. In the defendant's view, the police dragooned adult probation services into performing the searches and therefore usurped adult probation services' independent authority as a division of the Judicial Branch. The record is utterly devoid of support for this argument. As the trial court correctly noted, Moreau

[2] As we conclude that the exclusionary rule does not apply to the present case, we need not consider the defendant's arguments that he did not consent to the probation search and that he was in custody for the purposes of *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] The constitution of Connecticut, article second, as amended by article eighteen of the amendments, provides in relevant part: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. . . ."

The policy underlying the separation of powers doctrine is "to prevent the commingling of different powers of government in the same hands." (Internal quotation marks omitted.) *State* v. *McCahill*, 261 Conn. 492, 505, 811 A.2d 667 (2002).

was acting in his official capacity as a probation officer during the searches and there is no evidence that he was acting as a member of the Greater New Britain Shooting Task Force. See *State* v. *Cruz*, 260 Conn. 1, 14, 792 A.2d 823 (2003) (rejecting argument that presence of police converted nonpolice personnel into law enforcement agent). Additionally, the absolutist view of the separation of powers that the defendant espouses, in which two branches may not cooperate in the pursuit of a mutual goal, has no support in our case law. Conversely, we have recognized that the three powers of our state government often overlap and have shared objectives and that as a result "the separation of powers doctrine cannot be applied rigidly." *Bartholomew* v. *Schweizer*, 217 Conn. 671, 676, 587 A.2d 1014 (1991). To hold otherwise "would result in the paralysis of government." (Internal quotation marks omitted.) *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 552, 663 A.2d 317 (1995); see *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 597, 858 A.2d 709 (2004).

Having determined that the trial court properly admitted the Harrington handgun and the defendant's verbal statements into evidence, we turn to the defendant's claim that the evidence was itself insufficient to establish that he violated his probation. In reviewing the sufficiency of evidence, "[a]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation. . . . [A] challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when there is no evidence in the record to support [the court's finding

of fact] . . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *State* v. *Maurice M.*, 303 Conn. 18, 26–27, 31 A.3d 1063 (2011).

We conclude that the evidence adduced at the hearing was sufficient for the trial court to determine that the defendant violated the terms of his probation. The evidence reveals that, following his guilty plea on September 26, 2012, the defendant reviewed and signed the terms and conditions of his probation, thereby manifesting his understanding of the necessity to abide by those conditions. The defendant subsequently reviewed the conditions of his probation with a probation officer on both October 1 and 11, 2012. One of the conditions of the defendant's probation required him to comply with the court's standing criminal protective order of September 26, 2012, which barred him from contacting D or possessing any firearms. The defendant had signed a state police "Firearm Compliance Statement," reiterating his understanding that he could not possess firearms and representing that he currently did not possess or have access to any firearms as of October 1, 2012. In signing the statement, the defendant agreed to transfer or surrender any firearms in his possession within two business days. Despite being in possession of his father's Harrington handgun since at least 2009, the defendant did not surrender this firearm. Rather, during the November 1, 2012 search when Moreau asked the defendant if he possessed any guns, the defendant was able to articulate precisely where the Harrington handgun was stored, and the probation officers ultimately located the gun exactly where the defendant indicated it would be. On the basis of this evidence, we cannot say that it was clearly erroneous for the trial court to conclude that the defendant violated his probation by not complying with the condition that he abide by the

criminal protective order prohibiting him from possessing firearms.

We briefly address the defendant's remaining claims. First, the defendant alleges that the trial court abused its discretion when it allowed Moreau and Mattson to testify to a statement made by a sergeant with the New Britain Police Department regarding the purported record of transfer of the Harrington handgun from the defendant's father to the defendant. The defendant moved to strike this testimony as hearsay, and the trial court denied the defendant's motion. The defendant further argues that the trial court abused its discretion in not allowing into evidence a memorandum that, the defendant claims, would have rebutted Moreau's and Mattson's hearsay testimony. The defendant purports that these rulings denied him the right to present a defense.

We note at the outset that the rules of evidence do not apply to probation revocation hearings and, thus, relevant hearsay evidence is admissible at the discretion of the trial court. Conn. Code Evid. § 1-1 (d) (4); see *State* v. *White*, 169 Conn. 223, 239–40, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975); *State* v. *Quinones*, 92 Conn. App. 389, 392, 885 A.2d 227 (2005), cert. denied, 277 Conn. 904, 891 A.2d 4 (2006). The hearsay evidence at issue in the present case was corroborated by D's testimony that the defendant had received his father's guns and the physical evidence of the Harrington handgun itself. The hearsay statement was therefore reliable, and the trial court did not abuse its discretion in allowing it into evidence. See *State* v. *William C.*, 267 Conn. 686, 700–701, 841 A.2d 1144 (2004) (evidentiary rulings of trial court reviewed for abuse of discretion). Likewise, the trial court's rejection of the defendant's offer of a memorandum allegedly rebutting the hearsay statement did not deprive the defendant of his ability to present a

defense. The memorandum, written by William Durkin, an investigator with the State's Attorney's Office in New Britain, for Christian Watson, an assistant state's attorney in that office, described the transfer history of the Harrington handgun in relation to the defendant. The record reveals that the trial court did not allow the defendant to enter the memorandum into evidence as a full exhibit for the dual reasons that it was an internal state memorandum made in connection with a case investigation and, therefore, not subject to disclosure pursuant to Practice Book § 40-14 (1), and that the defendant's witness, Paul Farley, an inspector from the Office of the Public Defender, did not have sufficient familiarity with the document to introduce it and attest to its authenticity. The trial court, however, allowed the defendant to question Farley on the contents of the memorandum, and the trial court's decision excluding the memorandum itself from evidence cannot be said therefore to have deprived the defendant of his right to present a defense. See *State* v. *Andrews*, 313 Conn. 266, 276, 96 A.3d 1199 (2014) (primary consideration in whether defendant deprived of right to present defense is centrality of excluded evidence to defendant's claim).

Finally, the defendant advances the novel argument that the condition of his probation barring him from possessing firearms contravenes the second amendment right to bear arms. The second amendment to the United States constitution guarantees to citizens "the individual right to possess and carry weapons in case of confrontation"; *District of Columbia* v. *Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); although that right is "not unlimited . . . ." Id., 595; *State* v. *DeCiccio*, 315 Conn. 79, 109, 105 A.3d 165 (2014). Specifically, the second amendment does not prevent "[long-standing] prohibitions on the possession of firearms . . . ." *District of Columbia* v. *Heller*, supra, 626;

McDonald v. *Chicago*, 561 U.S. 742, 786, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Alito, J.).

We conclude, however, that the defendant waived his second amendment right when he agreed to the condition of his probation barring him from possessing firearms. It is well established that "a waiver of constitutional rights must be voluntary . . . [under] the totality of circumstances." (Citation omitted.) *State* v. *Ross*, 273 Conn. 684, 702, 873 A.2d 131 (2005); see *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). We have long recognized that "while a potential probationer may reject the offer of probation, if he accepts it, he must accept all the conditions sought and cannot accept some and reject others." *State* v. *Smith*, supra, 207 Conn. 169. As a result of their probationary status, probationers "do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions." (Internal quotation marks omitted.) Id., 165. In the present case, the defendant voluntarily accepted the terms of his probation and manifested his assent on several occasions to the condition that he could not possess firearms, most notably by signing the acknowledgment that he was to refrain from possessing firearms. The defendant cannot now claim that the conditions of his probation unconstitutionally infringe upon his second amendment right when he himself voluntarily agreed to the temporary restriction on the exercise of his second amendment right imposed by the condition barring him from possessing or having access to firearms. Had the defendant been fundamentally opposed to that particular condition, he was free to reject the offer of probation presented to him.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JOSUE RODRIGUEZ (SC 19199)

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

Syllabus

The defendant, who had been on probation following his conviction for various criminal offenses, appealed to the Appellate Court from the trial court's judgment revoking his probation and sentencing him to twelve years incarceration. The defendant, while on probation, was arrested and charged with attempt to commit arson in the second degree in connection with an incident that occurred at his former wife's house. On the same day that the trial court rendered judgment revoking the defendant's probation, the defendant appeared before another trial judge and pleaded guilty to the arson charge. On appeal, the defendant contended that there was insufficient evidence for the court to find that he had violated the terms of his probation. The defendant did not challenge on appeal his guilty plea to the arson charge, but, instead, filed a petition for a writ of habeas corpus in which he contended that the attorney who represented him at the probation revocation hearing and at the hearing on his guilty plea was ineffective and subject to conflicts of interest, and the defendant sought relief from both the arson conviction and the finding of violation of probation. The Appellate Court affirmed the trial court's judgment revoking the defendant's probation but dismissed as moot his claim that there was insufficient evidence to establish that he violated his probation. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court properly determined that the defendant's claim that there was insufficient evidence for the trial court to find that he had violated the terms of his probation was rendered moot when he subsequently pleaded guilty to the criminal charge underlying the finding of violation of probation, and the defendant's collateral attack on the intervening criminal conviction, by filing a habeas petition attacking that plea during the pendency of the violation of probation appeal, did not revive the controversy so as to render his direct appeal justiciable; furthermore, this court concluded that, in light of the expansive relief sought by the defendant in his habeas petition, should he prevail in his attack on the arson plea, the habeas court also may afford him appropriate relief in the violation of probation matter.

Argued November 4, 2015—officially released March 15, 2016

Procedural History

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

district of New Britain, geographical area number fifteen, and tried to the court, *Espinosa*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to the Appellate Court, *Gruendel*, *Beach* and *Schaller*, *Js.*, which dismissed in part the defendant's appeal and affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

David V. DeRosa, assigned counsel, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, was *Brian Preleski*, state's attorney, for the appellee (state).

Opinion

McDONALD, J. When a criminal defendant has been found to have violated the terms of his probation on the basis of allegations that he has committed a new crime while on probation, his appeal from the finding of violation of probation, contending that there was insufficient evidence for the trial court to conclude that he committed the new crime, is rendered moot if, subsequent to that finding, he either pleads guilty to or is convicted at trial of having committed the new crime. This is true because, as a matter of law, when a condition of probation is that the offender is to refrain from violating any criminal laws, conviction of a new crime conclusively establishes a probation violation. In *State* v. *T.D.*, 286 Conn. 353, 360, 944 A.2d 288 (2008), however, we recognized a narrow exception to this rule: when a defendant under these circumstances takes a timely direct appeal from his conviction on the new criminal charge, his violation of probation cannot be presumed, and an appellate court is not barred from considering the merits of the probation violation appeal. The question presented by this appeal is whether this exception to the mootness doctrine extends to cases

in which the defendant fails to take a timely appeal from his guilty plea to the new crime but, instead, challenges the plea collaterally in a habeas corpus proceeding. We conclude that a habeas corpus petition, unlike a direct appeal, does not keep alive a defendant's claim that there was insufficient evidence to find him in violation of his probation.

The relevant factual and procedural history is set forth in the opinion of the Appellate Court. See *State* v. *Rodriguez*, 130 Conn. App. 645, 646–49, 23 A.3d 826 (2011). "In 2005, the defendant [Josue Rodriguez] was convicted of sale of narcotics in violation of General Statutes § 21a-277 (a), and sentenced to twelve years incarceration, execution suspended, with five years probation. As a condition of the defendant's probation, he was not to violate the criminal laws of the state. In 2007, the defendant was convicted of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and burglary in the third degree in violation of General Statutes § 53a-103. He was sentenced to a total effective term of ten years incarceration, execution suspended, and five years probation. The defendant also was found in violation of his probation imposed in 2005, as a result of those offenses. His probation was not revoked, but, rather, it was to run concurrently with the probationary term imposed for the [2007] conviction. The conditions of his [2007] probation included, inter alia, no contact with the victim, Damaris Sanchez, and a 'zero tolerance' provision for any [future] violations." Id., 646–47.

"In the early morning hours on November 14, 2008, Sanchez, the defendant's former wife with whom he had an 'on and off' relationship, was asleep in her home when she awoke to the smell of gasoline fumes. When she looked outside the house, she saw a shadowy human figure walk near the front of her house. When she saw the person's face, she recognized the person as the defendant. She saw the defendant light a lighter

near the hood of her car, and she yelled to him, 'what are you doing to my car.' The defendant ran away. Once outside, Sanchez noticed that the defendant had vandalized her house and car with obscene words and phrases.

"On April 13, 2009, the court found that the defendant violated his probation by committing criminal mischief and violating the no contact order. The court revoked his probation and sentenced him to serve the entire twelve years of his original 2005 sentence." Id., 647.

Later that day, the defendant "appeared before another judge on the underlying criminal charges and pleaded guilty, pursuant to the *Alford* doctrine,[1] to attempt to commit arson in the second degree in violation of General Statutes §§ 53a-112 and 53a-49. The defendant was thereafter sentenced to eight years incarceration, concurrent to the twelve year sentence imposed for violating probation." Id., 648–49.

The defendant filed a timely appeal from the judgment of the trial court finding him in violation of his 2005 probation, contending, among other things, that there was insufficient evidence for the court to find by a preponderance of the evidence that he had violated the terms of his probation. Id., 646. The defendant, however, did not take a timely appeal challenging his guilty plea to the charge of attempt to commit arson. Instead, on July 30, 2009, three months after the period in which to take an appeal had expired, he filed a petition for habeas corpus, claiming that the attorney who represented him at both of the April 13, 2009 hearings was ineffective and subject to conflicts of interest, and seeking relief from both the arson conviction and the finding of probation violation. *Rodriguez* v. *Warden*,

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

Superior Court, judicial district of Tolland, Docket No. TSR-CV-09-4003132-S.

On appeal from the trial court's judgment finding a violation of probation, the Appellate Court dismissed the defendant's sufficiency challenge as moot. *State* v. *Rodriguez*, supra, 130 Conn. App. 649. Relying on its decision in *State* v. *Milner*, 130 Conn. App. 19, 21 A.3d 907 (2011), appeal dismissed, 309 Conn. 744, 72 A.3d 1068 (2013), the Appellate Court concluded that the defendant's plea of guilty to the arson charge conclusively established that he had violated the terms of his 2005 probation. The court also concluded that his collateral challenge by way of the habeas corpus petition, contending that the plea was the result of ineffective counsel, did not create or revive an actual controversy as to whether he had violated probation. *State* v. *Rodriguez*, supra, 648–49.

We granted certification to appeal, limited to the following question: "Did the Appellate Court properly conclude that the defendant's sufficiency of the evidence challenge to the trial court's finding that he had violated his probation was rendered moot by his guilty plea to the underlying criminal charges, despite the fact that he is now challenging that guilty plea in a pending habeas corpus proceeding?" *State* v. *Rodriguez*, 310 Conn. 907, 76 A.3d 628 (2013). After oral argument, we also asked the parties to submit supplemental briefs addressing the question whether, if we conclude that the present appeal is moot, and if the defendant subsequently were to prevail in his habeas action resulting in the vacating of the underlying arson conviction, either this court or the habeas court would have the jurisdiction and authority to reinstate his appellate rights in this matter. Additional facts will be set forth as appropriate.

The defendant's principal claim is that the Appellate Court improperly determined that his appeal, con-

tending that there was insufficient evidence to support the trial court's finding that he had violated the terms of his probation, was moot because he subsequently pleaded guilty to one of the alleged crimes underlying that finding. Specifically, he contends that, by filing a habeas corpus petition attacking that guilty plea during the pendency of the violation of probation appeal, he preserved a live controversy as to whether he did in fact commit a crime while on probation. The state, by contrast, contends that seeking habeas relief from the intervening conviction, unlike a timely appeal, does not preserve a live controversy with respect to the underlying criminal conduct and, accordingly, that the Appellate Court properly concluded that the defendant's appeal was moot. We agree with the state.

The following principles and precedents are relevant to the disposition of the defendant's claim. "For a case to be justiciable, it is required, among other things, that there be an actual controversy between or among the parties to the dispute . . . . [T]he requirement of an actual controversy . . . is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. . . . Moreover, [a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; internal quotation marks omitted.) *State* v. *T.D.*, supra, 286 Conn. 361. Mootness presents a question of law over which we exercise plenary review. Id.

In *State* v. *McElveen*, 261 Conn. 198, 203, 217, 218, 802 A.2d 74 (2002), "the defendant's probation was revoked after he was found to have violated it by attempting to

rob a food delivery person. . . . The defendant appealed from the judgment revoking his probation, claiming that the evidence was insufficient to support the finding of a violation. . . . During the pendency of his appeal, the defendant pleaded guilty to one count of attempted robbery in the third degree. . . . Consequently, we concluded that the appeal was moot because there no longer existed an actual controversy over whether the defendant had committed the criminal conduct underlying the violation of probation. . . . We explained [that] [t]he defendant is seeking review of the trial court's determination that he violated probation by virtue of his criminal conduct . . . . By admitting to that very conduct by virtue of his guilty plea and the resultant judgment of conviction of attempted robbery in the third degree . . . the defendant has eliminated the controversy before the court." (Citations omitted; internal quotation marks omitted.) *State* v. *T.D.*, supra, 286 Conn. 362. We reaffirmed the holding of *McElveen* in *State* v. *Singleton*, 274 Conn. 426, 438–39, 876 A.2d 1 (2005).

Subsequently, in *State* v. *T.D.*, supra, 286 Conn. 363–65, we concluded that a judgment of conviction of the underlying crime following a guilty verdict by a jury will have the same effect as a guilty plea: extinguishing, as a matter of law, any controversy as to whether the defendant committed that crime and rendering moot any appeal alleging that there was insufficient evidence to support a violation of probation. In that case, however, we nevertheless concluded that the defendant's appeal was not moot because, unlike in *McElveen* and *Singleton*, the defendant in *T.D.* took a timely appeal from the underlying judgment of conviction. Id., 365–66. "Given the existence of essentially contemporaneous appeals," we concluded, "there remained a live controversy over whether the defendant had engaged in the criminal conduct underlying the violation of probation."

Id., 366. We stated the rule as follows: "When . . . [a] defendant has pursued a timely appeal from a conviction for criminal conduct and that appeal remains unresolved, there exists a live controversy over whether the defendant engaged in the criminal conduct, and an appeal challenging a finding of violation of probation stemming from that conduct is not moot." Id., 366–67.

Most recently, in *State* v. *Milner*, supra, 130 Conn. App. 27, the Appellate Court considered whether to extend this rule to defendants who fail to take a timely appeal from a judgment of conviction resulting from a guilty plea or a guilty verdict on the underlying crime, but instead seek habeas relief from that conviction. After considering the "cogent arguments" on both sides of the issue, the Appellate Court concluded that a collateral attack on the intervening criminal conviction does not have the same effect as a direct appeal in preserving a live controversy as to a violation of probation finding predicated on the underlying criminal conduct. Id. That court identified two policy reasons favoring a bright line rule distinguishing direct appeals from collateral challenges in this context.

First, the court noted that "[t]here is no time limitation, other than considerations of custody and collateral consequences, on the filing of a petition seeking habeas corpus relief, and, additionally, several years can pass between the filing of a claim for habeas corpus relief and its disposition." Id., 28. Although the Appellate Court did not explain the import of this distinction, the concern presumably is that whereas a direct appeal has a single, continuous life span beginning within a circumscribed period after conviction and ending at a well-defined point of termination, habeas petitions—both original and successive—may be filed at any time. This means that, under the rule proposed by the defendant, an appeal from a finding of violation of probation might repeatedly be mooted and then revived, depending on

whether a defendant chose to pursue habeas relief for the underlying criminal conviction at the time. This would give rise to confusion and disruption; see, e.g., *State* v. *Milner*, 309 Conn. 744, 752 and n.9, 72 A.3d 1068 (2013); and create the potential for gamesmanship as well.

Second, even if, as in the present case, the habeas petition is filed relatively soon after the conviction, the Appellate Court emphasized that there is a clear jurisprudential distinction between direct appeals and collateral challenges: "[T]he mootness consideration underlying the bar [on challenging the evidentiary sufficiency of a finding of probation violation predicated on criminal conduct of which the probationer was subsequently convicted] is not whether practical relief can be afforded, but, rather, whether a live controversy exists as to whether the defendant committed the criminal conduct." *State* v. *Milner*, supra, 130 Conn. App. 28. While a timely appeal *preserves* a live controversy, the Appellate Court reasoned, a habeas corpus petition at best *revives* a controversy after the conviction has become final. Id., 27 and n.2. Therefore, the court concluded, the rationales underlying the direct appeal exception that we carved out in *T.D.* simply do not apply in the habeas context. Id., 27–28.

For these reasons, the Appellate Court in *Milner* dismissed as moot the defendant's claim that there was insufficient evidence to support the finding of violation of probation. Id., 36. We granted certification in *Milner* to consider the question presented herein; *State* v. *Milner*, 302 Conn. 926, 28 A.3d 226 (2011); but we subsequently dismissed the appeal as moot when that defendant failed to prosecute his habeas case. *State* v. *Milner*, supra, 309 Conn. 747. The question is now squarely before us.[2]

[2] In the habeas case, the habeas court, *Sferrazza*, *J.*, denied the present defendant's petition. *Rodriguez* v. *Warden*, supra, Superior Court, Docket No. TSR-CV-09-4003132-S. That case presently is on appeal to the Appellate

Having considered the parties' arguments, we are persuaded that *Milner* was correctly decided, and that "a collateral attack on the intervening criminal conviction does not serve to revive the controversy such that mootness is averted." *State* v. *Milner*, supra, 130 Conn. App. 27. In addition to the concerns regarding the finality of judgments and the timeliness and continuity of appeals on which the Appellate Court relied, we note that the rule in *Milner* promotes judicial economy. When the underlying conviction in a probation revocation hearing is the subject of a habeas petition, the most efficient approach will be to allow the habeas petition to proceed to resolution before expending judicial resources on a direct appeal of a finding of violation of probation, the merits of which may depend in large part on the outcome of the habeas case. If the defendant fails to prevail on his habeas petition, there will be no grounds ever to appeal the sufficiency of evidence supporting the probation violation. If he does prevail, as we explain hereinafter, the habeas court may provide an appropriate forum for raising those claims. Lastly, we recognize that a contrary rule could have the undesirable effect of promoting gamesmanship by those who find themselves in the defendant's position.

The defendant offers three primary arguments for treating collateral challenges the same as direct appeals for mootness purposes, none of which is compelling. First, he makes the somewhat circular argument that, by allowing a habeas petition attacking the underlying criminal conduct to preserve a live controversy for the purposes of a parallel probation violation proceeding, we would reduce or eliminate the incidence of habeas petitions claiming that, by advising a defendant to enter

Court, however, and so remains a live controversy. See *Rodriguez* v. *Commissioner of Correction*, Connecticut Appellate Court, Docket No. AC 35929. On October 7, 2015, the Appellate Court stayed the habeas appeal pending the outcome of the present case.

a guilty plea on the intervening charges (and thus sabotaging his violation of probation appeal), defense counsel provided ineffective legal assistance. Of course, this court, as well as the legislature and the judges of the Superior Court, could reduce the incidence of ineffective assistance of counsel claims by eliminating all manner of rules and procedures the ignorance of which may lead unwary counsel to offer poor advice. We think the more prudent course, however, is to trust in the diligence and competence of the defense bar to provide sound professional advice under such circumstances.

The defendant's second argument is that it is unfair to force a defendant to choose between (1) pleading guilty to the underlying criminal charges, and thereby rendering moot his violation of probation appeal, or (2) contesting the underlying criminal charges, and thus running the risk that, if he is later convicted thereof, he will not receive presentence jail credit for any time spent in jail before he is sentenced. If the argument is that a defendant who intends to contest his guilt on the underlying charges should have the right to game the system by pleading guilty to those charges, beginning to accrue presentence credit, and then attacking the voluntariness of the plea in a habeas proceeding while he simultaneously appeals the finding of violation of probation, the defendant has suggested no basis or authority for such a right, and we are aware of none.

The defendant's third argument is that, if we conclude that a collateral attack on the plea to the underlying criminal charge does not avert mootness of the violation of probation appeal, then, should he prevail on the former, he would be deprived, unfairly, of the opportunity to obtain relief with respect to the latter finding. We disagree. In his amended petition for a writ of habeas corpus, the defendant purported to challenge the validity of his guilty plea to the arson charge. The first claim of the petition, however, alleged that Attorney William

Gerace, who represented the defendant in his three criminal cases relevant to this appeal and the corresponding pleas in those criminal cases, was precluded from providing representation to the defendant commencing with his second criminal case, which resulted in the 2007 risk of injury and burglary convictions, due to a conflict of interest. Moreover, in his second habeas claim, alleging ineffective assistance of counsel and failure to investigate, the defendant alleged not only that Gerace failed to effectively advise him as to the legal consequences of his guilty plea to the arson charge in his third criminal case, but also that, during the violation of probation hearing, "Attorney Gerace failed to object to Judge Espinosa's conclusion that the victim was a battered woman in the absence of any evidence substantiating that conclusion." Consistent with these claims, the defendant requested, by way of relief, not only that the habeas court withdraw or vacate all of his guilty pleas in his three criminal cases, resulting in the narcotics, risk of injury, burglary, and arson convictions, but also that the court vacate the finding of violation of probation and order a new probation revocation hearing on the merits. In light of the expansive relief the defendant is seeking in the habeas case, we conclude that, should he prevail in his attack on the arson plea, the habeas court also may afford him appropriate relief in the violation of probation matter.[3]

[3] If the habeas court were to afford the defendant the full relief he seeks—including vacating the finding of probation violation and ordering a new hearing on the merits—then a pending direct appeal from that finding of probation violation would be unripe. Even if the habeas court were to allow the defendant only to withdraw his arson plea but leave the finding of probation violation undisturbed, that court's broad remedial powers encompass the authority, under appropriate circumstances, to reinstate his appellate rights in a matter under its jurisdiction. See *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 137–38, 7 A.3d 911 (2010). We do not foreclose, however, the possibility that, if the defendant prevails in his collateral attack on the arson plea but the habeas court does not then afford him any meaningful opportunity to obtain review of the finding of violation of probation, he may petition this court for the reinstatement of his appellate rights.

For these reasons, we conclude that the Appellate Court properly determined that, by pleading guilty to attempt to commit arson while he was on probation, the defendant rendered moot his claim that there was insufficient evidence for the trial court to find that he had violated the terms of his probation. We further conclude that by filing a subsequent habeas petition attacking that plea the defendant did not revive the controversy so as to render his direct appeal justiciable. Because we affirm the Appellate Court's determination that the defendant's sufficiency of evidence claim must be dismissed as moot, we do not consider the defendant's substantive arguments as to the merits of that claim.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

BRIAN LEWIS ET AL. *v.* WILLIAM CLARKE ET AL.
(SC 19464)

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

Syllabus

The plaintiffs sought to recover damages from the defendant C, for negligence in connection an automobile accident that had occurred during the course of C's employment as a limousine driver with the defendant tribal gaming authority. The plaintiffs withdrew their claims against the tribal gaming authority before trial. Thereafter, C filed a motion to dismiss, arguing that, because the accident had occurred during the course of his employment, the plaintiffs' claims against him in an individual capacity were barred under the doctrine of tribal sovereign immunity. The trial court denied C's motion to dismiss, determining that the doctrine of tribal sovereign immunity did not apply because the plaintiffs sought money damages from C personally and not from the tribal gaming authority. On C's subsequent appeal, *held* that the trial court improperly denied C's motion to dismiss; this court concluded that the doctrine of tribal sovereign immunity extended to the plaintiffs' claims against C because the undisputed facts established that he was an employee of

the tribal gaming authority and was acting within the scope of his employment when the accident occurred.

Argued December 15, 2015—officially released March 15, 2016

Procedural History

Action to recover damages for the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London, where the action was withdrawn as against the defendant Mohegan Tribal Gaming Authority; thereafter, the court, *Cole-Chu*, *J.*, denied the named defendant's motion to dismiss, and the named defendant appealed. *Reversed*; *judgment directed*.

Daniel J. Krisch, with whom was *Robert A. Rhodes*, for the appellant (named defendant).

James M. Harrington, for the appellees (plaintiffs).

Opinion

EVELEIGH, J. The dispositive issue in this appeal is whether the trial court properly denied the defendant William Clarke's[1] motion to dismiss the claims made by the plaintiffs, Brian Lewis and Michelle Lewis, on the ground that tribal sovereign immunity did not apply to their claims against the defendant in his individual capacity. On appeal, the defendant asserts that the trial court improperly denied his motion to dismiss because tribal sovereign immunity barred the plaintiffs' claims against him for an accident that occurred while he was acting within the scope of his employment with the Mohegan Tribal Gaming Authority. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

[1] Although Clarke's employer, the Mohegan Tribal Gaming Authority, was also named as a defendant in this case, it is not a party to the present appeal. See footnote 2 of this opinion. For the sake of simplicity, references to the defendant in this opinion are to Clarke in his individual capacity.

The following undisputed facts and procedural history are relevant to this appeal. "On October 22, 2011 . . . Brian Lewis was operating a motor vehicle southbound on [Interstate 95] in Norwalk, Connecticut. . . . Michelle Lewis was his passenger. [The defendant] was driving a limousine behind the plaintiffs. Suddenly and without warning, [the defendant] drove the limousine into the rear of the plaintiffs' vehicle and propelled the plaintiffs' vehicle forward with such force that it came to rest partially on top of a [concrete] barrier on the left-hand side of the highway. The collision and the plaintiffs' resulting injuries were caused by [the defendant's] negligence. At that time, [the defendant] was a Connecticut resident, had a Connecticut driver's license, and, according to the affidavit of Michael Hamilton, the [Mohegan Tribal Gaming Authority's director of transportation], was driving a limousine owned by the [Mohegan Tribal Gaming Authority] and was employed by the [Mohegan Tribal Gaming Authority] to do so. Specifically, [the defendant] was driving patrons of the Mohegan Sun Casino to their homes. The limousine was covered by an automobile insurance policy issued by Arch Insurance." (Footnote omitted.)

The plaintiffs filed an action against the defendant claiming, inter alia, that they sustained injuries as a result of the defendant's negligence and carelessness.[2] The defendant filed a motion to dismiss the complaint, claiming that the trial court lacked subject matter jurisdiction because he was entitled to tribal sovereign immunity. In support of his motion, the defendant filed, inter alia, the affidavit from Hamilton. The plaintiffs opposed the motion, claiming that the trial court was not without subject matter jurisdiction because the doctrine of tribal sovereign immunity does not extend to a tribal employee, who is named in his individual capac-

[2] Although the plaintiffs initially filed claims against the Mohegan Tribal Gaming Authority, those claims were subsequently withdrawn.

ity, and the damages are sought from the employee, not from the tribe. The trial court denied the defendant's motion to dismiss, determining that it was not deprived of jurisdiction over the plaintiffs' claims under the doctrine of tribal sovereign immunity because the plaintiffs sought money damages from the defendant personally, not from the Mohegan Tribal Gaming Authority. This appeal followed.[3]

On appeal, the defendant claims that the trial court improperly denied his motion to dismiss. Specifically, the defendant asserts that the trial court improperly concluded that the doctrine of tribal sovereign immunity did not extend to the plaintiffs' claims against the defendant in the present case because they were claims against the defendant in his individual capacity. The defendant asserts that, because he was acting within the scope of his employment for the Mohegan Tribal Gaming Authority and the Mohegan Tribal Gaming Authority is an arm of the Mohegan Tribe (tribe),[4] tribal sovereign immunity bars the plaintiffs' claims against him. In response, the plaintiffs assert that the trial court properly denied the defendant's motion to dismiss. In support of their position, the plaintiffs assert that the remedy sought in their complaint was for damages against the defendant individually and, therefore, would not affect the tribe, accordingly, tribal immunity should not be extended to deprive the court of jurisdiction over their claims.

First, we must address the threshold issue of whether the decision of the trial court denying the motion to dismiss is immediately appealable. "The general rule is that the denial of a motion to dismiss is an interlocutory

[3] The defendant appealed from the judgment of the trial 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.

[4] The parties do not dispute that the Mohegan Tribal Gaming Authority is an arm of the tribe. Therefore, we do not address this issue.

ruling and, therefore, is not a final judgment for purposes of appeal. . . . The denial of a motion to dismiss based on a colorable claim of sovereign immunity, by contrast, is an immediately appealable final judgment because the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Sullins* v. *Rodriguez*, 281 Conn. 128, 130 n.2, 913 A.2d 415 (2007); see also *Kizis* v. *Morse Diesel International, Inc.*, 260 Conn. 46, 51, 794 A.2d 498 (2002) (denial of motion to dismiss filed by tribal employees based on tribal sovereign immunity constitutes final judgment for purpose of appeal). In the present case, because the basis of the defendant's motion to dismiss was a claim of tribal sovereign immunity, we conclude that the denial of the motion to dismiss is an immediately appealable final judgment.

Having concluded that the decision of the trial court denying the motion to dismiss is an immediately appealable final judgment, we next address the standard of review and the general principles governing a trial court's disposition of a motion to dismiss that challenges jurisdiction. The defendant's claim that the plaintiffs' claims are barred because the actions arose in the course of his employment with the Mohegan Tribal Gaming Authority is an assertion of "sovereign immunity [that] 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." (Internal quotation marks omitted.) *Bloom* v. *Gershon*, 271 Conn. 96, 113, 856 A.2d 335 (2004); see also *Fresenius Medical* v. *Puerto Rico Cardiovascular*, 322 F.3d 56, 61 (1st Cir.) (question of whether entity is arm of state entitled to immunity is legal one), cert. denied, 540 U.S. 878, 124 S. Ct. 296, 157 L. Ed. 2d 142 (2003). Accordingly, "[o]ur review of the court's ultimate legal conclusion[s] and

resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010).

Depending on the record before it, a trial court ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to Practice Book § 10-31 (a) (1) may decide that motion on the basis of: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed." (Citation omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651, 974 A.2d 669 (2009).

If the trial court decides the motion "on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . [or] public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits [or] other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with

counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 651–54; see also *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 277–78, 105 A.3d 857 (2015).

It is well established that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority. *Oklahoma Tax* [*Commission*] v. *Citizen Band Potawatomi Tribe of* [*Oklahoma*], 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) . . . . As dependents, the tribes are subject to plenary control by Congress. See *United States* v. *Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) ([t]he [c]onstitution grants Congress powers we have consistently described as plenary and exclusive to legislate in respect to Indian tribes). And yet they remain separate sovereigns [preexisting] the [c]onstitution. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Thus, unless and until Congress

acts, the tribes retain their historic sovereign authority. *United States* v. *Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).

"Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . That immunity, we have explained, is a necessary corollary to Indian sovereignty and self-governance. *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) ([Alexander] Hamilton) ([i]t is inherent in the nature of sovereignty not to be amenable to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in [Congress'] hands. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 84 L. Ed. 894 (1940) . . . ([i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit)." (Citations omitted; internal quotation marks omitted.) *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 788–89, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014).

The United States Supreme Court has recently explained that the "baseline position . . . is tribal immunity; and [t]o abrogate [such] immunity, Congress must unequivocally express that purpose. . . . That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." (Citations omitted; internal quotation marks omitted.) Id., 790.

In the present case, the plaintiffs' complaint contained two counts. Both counts originally named both

the defendant and the Mohegan Tribal Gaming Authority. Prior to the defendant filing his motion to dismiss, the plaintiffs withdrew all of their claims against the Mohegan Tribal Gaming Authority. Therefore, in deciding the motion to dismiss, the only issue before the trial court was whether the doctrine of tribal sovereign immunity barred the plaintiffs' claims against the defendant in his individual capacity.

As we explained previously in this opinion, "if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts . . . ." (Citations omitted; emphasis omitted; footnote omitted.) *Conboy* v. *State*, supra, 292 Conn. 651–52.

In their complaint, the plaintiffs themselves alleged that, "at all relevant times herein, [the defendant] was acting in the scope of his employment with the Mohegan Tribal Gaming Authority and was driving said vehicle with the permission of the Mohegan Tribal Gaming Authority as its [employee, agent or servant]." Furthermore, accompanying his motion to dismiss, the defendant filed the affidavit from Hamilton, which averred that the defendant was driving a limousine owned by the Mohegan Tribal Gaming Authority at the time of the accident. Hamilton further averred that the defendant was employed by the Mohegan Tribal Gaming Authority to use the limousine to drive patrons of the Mohegan Sun Casino to their homes. The plaintiffs did not present any evidence that the defendant was acting outside the scope of his employment at the time of the accident. Therefore, the undisputed facts establish that the defendant was acting within the scope of his

employment when the accident that injured the plaintiffs occurred.[5]

It is well established that "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." (Internal quotation marks omitted.) *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997), citing F. Cohen, Federal Indian Law (1986) p. 284 ("it has been held that where the tribe itself is not subject to suit, tribal officers cannot be [held liable] on the basis of tribal obligations"); see *Romanella* v. *Hayward*, supra, 167 ("[The plaintiff's] action against the tribal officers is a suit against the tribe. As such, the individual defendants' immunity from suit is coextensive with the [t]ribe's immunity from suit."); see also, e.g., *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985); *Tenneco Oil Co.* v. *Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984). Indeed, this court has also recognized that tribal immunity extends to individual tribal officials and employees acting within the scope of their authority. *Kizis* v. *Morse Diesel International, Inc.*, supra, 260 Conn. 54.

The United States Court of Appeals for the Second Circuit has also addressed the implications of tribal immunity in actions against individual employees of the tribe. In *Chayoon* v. *Chao*, 355 F.3d 141 (2d Cir.), cert. denied sub nom. *Chayoon* v. *Reels*, 543 U.S. 966, 125 S. Ct. 429, 160 L. Ed. 2d 336 (2004), the plaintiff appealed the dismissal of certain employment claims against several individuals who were either on the Mashantucket Pequot Tribal Council or were officers or

[5] The plaintiffs do not assert that tribal sovereign immunity is inapplicable in the present case because the accident occurred outside of the reservation. Therefore, we do not address the issue of whether, and to what extent, a tribe is immune from liability arising out of commercial activities that occur outside the reservation.

employees of Mashantucket Pequot Gaming Enterprise, which operates the gaming facility known as Foxwoods Resort Casino. The Second Circuit rejected the plaintiff's claims, concluding that "Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are 'subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.' . . . Furthermore, [the plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the [t]ribe when the complaint concerns actions taken in [the] defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." (Citations omitted.) Id., 143.

Similarly, the United States District Court for the District of Connecticut has also examined whether the doctrine of tribal immunity extended to claims for damages against two employees of the Mashantucket Pequot Museum and Research Center, Inc., where the complaint alleged that they were being named, inter alia, in their "individual capacities." *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271, 274 (D. Conn. 2002). In addressing the claims against the employees in their individual capacities, the court explained that, "[i]n the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity *only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the* [*t*]*ribe*." (Emphasis added.) Id., 280; see *Garcia* v. *Akwesasne Housing Authority*, 105 F. Supp. 2d 12, 18 (N.D.N.Y. 2000) (stating that personal capacity claim may proceed against tribal official if allegations indicate that tribal official acted outside scope of delegated authority), vacated on other grounds, 268 F.3d 76 (2d Cir. 2001); see also *Puyallup Tribe, Inc.* v. *Washington Game Dept.*, 433 U.S. 165, 170–73, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977) (claim

permitted against tribal officials, who were acting as fishermen, rather than tribal government officers when they had engaged in challenged activities).

The District Court further explained that "[c]laimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity. . . . Permitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject [t]ribes to damages actions for every violation of state or federal law. The sounder approach is to examine the actions of the individual tribal defendants. Thus, the [c]ourt holds that a tribal official—even if [named] in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority . . . .' " (Emphasis omitted.) *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F. Supp. 2d 280; see also *Sue/Perior Concrete & Paving, Inc.* v. *Seneca Gaming Corp.*, 99 App. Div. 3d 1203, 1204, 952 N.Y.S.2d 353 (2012) ("[a]lthough tribal immunity does not necessarily extend to individual members of the tribe . . . it does as a rule [extend] to individual tribal officials acting in their representative capacity and within the scope of their authority" [citations omitted; internal quotation marks omitted]); *Gooding* v. *Ketcher*, 838 F. Supp. 2d 1231, 1246 (N.D. Okla. 2012) ("[a] tribal official, even if [named] in an individual capacity, is only stripped of tribal immunity when he acts without any colorable claim of authority" [internal quotation marks omitted]).

Nevertheless, the plaintiffs assert, and the trial court agreed, that the doctrine of tribal immunity should not be applied in the present case. Specifically, the plaintiffs assert that the doctrine of tribal immunity does not apply in the present case because the tribe is neither a party, nor the real party in interest because the remedy sought will be paid by the defendant himself, and not

the tribe. In support of their claim, the plaintiffs cite and the trial court relied on *Maxwell* v. *San Diego*, 708 F.3d 1075 (9th Cir. 2013).

In *Maxwell*, family members of a shooting victim brought an action alleging that the victim had been delayed medical treatment. Id., 1079–81. The United States Court of Appeals for the Ninth Circuit reversed the decision of the trial court dismissing an action against paramedics employed by a tribal fire department. Id., 1081. In reversing the trial court's judgment, the Ninth Circuit concluded that tribal immunity did not bar the claims against the paramedics because "a remedy would operate against them, not the tribe." Id., 1087. The Ninth Circuit explained that because the plaintiffs had brought an action against the tribal paramedics in their individual capacities for money damages, "[a]ny damages will come from [the paramedics'] own pockets, not the tribal treasury." Id., 1089.

We reject the plaintiffs' invitation to apply *Maxwell* in the present case. The Ninth Circuit acknowledged that *Maxwell* concerned "allegedly grossly negligent acts committed outside tribal land pursuant to an agreement with a [nontribal] entity." Id., 1090. The fact that the allegations against the plaintiffs in *Maxwell* involved claims of gross negligence makes the Ninth Circuit's holding in that case distinguishable from the present case. Actions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity. See, e.g., *Young* v. *Mount Ranier*, 238 F.3d 567, 578 (4th Cir. 2001) (discussing Maryland statute providing that "state personnel are immune from suit and from liability for tortious conduct committed within the scope of their public duties and without malice or gross negligence" [footnote omitted]); *Gedrich* v. *Dept. of Family Services*, 282 F. Supp. 2d 439, 474–75 (E.D. Va. 2003) ("[t]he doctrine of sovereign immunity does not

shield state employees from liability for acts or omissions constituting gross negligence"); see also General Statutes § 4-165 ("[n]o state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment").[6]

Indeed, even the Ninth Circuit does not always follow the approach applied in *Maxwell*. See, e.g., *Murgia* v. *Reed*, 338 Fed. Appx. 614, 616 (9th Cir. 2009). In *Murgia*, the Ninth Circuit explained that "[t]he [trial] court erred in concluding that tribal sovereign immunity did not apply solely because the [d]efendants were [named] in their individual capacities. In our circuit, the fact that a tribal officer is [named] in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity. . . . If the [defendant tribal employees] were acting for the tribe within the scope of their authority, they are immune from [the plaintiff's claims] regardless of whether the words 'individual capacity' appear on the complaint." (Citation omitted.) Id. Similarly, in an opinion published approximately one month before *Maxwell*, the Ninth Circuit explained that a tribe's sovereign immunity "extends

[6] The Ninth Circuit recently followed the *Maxwell* "remedy sought" approach in the case of *Pistor* v. *Garcia*, 791 F.3d 1104, 1109 (9th Cir. 2015). In *Pistor*, the Ninth Circuit concluded that tribal immunity did not extend to employees of a tribe who had an action brought against them for working with local police to seize gamblers at the casino and steal their property. Id., 1108–1109. Once again, the decision of the Ninth Circuit not to apply tribal immunity to the defendants is distinguishable because their actions were beyond the scope of their authority. Indeed, the plaintiffs in *Pistor* alleged that the tribal employees developed a scheme with local police "concocted with the goal of punishing plaintiffs for winning so much at . . . [their casino], and the hope of stealing back some of the funds that the plaintiffs had legitimately won." (Internal quotation marks omitted.) Id., 1109. Like *Maxwell*, the facts of *Pistor* are distinguishable from the present case, where there is no allegation that the defendant was acting outside the scope of his employment or in a grossly negligent manner.

to its officials who were acting in their official capacities and within the scope of their authority when they taxed transactions occurring on the reservation." *Miller* v. *Wright*, 705 F.3d 919, 928 (9th Cir. 2013). Furthermore, no other jurisdictions have adopted the "remedy sought" approach applied in *Maxwell*.

On the basis of the foregoing, we conclude that the doctrine of tribal sovereign immunity extends to the plaintiffs' claims against the defendant because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the scope of his employment when the accident occurred. We agree with the United States District Court for the District of Connecticut that the plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside the scope of his authority. See *Chayoon* v. *Chao*, supra, 355 F.3d 143. Accordingly, we conclude that the trial court improperly determined that tribal sovereign immunity did not extend to the defendant in the present case and, therefore, improperly denied the defendant's motion to dismiss the plaintiffs' complaint.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* KYLE PETERSON
(SC 19414)

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

Syllabus

The defendant, who was convicted of possession of a controlled substance with intent to sell on a conditional plea of nolo contendere following

the trial court's denial of his motion to suppress, appealed to the Appellate Court, claiming that the trial court improperly denied his motion to suppress certain evidence seized from his vehicle. On the basis of information received from two individuals who had been arrested on possession of marijuana charges and who had named the defendant as their source, the police began conducting surveillance of the defendant's residence. The defendant was observed making a trip to a particular three-story, multifamily residence in New Britain, which also had been identified as a location from which a confidential police informant had admitted to purchasing marijuana. The defendant parked in the driveway, entered the residence for approximately five minutes, and then left. A few weeks later, the police observed the defendant leaving his residence carrying a weighted plastic bag and they followed him to the same multifamily residence. When the defendant entered the driveway of the residence, the police blocked him in, believing that the defendant was making a marijuana delivery. The police approached the defendant's vehicle and ordered him to exit his vehicle, and subsequently executed a patdown search of the defendant's person. While outside the vehicle, the police observed a plastic bag that appeared to contain marijuana in plain view on the floor behind the front passenger seat. The police then searched the defendant's vehicle and seized the plastic bag, and a field test of the substance in the bag confirmed that it was marijuana. Prior to his trial, the defendant sought to suppress the evidence seized from his vehicle, claiming that the police did not possess a reasonable and articulable suspicion that he was engaged in or about to engage in criminal activity when the police blocked his vehicle in the driveway. The trial court denied the defendant's motion to suppress, finding that, on the basis of the information the police had received and on their observation of the defendant leaving his residence and traveling to the particular multifamily residence, the police had a particularized and objective basis for suspecting the defendant of criminal activity, specifically, the delivery of marijuana. Accordingly, that court concluded that the police had an appropriate basis to stop the defendant and to investigate further. On appeal, the defendant again claimed, inter alia, that the police lacked a reasonable and articulable suspicion that he was engaged in or about to engage in criminal activity when they detained him. The Appellate Court agreed, concluding that the presence of the defendant with a plastic bag at a location where he was believed to have previously delivered drugs once before, without more, was insufficient to particularize the general suspicion of the police officers. That court concluded that any suspicion the police had was founded in conjecture, and that the trial court's determination that the police possessed a reasonable and articulable suspicion that criminal activity was afoot was legally and logically incorrect. Accordingly, the Appellate Court reversed the trial court's judgment and remanded the case with direction to vacate the defendant's plea and to grant his motion to suppress. From that

judgment, the state, on the granting of certification, appealed to this court. *Held* that under the totality of the circumstances of this case, the police possessed a reasonable and articulable suspicion to detain the defendant, the trial court's findings regarding the information that the police possessed before stopping the defendant having allowed a rational inference to be drawn that the defendant was at the location to deliver drugs, and, therefore, the trial court's conclusions were legally and logically consistent with those facts: although the defendant was still parked in the driveway of the multifamily residence when he was detained, based on the totality of the information available to the police that he was an admitted marijuana trafficker, that he was carrying a weighted plastic bag, and that he had pulled into a driveway of a known drug location where police had observed him engage in conduct consistent with drug activity, it was not logically and legally incorrect for the trial court to have found that the police had a reasonable and articulable suspicion that the defendant was there to deliver drugs, and that the plastic bag did not contain innocuous items; furthermore, there was no merit to the defendant's alternative claim that, even if the police had the authority to detain him, they exceeded the permissible scope of a stop pursuant to *Terry* v. *Ohio* (392 U.S. 1) by asking him to exit his vehicle, the trial court here having found that the police had a reasonable and articulable suspicion to have suspected that the defendant was armed.

Argued November 3, 2015—officially released March 15, 2016

Procedural History

Substitute information charging the defendant with two counts of the crime of possession of a controlled substance with intent to sell, and with one count each of the crimes of possession of a controlled substance within 1500 feet of an elementary school and possession of a controlled substance, brought to the Superior Court in the judicial district of New Britain, where the court, *Alander*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Strackbein*, *J.*, on a conditional plea of nolo contendere to one count of possession of a controlled substance with intent to sell; subsequently, the state entered a nolle prosequi as to the remaining charges, and the court, *Strackbein*, *J.*, rendered judgment of guilty in accordance with the plea, from which the defendant appealed to the Appellate Court, *Keller*

and *Schaller*, *Js.*, with *Bear*, *J.*, dissenting, which reversed the trial court's judgment and remanded the case with direction to vacate the plea of nolo contendere and to grant the defendant's motion to suppress, and the state, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Christian Watson*, assistant state's attorney, for the appellant (state).

Jon L. Schoenhorn, with whom, on the brief, was *Irene J. Kim*, for the appellee (defendant).

Opinion

ROGERS, C. J. The principal issue in this case is whether, under the totality of the circumstances, the police possessed a reasonable and articulable suspicion to detain the defendant, Kyle Peterson. After the defendant's motion to suppress was denied, the defendant entered a conditional plea of nolo contendere, pursuant to General Statutes § 54-94a,[1] to possession of a controlled substance with intent to sell in violation of General Statutes § 21a-277 (b). The trial court thereafter rendered judgment in accordance with the defendant's plea and sentenced him to three years imprisonment. The state appeals from the judgment of the Appellate Court reversing the judgment of the trial court and

[1] General Statutes § 54-94a provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress . . . the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress . . . would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress . . . . A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

remanding the case with direction to vacate the conditional plea of nolo contendere and to grant the defendant's motion to suppress, after the Appellate Court concluded that the police did not possess a reasonable and articulable suspicion that "criminal activity was afoot . . . ." *State* v. *Peterson*, 153 Conn. App. 358, 376, 101 A.3d 337 (2014). The state argues that, under the totality of the circumstances, the police had a reasonable and articulable suspicion to detain the defendant outside a known drug location where the defendant had acted in a manner consistent with drug activity once before. We agree and, accordingly, reverse the judgment of the Appellate Court.

The trial court's findings and the record reveal the following undisputed facts and procedural background relevant to this appeal. "On March 10, 2010, officers of the New Britain Police Department were conducting surveillance [of] the residence of Pedro Ayala, a suspected marijuana trafficker. On the same date, the police observed the defendant arrive at Ayala's residence in a Jeep Cherokee, stay for approximately five minutes, and then leave. Once the defendant left Ayala's residence in his vehicle, the police stopped him, searched him, and discovered $4000 in cash on his person. Thereafter, on March 23, 2010, the police executed a search warrant on Ayala's residence and discovered more than two pounds of marijuana, a firearm, and what the police described as 'drug proceeds.' The police arrested Ayala who, in turn, told the police that the defendant was one of his several sources of marijuana and [that], on March 10, 2010, he had paid the defendant $4000 in cash for marijuana.

"Approximately six months later, on September 29, 2010, the police arrested Eric Cedeno for the sale of marijuana. While in police custody, Cedeno told Officer Joseph Lopa that he regularly purchased marijuana from an individual named Kyle Peterson, whom Cedeno

described as a twenty-five year old male who drove two different Jeep Cherokees. Lopa, on the basis of past investigations involving the defendant, corroborated that Cedeno was describing the defendant.

"On the basis of the information received from Ayala and Cedeno that the defendant was selling marijuana in large quantities, the police began conducting surveillance of the defendant's New Britain residence in early October, 2010. In the course of their surveillance, the police observed the defendant make a single trip to 33 Thorniley Street . . . ." Id., 361–62. During that trip, at 33 Thorniley Street, a three-story, multifamily residence in New Britain, the police observed the defendant "park in the driveway, enter the residence for approximately five minutes, and then leave." Id., 362. Just before this observation, on October 7, 2010, "the police arrested Leonardo Soares, a registered confidential informant for the Federal Drug Enforcement Administration, for the illegal possession of prescription drugs. Soares told the police that he had purchased marijuana from an unidentified male living on the third floor of 33 Thorniley Street." Id. Soares said that he had been inside the third floor apartment several times in the past and had witnessed several pounds of marijuana and a large quantity of cash. Id. "On the basis of this information, as well as information previously obtained from Ayala corroborating that the defendant's March, 2010 visit to Ayala's residence involved the sale of marijuana, the police believed that the defendant's October, 2010 visit to 33 Thorniley Street, insofar as the defendant quickly entered and exited the residence, was consistent with drug activity." Id.

The following week, "[o]n October 13, 2010, Lopa contacted Adrian Arocho, a registered confidential informant for the police who had previously provided reliable information, and requested that he make a controlled purchase of marijuana from the defendant. In

addition to agreeing to make the controlled purchase, Arocho indicated that he was familiar with the defendant and knew that the defendant sells marijuana. Lopa provided Arocho with a telephone number that he received from Cedeno. With Lopa seated next to him and the speakerphone activated, Arocho called the number from his cell phone. When an individual answered his call, Arocho told the individual that he wanted to purchase marijuana but his usual supplier, Cedeno, did not have any. The individual responded that he had recently 'set up' Cedeno and that he would call Arocho back. Lopa, who was familiar with the defendant's voice, confirmed that the individual to whom Arocho was speaking was the defendant. Approximately two minutes after that call ended, the defendant called Arocho back and told him never to call again.

"On October 20, 2010, at approximately 1 p.m., Officer Michael Farrell was conducting surveillance of the defendant's residence when he observed the defendant depart the residence in his vehicle with a white, weighted plastic bag in his possession. Farrell contacted Sergeant Jerry Chrostowski via radio to inform him of his observations. Chrostowski, who was conducting patrol in an unmarked police vehicle, followed the defendant to Thorniley Street in New Britain. When Chrostowski turned on to Thorniley Street, he observed the defendant's vehicle enter the driveway of 33 Thorniley Street and come to a stop. At that point, Chrostowski observed the defendant, from his vehicle's driver's seat, begin speaking to an individual unknown to the police through his passenger side window.

"On the basis of the information obtained by the police prior to October 20, 2010, as well as Farrell's observation of the defendant carrying a white, 'weighted' plastic bag out of his residence, Chrostowski 'believed that [the defendant] was making a [marijuana] delivery to

. . . [33 Thorniley Street].' Chrostowski subsequently drove his vehicle into the driveway of 33 Thorniley Street, blocking in the defendant's vehicle from the rear. Chrostowski exited his vehicle, approached the passenger side of the defendant's vehicle, identified himself as a police officer, and instructed the defendant to turn off his engine. Lopa, who arrived at 33 Thorniley Street shortly after Chrostowski exited his vehicle, approached the driver's side of the defendant's vehicle, ordered the defendant to exit the vehicle, and conducted a patdown search of the defendant's person. After Lopa completed his patdown search, he handcuffed the defendant and ordered him to [stand by] the rear of the vehicle." Id., 363–64. The trial court noted in its memorandum of decision that "Lopa, while still outside the defendant's vehicle, gazed into the rear of the vehicle through the open front driver's door and saw in plain view on the floor behind the front passenger's seat a ziplock bag sitting on top of a white plastic bag. The ziplock bag appeared to contain marijuana." (Footnote omitted.) Chrostowski then searched the defendant's vehicle and seized the plastic bag, which contained two ziplock bags. *State* v. *Peterson*, supra, 153 Conn. App. 364. "Following a field test, the substance was confirmed to be marijuana and the police placed the defendant under arrest." Id.

"Prior to trial, the defendant moved to suppress evidence seized from his vehicle, claiming, inter alia, that the police did not possess a reasonable and articulable suspicion that he was engaged in or about to engage in criminal activity when Chrostowski entered the driveway of 33 Thorniley Street. Following a suppression hearing, in its memorandum of decision dated August 23, 2012, the trial court denied the defendant's motion to suppress. In its decision, the court stated: Armed with [the] information [from Ayala, Cedeno, Arocho, and Soares] when the police observed the defendant

leave his residence with a weighted white bag and travel in his vehicle to 33 Thorniley Street on October 20, 2010, they had a particularized and objective basis for suspecting the defendant of criminal activity; specifically the delivery of marijuana to 33 Thorniley Street. Accordingly, the police had an appropriate basis to stop the defendant, by blocking his vehicle, after he entered the driveway of 33 Thorniley Street and investigate further.

"Following the court's denial of his motion to suppress, the defendant entered a conditional plea of nolo contendere, pursuant to . . . § 54-94a, to one count of possession of a controlled substance with intent to sell in violation of § 21a-277 (b). The court accepted the defendant's plea and sentenced him to a total effective sentence of three years imprisonment followed by three years of probation." (Footnote omitted; internal quotation marks omitted.) Id., 364–65.

On appeal to the Appellate Court, the defendant argued, inter alia, that the trial court improperly denied his motion to suppress because the police lacked a reasonable and articulable suspicion that he was engaged in or about to engage in criminal activity when Chrostowski detained him in the driveway of 33 Thorniley Street.[2] Id., 367. Specifically, the defendant contended

[2] The Appellate Court declined to review the defendant's remaining claim with respect to the propriety of the trial court's denial of his motion to suppress because the Appellate Court did not perceive how the defendant's request to enunciate, as a matter of state constitutional law, the circumstances under which the police may properly order an individual from his vehicle and subject him to a physical search implicated the propriety of the denial of his motion to suppress. *State* v. *Peterson*, supra, 153 Conn. App. 366 and nn.2 and 3. Although we generally agree with the Appellate Court, because the patdown search revealed no drugs subject to suppression and the subsequent search of the vehicle was carried out due to the plain view observation of a ziplock bag that appeared to contain marijuana, we will briefly address the defendant's alternative claim for affirmance at the end of our analysis.

there were no contemporaneous facts indicating that he was engaged in or about to engage in criminal activity on October 20, 2010. Id. The defendant argued that "the police did not have a specific and individualized basis to suspect that either (1) the white plastic bag he carried out of his residence contained marijuana or (2) he traveled to 33 Thorniley Street for the purpose of delivering marijuana." Id. A majority of the Appellate Court agreed and concluded that "[t]he presence of a known drug dealer with a plastic bag at a location where he is believed to have previously delivered drugs once before, without more, is insufficient to particularize the general suspicion the police harbored with respect to the defendant on October 20, 2010." Id., 375. The Appellate Court stated in its opinion that "[w]ithout information or observations that would have particularized their general suspicion that the defendant was delivering marijuana to 33 Thorniley Street on October 20, 2010 . . . any suspicion of ongoing crime was necessarily founded in conjecture or the police's subjective notions of the defendant's propensity to engage in criminal behavior. . . . Whatever the basis of Chrostowski's conclusion that the defendant was transporting marijuana to 33 Thorniley Street on October 20, 2010, [the Appellate Court's] review of the record . . . revealed that it could not have been more than a hunch. For that reason, [it] conclude[d] that the [trial] court's determination that the police possessed a reasonable and articulable suspicion that criminal activity was afoot when they detained the defendant on October 20, 2010, was legally and logically incorrect." (Citation omitted.) Id., 375–76. Accordingly, the Appellate Court reversed the judgment of the trial court. Id., 377. This appeal followed.[3]

[3] This court granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine that the totality of the circumstances did not provide sufficient reasonable and articulable suspicion for [the] police to detain the defendant?" *State* v. *Peterson*, 314 Conn. 947, 103 A.3d 980 (2014).

We first address the proper standard of review. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Burroughs*, 288 Conn. 836, 843, 955 A.2d 43 (2008). "[T]he trial court's conclusions must stand unless they are legally and logically inconsistent with the facts." (Internal quotation marks omitted.) *State* v. *Lipscomb*, 258 Conn. 68, 74, 779 A.2d 88 (2001).

The law governing investigatory detentions is also well settled. "Under the fourth amendment to the United States constitution and article first, §§ 7 and 9, of our state constitution, a police officer is permitted in appropriate circumstances and in an appropriate manner to detain an individual for investigative purposes if the officer believes, based on a reasonable and articulable suspicion that the individual is engaged in criminal activity, even if there is no probable cause to make an arrest. . . . Reasonable and articulable suspicion is an objective standard that focuses 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."[4] (Citations omitted; internal quotation marks omitted.) Id., 75.

[4] Reasonable and articulable suspicion is a lower standard than probable cause. *State* v. *Mann*, 271 Conn. 300, 306 n.8, 857 A.2d 329 (2004) ("[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable to show probable cause" [internal quotation marks omitted]), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005).

"[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State* v. *Lipscomb*, supra, 258 Conn. 75. "[A]n investigative stop can be appropriate even where the police have not observed a violation because a reasonable and articulable suspicion can arise from conduct that alone is not criminal. . . . In evaluating the validity of such a stop, courts must consider whether, in light of the totality of the circumstances, the police officer had a particularized and objective basis for suspecting the particular person stopped of criminal activity." (Citations omitted; internal quotation marks omitted.) *State* v. *Lipscomb*, supra, 76. "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." (Internal quotation marks omitted.) *United States* v. *Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); *State* v. *Nash*, 278 Conn. 620, 635, 899 A.2d 1 (2006) ("law enforcement officials are trained to cull significance from behavior that would appear innocent to the untrained observer" [internal quotation marks omitted]).

Consequently, "[w]e do not consider whether the defendant's conduct possibly was consistent with innocent activity but, rather, whether the rational inferences that can be derived from it reasonably suggest criminal activity to a police officer." *State* v. *Madison*, 116 Conn.

"Proof of probable cause requires less than proof by a preponderance of the evidence," or, in other words, less than proof that something is more likely than not. (Internal quotation marks omitted.) *State* v. *Johnson*, 286 Conn. 427, 435, 944 A.2d 297, cert. denied, 555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144 (2008).

App. 327, 336, 976 A.2d 15, cert. denied, 293 Conn. 929, 980 A.2d 916 (2009), citing *State* v. *Lipscomb*, supra, 258 Conn. 75–76, and *State* v. *Trine*, 236 Conn. 216, 230–31, 673 A.2d 1098 (1996). "When reviewing the legality of a stop, a court must examine the specific information available to the police officer at the time of the initial intrusion and any rational inferences to be derived therefrom." *State* v. *Lipscomb*, supra, 76.

On appeal, the defendant does not challenge the underlying factual findings for clear error. Accordingly, the only issue before this court is whether the trial court's conclusion that there was a reasonable and articulable suspicion for the defendant's detention was legally and logically correct.

The defendant's primary claims are that there is no evidence to suggest that the police observation that the plastic bag was weighted meant anything more than the " 'opposite of empty' " and that the state entirely dismisses the temporal requirement that criminal activity must be "afoot." The Appellate Court majority agreed, and in support of its decision stated: "The record does not reveal any particularized basis upon which Chrostowski could have associated the defendant's apparently innocuous conduct in the driveway of 33 Thorniley Street *on that day* with drug activity. . . . Thus, we fail to perceive what specific and individualized factors, if any, led Chrostowski to conclude that the plastic bag in the defendant's vehicle contained marijuana. Indeed, absent any observations of conduct consistent with drug activity, or specific and individualized information suggesting that the defendant's mere presence at 33 Thorniley Street with a plastic bag in his possession gave rise to a reasonable suspicion that he was there to effectuate a drug transaction, Chrostowski not only did not, but could not have known what, if anything, the defendant was doing there on October 20, 2010, aside from talking to someone." (Emphasis in

original.) *State* v. *Peterson*, supra, 153 Conn. App. 373–74.

The flaw in the Appellate Court majority's analysis as to whether the police had a reasonable and articulable suspicion is that it focuses only on the defendant's activities on October 20, 2010, and fails to take into account all of the specific information available to the police on that date and the rational inferences that could be drawn from such information. See *State* v. *Lipscomb*, supra, 258 Conn. 76 ("a court must consider if, relying on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity"). Moreover, "[w]e do not consider whether the defendant's conduct possibly was consistent with innocent activity . . . ." *State* v. *Madison*, supra, 116 Conn. App. 336.

In the present case, the defendant was known to the police because they had corroborated the claim by Ayala, another marijuana trafficker, that he had purchased $4000 of marijuana on March 10, 2010, from the defendant at Ayala's home because they had stopped the defendant that day and found that precise amount of cash in his possession. Additionally, another informant had recently identified the defendant as a person from whom he regularly purchased marijuana. The defendant also had already been observed earlier in the month engaging in conduct consistent with drug activity at 33 Thorniley Street, a location where the police had information that large amounts of marijuana and cash were being stored. Finally, the police had the defendant's recent incriminating statement that he had delivered marijuana to another drug dealer, which corroborated the information from multiple reliable informants that they bought marijuana from the defendant.

Against this factual background, the issue "is not whether the particular conduct is innocent or guilty,

but the degree of suspicion that attaches to particular types of noncriminal acts." (Internal quotation marks omitted.) *United States* v. *Sokolow*, 490 U.S. 1, 10, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). Although the defendant was still parked in the driveway of 33 Thorniley Street when the police detained him, based on the totality of the information available to the police that he was an admitted marijuana trafficker, carrying a weighted plastic bag,[5] and had pulled into the driveway of a drug location where police had seen him recently engage in conduct consistent with drug activity, it was not logically and legally incorrect for the trial court to find that the police had a reasonable and articulable suspicion that the defendant was there to deliver drugs and that the plastic bag did not contain innocuous items.

The defendant's contention that there were no particularized facts that would indicate any ongoing crime at 33 Thorniley Street is not supported by the record or the trial court's findings. 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; *Brown* v. *Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *State* v. *Scully*, 195 Conn. 668, 678–79 n.15, 490 A.2d 984 (1985); the individual's presence in such a location can be a relevant articulable fact in the *Terry* reasonable suspicion calculus. *State* v. *Nash*, supra, 278 Conn. 634; *State* v. *Moreland*, 23 Conn. App. 495, 497, 582 A.2d 212 (1990).

[5] The Appellate Court majority concluded that there was nothing in the record from which to infer that the defendant employed plastic bags or similar items to transport marijuana or that drug dealers in general use plastic bags or that the plastic bag in the defendant's vehicle contained marijuana. *State* v. *Peterson*, supra, 153 Conn. App. 373 and n.7. In addressing this concern, the dissenting judge appropriately referenced the argument put forth by the state that the bag was suspicious, under the circumstances, due to the fact that the defendant was an active marijuana wholesaler dealing in pound quantities of the product and that the bag looked like it contained one pound or more of marijuana. Id., 380–81 n.4 (*Bear*, *J.*, dissenting).

The record in this case, however, demonstrates that the defendant was not stopped just because he happened to be in the wrong place at the wrong time. He also was not stopped merely because he was known to have sold drugs in the past. Rather, the trial court specifically found, relying on Soares' information,[6] that there was a suspicion of ongoing criminal activity at 33 Thorniley Street by noting in its memorandum of decision that "the police had information that 33 Thorniley Street was an address where large amounts of marijuana and cash were stored."[7] Even the Appellate Court majority

[6] The Appellate Court majority took issue with the state's characterization that there was a marijuana dealer "actively operating" out of 33 Thorniley Street based solely on Soares' information, because the trial court did not make a finding of fact to that effect. (Emphasis omitted.) *State* v. *Peterson*, supra, 153 Conn. App. 370–71 n.5. As Soares did not testify at the suppression hearing, Chrostowski testified to Soares' information including that Soares "personally purchases marijuana from 33 Thorniley Street . . . ." On the basis of this testimony by Chrostowski, the trial court found that Soares " 'personally purchased' " marijuana from an individual living at 33 Thorniley Street and that, " 'several times in the past,' " Soares had been inside the third floor apartment where he witnessed " 'several pounds of marijuana and large amounts of cash.' " *State* v. *Peterson*, supra, 370 n.5. While somewhat ambiguous, based on the underlying testimony, we do not believe the state's view of the trial court's finding to be a mischaracterization. Regardless, in making its reasonable and articulable suspicion determination, the trial court simply needed to find Soares' information relevant and credible enough to indicate to the police that there was ongoing criminal activity, which the trial court clearly did find by including Soares' information in its analysis. See *State* v. *Johnson*, 219 Conn. 557, 567, 594 A.2d 933 (1991) (although informant's tip alone would not have supported finding of probable cause, it did indicate ongoing drug activity that was corroborated by subsequent controlled purchase arranged by police); see also *State* v. *Mann*, supra, 271 Conn. 306 n.8 ("reasonable suspicion can arise from information that is less reliable [than that required] to show probable cause" [internal quotation marks omitted]). Furthermore, as to the defendant's contention that Soares' information was stale, the trial court would not have used this information in its reasonable and articulable suspicion analysis if it believed it was stale. See *State* v. *Batts*, 281 Conn. 682, 693, 916 A.2d 788 (2007); *State* v. *Buddhu*, 264 Conn. 449, 465–66, 825 A.2d 48 (2003), cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004).

[7] While the facts are distinguishable, *United States* v. *Collins*, 445 Fed. Appx. 840 (6th Cir. 2011), is illustrative. In that case, the police were aware that the defendant previously had been involved in drug related activity.

recognized that this information, along with the fact that the defendant's actions at 33 Thorniley Street were also consistent with his previous drug transaction at Ayala's home, meant that "the police were not only entitled to lend some degree of credence to the information from Soares . . . but they reasonably could have inferred that the defendant may have sold marijuana to someone living at 33 Thorniley Street when he visited the residence in early October, 2010." *State* v. *Peterson*, supra, 153 Conn. App. 372.

Finally, the Appellate Court majority in reaching its decision relied heavily on a lack of overt drug activity on October 20, 2010. See id. Although the temporal element, or contemporaneous observation, is an important factor in determining reasonable and articulable suspicion; id., 375 (and cases cited therein); it is not the only factor that can lead to a determination that criminal activity was afoot. See *State* v. *Groomes*, 232 Conn. 455, 467–68, 656 A.2d 646 (1995) ("police may detain an individual for investigative purposes if there is a reasonable and articulable suspicion that the individual is engaged in or *about to engage in* criminal activity" [emphasis added]). Farrell, the officer who

Id., 841. Further, an identified citizen submitted weekly complaints to law enforcement that numerous individuals entered the defendant's residence for a short period of time, often carrying bags, and the police verified this suspicious activity. Id. "When [the defendant] left his home on the day of his arrest, he was seen *carrying a small bag*." (Emphasis added.) Id. The United States Court of Appeals for the Sixth Circuit determined that, at that point, the police officers had "an objective and particularized basis for suspecting criminal activity" and thus for attempting to stop the defendant's vehicle in his driveway. Id. Arguably, the facts in the present case are more compelling than, or at least as compelling as, those in *Collins* and, thus, justified an investigatory stop of the defendant. In *Collins*, the suspicion was based on suspicious activity observed outside of the defendant's home and his known involvement in drug related activity but not on any information regarding what was actually occurring at the location. In the present case, the police had observed suspicious activity at a house, the defendant's prior and ongoing involvement in drug activity, *and* actual information that there were large amounts of marijuana and cash being stored at the location.

had been conducting surveillance of the defendant's residence in New Britain in early October, 2010, testified that the defendant used both of his Jeeps to travel to and from his residence approximately thirty to forty times in the span of one week. Chrostkowski testified that, during that time, other officers would rely on Farrell's surveillance and use unmarked vehicles to follow the defendant to other residences in New Britain, including his father's home, where they would observe him engage in activity consistent with drug-related transactions, in particular making quick stops and leaving after less than ten minutes after meeting someone who had been waiting for him in a parked car. Indeed, as Judge Bear noted in his dissenting opinion, the defendant's own incriminating statement one week earlier about delivering marijuana to another drug dealer provided a foundation for the rational inference that he was there to deliver drugs on the day of his arrest. See *State* v. *Peterson*, supra, 153 Conn. App. 386 n.6 (*Bear*, *J.*, dissenting) ("[the defendant's] October 13 admission to resupplying Cedeno with marijuana, and the common knowledge that selling illegal drugs is a regenerating activity . . . alone supported the inference that the defendant was actively engaged in selling marijuana one week later" [citation omitted; internal quotation marks omitted]). This statement, in addition to all the information the police possessed about the defendant when he entered the driveway of 33 Thorniley Street with a weighted plastic bag, were facts that allowed a rational inference to be drawn that the defendant was at the location to deliver drugs contained in that plastic bag that day. The police can make a minimally intrusive inquiry to find out if such a delivery was about to occur and, in this case, did not have to wait for the defendant to exit his vehicle and deliver the drugs. See *State* v. *Lipscomb*, supra, 258 Conn. 76 ("A recognized function of a constitutionally permissible stop is to maintain the

status quo for a brief period of time to enable the police to investigate a suspected crime. . . . [A]n investigative stop can be appropriate even where the police have not observed a violation . . . ." [Citations omitted; internal quotation marks omitted.]).

"In conducting our review, we recognize that the trial court is given great deference in its fact-finding function because it is in the unique [position] to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us." (Internal quotation marks omitted.) Id., 74. While the line can be close between a good hunch and a reasonable and articulable suspicion, in the present case, the trial court's findings regarding the information the police possessed before the stop allowed a rational inference to be drawn that the defendant was at 33 Thorniley Street to deliver drugs. The trial court's conclusions were therefore legally and logically consistent with the facts and, under the totality of the circumstances, we agree that the police possessed a reasonable and articulable suspicion to detain the defendant.

The defendant claims in the alternative that, even assuming that the police had the authority to detain him, the police exceeded the permissible scope of a *Terry* stop when they directed him to exit his vehicle, which afforded the police a plain view of the marijuana located in his vehicle. This claim is meritless. As the trial court observed: "It was . . . reasonable for Officer Lopa to ask the defendant to exit his vehicle during the investigatory stop. . . . Such a step was reasonably related to the need to protect the safety of the police officer. Officer Lopa was approaching a person he knew to traffic in large quantities of marijuana and cash. Accordingly, it was reasonable to suspect that the defendant might be armed to safeguard the drugs and the cash.

In addition, police face 'inordinate risk' approaching a person seated in an automobile. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 [98 S. Ct. 330, 54 L. Ed. 2d 331 (1977)]. This concern for officer safety outweighed the 'de minimis' intrusion into the driver's personal liberty by ordering him out of the vehicle. Id., 111; see also *State* v. *Dukes*, 209 Conn. 98, 122 [547 A.2d 10] (1988) ([a]ny intrusion upon an occupant's personal liberty by asking the occupant to exit a vehicle during a motor vehicle infraction stop is de minimis because it serves to protect the officer)." (Citation omitted.)

The defendant attempts to counter this logic by claiming that the trial court misapplied *Mimms* and *Dukes* because those cases are limited to stops for motor vehicle offenses committed by drivers and this was a *Terry* stop. He argues that, in the *Terry* stop context, the police must have a reasonable and articulable suspicion that an individual is armed and dangerous in order to frisk the individual. "[W]e agree with the defendant that the police must have a reasonable and articulable suspicion that a suspect is armed and dangerous before they may commence a protective patdown search during an investigative stop." *State* v. *Nash*, supra, 278 Conn. 633. The trial court, however, found that it was reasonable to suspect that the defendant was armed.[8] See *State* v. *Mann*, 271 Conn. 300, 325, 857 A.2d 329 (2004) ("the facts supporting the officers' reasonable suspicion that the defendant may have been involved in narcotics trafficking also gave rise to a reasonable suspicion that the defendant was armed and dangerous"), cert. denied,

[8] Although the defendant has briefed and requested that we conduct a state constitutional analysis under *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), and "hold that any removal of automobile occupants by law enforcement and subjecting them to physical searches, must be justified by individualized, reasonable and articulable suspicion that they are armed or dangerous," we decline to undertake this analysis because that determination was actually made by the trial court in the present case. See also footnote 2 of this opinion.

544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005). We conclude, then, that "it [would defy] logic to permit the policeman to order a minor traffic violator out of the car for the policeman's safety [as the United States Supreme Court held in *Pennsylvania* v. *Mimms*, supra, 434 U.S. 111] but not allow him to exercise the same precaution when making a valid [*Terry*] stop of suspected narcotics traffickers." *United States* v. *White*, 648 F.2d 29, 38–39 (D.C. Cir. 1981).

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to render judgment affirming the judgment of the trial court.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* RICHARD BRUNDAGE (SC 19308)

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

Syllabus

Convicted of two counts each of the crimes of sexual assault in the first degree and risk of injury to a child for his abuse of the minor victim, the defendant appealed to the Appellate Court, which determined that one of the four counts in the operative informations was time barred and the other three counts were partially time barred, and reversed the trial court's judgments and remanded the case for a new trial "as to the remaining charges." On remand, the state filed a substitute information charging the defendant with two counts of the crime of kidnapping in the first degree to which the defendant objected, arguing that the Appellate Court's remand order limited his retrial to the three partially time barred charges—one count of sexual assault in the first degree and two counts of risk of injury to a child—amended to cure the statute of limitations defect. The trial court granted the defendant's motion to dismiss the substitute information on the basis that the scope of the remand order precluded the state from amending its information, and the state appealed to the Appellate Court, which reversed the trial court's judgment and remanded the case with direction to reinstate the substitute

information and for further proceedings. On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court properly concluded that its previous remand order did not preclude the state from filing a substitute information containing new kidnapping charges against the defendant: nothing in that court's decision on the defendant's direct appeal considered whether the state should be allowed to file a substitute information containing new charges or was prohibited from doing so, and that court correctly concluded that its decision held only that the state could not proceed on any charges against the defendant that were time barred.
2. The defendant could not prevail on his claim that the Appellate Court improperly determined that the kidnapping charges in the state's substitute information were not barred by the doctrine of res judicata, this court having concluded that res judicata does not apply where, as here, the state had filed a substitute information charging new offenses following the defendant's successful appeal from judgments of conviction and a remand for a new trial; the judgments of conviction for sexual assault and risk of injury on which the defendant relied in invoking the doctrine had been vacated and had no preclusive effect, and the only valid final judgment that remained here was the judgment of the Appellate Court, which reversed the defendant's judgments of conviction, remanded the case to the trial court with direction to dismiss the time barred count of sexual assault and expressly directed further proceedings, specifically, a new trial.

(*One justice dissenting*)

Argued October 8, 2015—officially released March 22, 2016

Procedural History

Substitute informations, in two cases, charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury, where the matter was tried to the jury before *Crawford*, *J.*; verdicts and judgments of guilty, from which the defendant appealed to the Appellate Court, *Lavine*, *Robinson* and *Flynn*, *Js.*, which reversed the trial court's judgments and remanded the cases for a new trial; thereafter, the state filed a substitute information in one case charging the defendant with two counts of the crime of kidnapping in the first degree; subsequently, the trial court, *Fasano*, *J.*, granted the defendant's motion to dismiss the substitute information, and

rendered judgment thereon, from which the state, on the granting of permission, appealed to the Appellate Court, *Gruendel*, *Keller* and *Borden*, *Js.*, which reversed the trial court's judgment and remanded the case with direction to reinstate the substitute information and for further proceedings, from which the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Raymond L. Durelli, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom were *Cynthia S. Serafini*, senior assistant state's attorney, and, on the brief, *Maureen Platt*, state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. Both issues in this certified appeal center on the claim of the defendant, Richard Brundage, that the state is precluded from filing a substitute information bringing new charges against him following his partially successful appeal challenging his convictions on charges that were determined to be time barred. The defendant appeals from the judgment of the Appellate Court, which concluded that the trial court improperly determined that the state was barred from filing a substitute information on remand because the new charges exceeded the scope of the remand from the Appellate Court.[1] *State* v. *Brundage*, 148 Conn. App. 550, 552, 87

[1] We granted the defendant's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issues: (1) "Did the Appellate Court correctly construe its own rescript in *State* v. *Brundage*, 138 Conn. App. 22, 50 A.3d 396 (2012), and thereby properly conclude that the trial court abused its discretion in sustaining the defendant's objection to a substitute information filed by the state after remand?"; and (2) "If the answer to the first question is in the affirmative, did the Appellate Court properly conclude that the doctrine of res judicata did not bar a retrial on the kidnapping charges?" *State* v. *Brundage*, 311 Conn. 943, 89 A.3d 351 (2014).

A.3d 582 (2014) (*Brundage II*). The procedural background of this appeal began in *State* v. *Brundage*, 138 Conn. App. 22, 23–24, 50 A.3d 396 (2012) (*Brundage I*), in which the Appellate Court reversed the judgments of conviction of the defendant of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and (2) and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). In resolving the defendant's statute of limitations challenge to his convictions, the court in *Brundage I* concluded in relevant part that, "[o]f the four counts in the operative informations, only count one . . . is completely time barred [under General Statutes (Rev. to 1993) § 54-193a]. . . . [T]he other three counts are partially untimely and partially timely." (Footnote omitted.) Id., 32. The court remanded the case to the trial court for a new trial "as to the remaining charges." Id., 40. On remand, the trial court granted the defendant's motion to dismiss the state's November 26, 2012 substitute information charging him with two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A) and (B) (2012 substitute information). The trial court ruled that the scope of the remand order precluded the state from amending its information. After receiving permission from the trial court, the state appealed from the dismissal and the Appellate Court reversed the judgment of the trial court. *Brundage II*, supra, 565.

The defendant claims that the Appellate Court improperly concluded that (1) the trial court abused its discretion in granting his motion to dismiss the 2012 substitute information filed by the state on the basis that the remand order from the Appellate Court precluded the state from amending its information, and (2) the trial court properly concluded that the charges in the 2012 substitute information were not barred by the doctrine of res judicata. We conclude that the Appel-

late Court properly construed its own rescript order. We further conclude that the doctrine of res judicata does not apply to the present case, where the only valid final judgment on which the defendant could rely to bar the state from filing the 2012 substitute information is the decision of the Appellate Court in *Brundage I*, supra, 138 Conn. App. 22, which authorized the very proceedings that the defendant claims are barred by that judgment. Accordingly, we affirm the judgment of the Appellate Court.

The Appellate Court decisions in *Brundage I* and *Brundage II* set forth the following relevant facts and procedure. "In January, 1995, the defendant, the boyfriend of the victim's mother,[2] moved into the family home with the victim and her mother in Wolcott. At that time, the victim was eight years old and in third grade. Around this time, the defendant began sexually abusing the victim in the family home when the victim's mother was at work or had gone to bed.

"The abuse began with the defendant fondling the victim's breasts and vagina and digitally penetrating the victim's vagina. When the victim was ten years old and in sixth grade, the defendant began having forced penile-vaginal intercourse with her. Initially, the defendant abused the victim approximately twice each month, but as she became older, the abuse increased to approximately once each week. The victim did not report the abuse because she was afraid of the defendant and he threatened to leave her mother if she told her about the abuse. The abuse continued until approximately March, 2003, when the victim's mother discovered that the defendant was having an affair with another woman and the defendant moved out.

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

"On July 31, 2007, after reading a newspaper article discussing the deportation of the defendant's wife, the victim reported the sexual abuse to the Waterbury police. On October 20, 2007, the victim reported the sexual abuse to the Wolcott police. On November 13, 2007, the Waterbury police obtained a warrant for the defendant's arrest. On November 26, 2007, the Wolcott police obtained a warrant for the defendant's arrest. The defendant was charged with one count of sexual assault in the first degree and one count of risk of injury to a child in two separate informations. The victim testified about the abuse at trial, explaining that the defendant fondled and digitally penetrated her on more than 100 occasions and that the defendant had penile-vaginal intercourse with her on more than 100 occasions. The victim also testified as to five specific incidents of sexual abuse that occurred between 1995 and 2003. On November 10, 2009, the jury found the defendant guilty on all counts in both informations. On January 29, 2010, the court sentenced the defendant to a total effective term of thirty years imprisonment, execution suspended after twenty years, and twenty years probation." (Footnotes altered.) Id., 24–25.

Because the Appellate Court concluded that one of the four counts was completely time barred, and the remaining three counts were partially time barred, it reversed the judgments of conviction and remanded the case to the trial court "for a new trial as to the charges that are not time barred." Id., 32. The rescript to the decision provides that "[t]he judgments are reversed and the cases are remanded with direction to dismiss count one of the Wolcott information and for a new trial as to the remaining charges." Id., 39–40.

"On November 26, 2012, the state filed a substitute information charging the defendant with two counts of kidnapping in the first degree, to which the defendant filed a written objection. In an attempt to resolve any

ambiguity as to the scope of the remand order in *Brundage I*, the state on December 4, 2012, filed a motion for articulation with [the Appellate Court], which was dismissed. The trial court heard argument on the defendant's objection to the substitute information on January 24, 2013. At that time, the state argued that 'if you look at the decision of the Appellate Court, there hasn't been—[it] didn't decide the issue of whether or not the state could amend the charges.' Defense counsel argued that 'the reason we object is because we feel that the Appellate Court was very, very clear in its decision when it stated that the case was going to be reversed and remanded for [a] new trial for charges that are not time barred. . . . [W]e feel it's very clear the Appellate Court was referring to charges not time barred regarding the sexual assault charges and that would be it.' " (Footnote omitted.) *Brundage II*, supra, 148 Conn. App. 553–54. The trial court agreed with the defendant and dismissed the 2012 substitute information. The Appellate Court reversed the judgment of the trial court and remanded the case with direction to reinstate the 2012 substitute information and for further proceedings. Id., 565. This appeal followed.

I

We first address the defendant's claim that the Appellate Court improperly concluded that the trial court abused its discretion in granting the defendant's motion to dismiss the 2012 substitute information. The defendant claims that decisions of this court establish that the trial court properly concluded that the Appellate Court's remand order must be read to allow retrial only on the charges in the two informations under which he had previously been tried—amended to cure the statute of limitations defect—and to preclude the state from filing different charges in a substitute information. The defendant argues that the Appellate Court's remand order unequivocally limits the defendant's retrial to the

remaining count of sexual assault in the first degree and the two counts of risk of injury because those were the only counts that were presented to and addressed by the Appellate Court in *Brundage I*. The state responds that such a narrow reading of the Appellate Court's remand order runs contrary to a basic principle of appellate adjudication—when a reviewing court has not decided a particular issue, the trial court, on remand, is free to consider and rule on that issue. The state contends that because the issue of whether the state would be allowed to file a substitute information bringing new charges against the defendant was neither raised nor considered by the Appellate Court, its decision and rescript cannot be read to bar the state from doing so. We agree with the state.

We begin with the applicable standard of review. "Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . 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.) *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011).

"Well established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted *in light of the opinion*. . . . This is the guiding principle that the trial court must observe. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . . These principles apply to crim-

inal as well as to civil proceedings. . . . The trial court cannot adjudicate rights and duties not within the scope of the remand." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 714–15. "It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 65, 689 A.2d 1097 (1997).

"We have also cautioned, however, that our remand orders should not be construed so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. . . . So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing." (Internal quotation marks omitted.) Id., 65–66.

This court's decisions consistently have declined to read our remand orders narrowly to preclude the trial court from exercising its discretion to manage a case remanded to that court. See, e.g., *State* v. *Wade*, 297 Conn. 262, 276–77, 998 A.2d 1114 (2010) (trial court did not exceed scope of remand when it resentenced defendant on all remaining counts rather than only on reversed count, notwithstanding Appellate Court's rescript directing sentence only on reversed count); *Higgins* v. *Karp*, 243 Conn. 495, 498, 706 A.2d 1 (1998) (trial court misinterpreted remand order, directing trial court to determine whether good cause existed to set aside defaults entered against defendant for failure to plead, to preclude introduction of additional evidence); *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 65–66 (in granting defendants' postremand motion for attorney's

fees, trial court acted within scope of remand that merely directed it to render judgment in favor of defendants); *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 522–25, 686 A.2d 481 (1996) (trial court improperly interpreted remand order for further proceedings " 'for consideration of the zoning enforcement officer's claim for injunctive relief' " to prohibit parties from amending pleadings on remand).

This rule is consistent with the respective roles served by an appellate tribunal and the trial court. A reviewing court is limited to the issues presented to it by the parties to the appeal, and the court cannot and should not attempt to anticipate in its decision every procedural and factual eventuality that could arise upon remand to the trial court. By contrast, the trial court is in the best position to deal with procedural and factual developments in a case on remand and is the proper court to address such eventualities as they arise.

This court's decision in *Beccia* v. *Waterbury*, 192 Conn. 127, 470 A.2d 1202 (1984) (*Beccia II*), aptly illustrates this principle. The plaintiff appealed from the trial court's judgment rejecting his statutory challenge to the certification of another applicant as having ranked first in an examination for the position of fire marshal. *Beccia* v. *Waterbury*, 185 Conn. 445, 447–48, 441 A.2d 131 (1981) (*Beccia I*). On the basis of its construction of the language of the applicable statute, General Statutes (Rev. to 1981) § 29-45, this court reversed the judgment of the trial court and remanded the case to that court "for further proceedings not inconsistent with this opinion." Id., 463. Following this court's decision, the plaintiff commenced two independent actions in the trial court, one of which was an action in quo warranto that sought to oust the defendant—the applicant who had been given the post of fire marshal—from that position, and to declare the position vacant. *Beccia II*, supra, 129. The defendant attempted to assert

as a defense that General Statutes (Rev. to 1981) § 29-45 was unconstitutional. Id., 131. The trial court declined to consider the defendant's constitutional defense, reasoning that it was beyond the scope of the remand. Id. This court disagreed that the failure of the defendant to raise the constitutional challenge in *Beccia I*, and the resulting failure of this court to consider the constitutionality of General Statutes (Rev. to 1981) § 29-45, limited the scope of the remand. We explained: "The constitutional issue was not before us in *Beccia I*. Our opinion does not address that question at all and cannot be read, as the plaintiff suggests, to uphold the statute sub silentio." Id., 133.

The principles that we relied on in *Beccia II* apply with equal force to the present case. In *Brundage I*, the Appellate Court did not have before it the question of whether the state could file, subsequent to a reversal of the defendant's judgments of conviction, a substitute information bringing different charges against the defendant. That question was completely outside the scope of the issues presented in the appeal, and to impose a rule that presumes that a reviewing court would address such an issue would require the reviewing court to act with a degree of prescience that cannot reasonably be expected, and, therefore, is completely inconsistent with the role played by a reviewing court. Instead, the court properly confined its decision to the issues presented to it in that appeal—including the question of whether the trial court improperly denied the defendant's motion to dismiss the sexual assault and risk of injury charges against him as time barred. *Brundage I*, supra, 138 Conn. App. 25. The court's remand order was properly tailored to instruct the trial court that the first count of one information, which was completely time barred, should be dismissed, and that, as to the remaining charges in the informations, the defendant was entitled to a new trial.

Nothing in the court's decision in *Brundage I* envisioned that, on remand, rather than pursuing the portion of the sexual assault and risk of injury charges that were not time barred, the state would elect to file a substitute information bringing new charges against the defendant. Therefore, nothing in the Appellate Court's decision in *Brundage I* considered whether the state should be allowed to file a substitute information or was prohibited from doing so. The Appellate Court correctly concluded in *Brundage II*, supra, 148 Conn. App. 555, that its decision in *Brundage I* held only that "the state could not proceed on any charges against the defendant that were time barred . . . ." Accordingly, the Appellate Court properly concluded that its remand order in *Brundage I* did not preclude the state from filing the 2012 substitute information.[3] Id., 558.

II

Our conclusion that the Appellate Court's remand order did not prohibit the state from filing the 2012 substitute information bringing new charges against the defendant does not end our inquiry. The defendant also contends that the Appellate Court improperly concluded that the kidnapping charges in the state's 2012 substitute information were not barred by the doctrine of res judicata. We conclude that the doctrine of res judicata does not apply where the state has filed a substitute information charging new offenses, following a defendant's successful appeal from judgments of conviction and a remand for a new trial.

[3] We observe that the defendant conceded at oral argument before this court that the Appellate Court's remand order would not preclude the state from entering a nolle prosequi on the sexual assault and risk of injury charges in the present case, then filing a new information charging the defendant with kidnapping under a different docket number. In that event, the defendant would not be entitled to any credit for the time that he has served in connection with the present prosecution. Accordingly, the procedure followed by the state in the present case is more beneficial for the defendant.

We first observe what is *not* before the court in this appeal. The defendant has not claimed that the 2012 substitute information charging him with two counts of kidnapping violates his constitutional protection against being placed in double jeopardy, which is akin to the doctrine of res judicata, and ordinarily serves as the basis of a criminal defendant's claim that a former judgment bars a present prosecution. See *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 120 n.2, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) (Ginsburg, J., dissenting) (noting that "[a] primary purpose served by the [d]ouble [j]eopardy [c]lause is akin to that served by the doctrines of res judicata and collateral estoppel—to preserve the finality of judgments" [internal quotation marks omitted]). Our analysis is therefore confined to whether the new charges violate the civil doctrine of res judicata. That doctrine includes two subcategories: issue preclusion, or collateral estoppel;[4] and claim preclusion, or res judicata. Because the defendant argues that the state is barred from bringing charges that it could have prosecuted in the original trial, but did not, the defendant in the present case relies on the doctrine of claim preclusion. We have explained that under "the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to *any other admissible matter which might have been offered for that purpose*." (Emphasis added; internal quotation marks omit-

[4] The doctrine of collateral estoppel or issue preclusion "is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim." (Internal quotation marks omitted.) *State* v. *Ellis*, 197 Conn. 436, 463, 497 A.2d 974 (1985). The defendant concedes that the state's kidnapping charges were not actually litigated and determined in the first trial, so the doctrine of collateral estoppel is inapplicable to his claim that the state is precluded from filing the 2012 substitute information.

ted.) *State* v. *Ellis*, 197 Conn. 436, 462–63, 497 A.2d 974 (1985).

This court has expressed some reservations regarding the propriety of importing civil joinder rules to the criminal context by way of application of the doctrine of res judicata. Id., 471. Notwithstanding those reservations, however, the doctrine may be applied to preclude a claim if the court concludes that the three public policy principles, or purposes, served by the doctrine of res judicata, weigh in favor of preclusion. Those principles include the promotion of judicial economy, the prevention of inconsistent judgments, and the provision of repose, "by preventing a person from being harassed by vexatious litigation." (Internal quotation marks omitted.) Id., 465–66. The proper inquiry, this court stated, "looks to the actual litigation [that] has occurred in the former prosecution, to the claims raised, the issues decided, and the attendant expenditure of judicial resources. It further looks to the potential for inconsistent judgments which tend to undermine the integrity of the judicial system, and to the harassing effects of repetitious litigation on the defendant." Id., 473–74. It is unnecessary in the present case, however, to consider whether the purposes served by the doctrine of res judicata support preclusion because, given the procedural background, particularly the substance of the Appellate Court's judgment and remand in *Brundage I*, the doctrine is inapplicable.

"[A]pplication of the [doctrine] of res judicata . . . depend[s] on the existence of a valid final judgment . . . ." (Internal quotation marks omitted.) *Beccia II*, supra, 192 Conn. 132. Our first task in determining whether the doctrine applies, therefore, is to identify the valid final judgment on which the defendant relies in invoking the doctrine. Because the defendant's judgments of conviction for sexual assault and risk of injury have been vacated, those judgments have no preclusive

effect. 46 Am. Jur. 2d 739, Judgments § 449 (2006); see *Omimex Canada, Ltd.* v. *State*, 378 Mont. 490, 495, 346 P.3d 1125 (2015) ("when a judgment is reversed, the judgment cannot serve as the basis for a disposition on the grounds of res judicata or collateral estoppel [issue preclusion]" [internal quotation marks omitted]); *California Dept. of Social Services* v. *Thompson*, 321 F.3d 835, 847 (9th Cir. 2003) (same). The only valid final judgment that remains in the present case is the judgment of the Appellate Court in *Brundage I*, which reversed the defendant's judgments of conviction and remanded the case to the trial court "with direction to dismiss count one . . . *and for a new trial as to the remaining charges*." (Emphasis added.) *Brundage I*, supra, 138 Conn. App. 39–40.

As we have explained in part I of this opinion, the Appellate Court properly held that its decision in *Brundage I* was limited to the conclusion that "the state could not proceed on any charges against the defendant that were time barred . . . ." *Brundage II*, supra, 148 Conn. App. 555. Accordingly, the only existing valid final judgment in the present case—the judgment of the Appellate Court—expressly directed further proceedings, specifically, a new trial. The doctrine of claim preclusion, therefore, is simply inapplicable given the substance of the Appellate Court's judgment and the remand. Claim preclusion, when it applies, "is an *absolute bar* to a subsequent action . . . between the same parties or those in privity with them, upon the same claim." (Emphasis added; internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 555, 848 A.2d 352 (2004). The substance of the judgment of the Appellate Court in the present case, however, prevents it from being an absolute bar to further proceedings. Indeed, it would be bizarre to conclude that the judgment of the Appellate Court had a claim preclusive effect on the retrial of the defendant in light of the fact

that the court's decision expressly ordered that there be a retrial. Put another way, the application of the doctrine of res judicata would require rendering the remand order of the Appellate Court a nullity. The Appellate Court properly concluded that the kidnapping charges are not barred by the doctrine of res judicata.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and PALMER, ZARELLA, EVELEIGH and VERTEFEUILLE, Js., concurred.

McDONALD, J., dissenting. I cannot square the majority's conclusion that the state was entitled to file a substitute information containing exclusively new charges against the defendant, Richard Brundage, with the focused and definite terms of the Appellate Court's remand order under our established law. Moreover, I am troubled by the institutional implications that await the Judicial Branch if a specific remand order is interpreted so broadly that it allows a party who is disenchanted with the outcome of an appeal to reinvent its case after the conclusion of that appeal. Because I do not agree that an unsuccessful litigant to an appeal should be permitted a judicial mulligan in such circumstances, I respectfully dissent.

I begin by emphasizing the significance of the fact that the Appellate Court's remand order was directed to a specific end. The order instructed the trial court to conduct a "new trial as to the *remaining* charges." (Emphasis added.) *State* v. *Brundage*, 138 Conn. App. 22, 40, 50 A.3d 396 (2012); cf. *Beccia* v. *Waterbury*, 185 Conn. 445, 463, 441 A.2d 131 (1981) ("the case is remanded for further proceedings not inconsistent with this opinion"). As the majority properly recognizes, a trial court must strictly comply with a remand order and cannot consider matters that are extraneous to the issues and purposes of the remand. See *Hurley* v. *Heart*

Physicians, P.C., 298 Conn. 371, 384, 3 A.3d 892 (2010), and cases cited therein. Compliance with a remand order "means that the direction is not deviated from. . . . No judgment other than that directed or permitted by the reviewing court may be rendered . . . ." (Internal quotation marks omitted.) Id.

It is manifest that a trial on *new* charges, rather than a new trial on the *remaining* charges, does not satisfy these plain requirements. A trial on new charges undeniably and directly deviates from the remand order. Moreover, a trial on new charges indisputably requires the trial court and the parties to consider extraneous matters not within the purview of the original information because the state must prove the distinct elements of the newly charged crimes, the defendant must assert any applicable defenses to those new charges and the trial court must instruct the jury on those charges and any associated defenses that never were the subject of the original case. Regardless of whether the state proves those elements, the judgment that is rendered will be one that was not permitted by the remand order because it is not a judgment on the remaining charges (which the state here abandoned after remand). As such, allowing the state to file a substitute information impermissibly exceeds the scope of the Appellate Court's limited remand order. See *Fair Haven & Westville Railroad Co.* v. *New Haven*, 77 Conn. 667, 672–73, 60 A. 651 (1905) (plaintiff not allowed to amend pleading where remand order was specific and new trial was not ordered); *Oldani* v. *Oldani*, 154 Conn. App. 766, 776, 778, 108 A.3d 272 (new claims in amended complaint extraneous to remand for specific purpose), cert. denied, 315 Conn. 930, 110 A.3d 433 (2015); see also *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 128–29, 629 A.2d 413 (1993) (lower court exceeded scope of limited remand); *Mazzotta* v. *Bornstein*, 105 Conn. 242, 244, 135 A. 38 (1926) (same); *Patron* v.

Konover, 43 Conn. App. 645, 653, 685 A.2d 1133 (1996) (same), cert. denied, 240 Conn. 911, 690 A.2d 400 (1997); *Grady* v. *Schmitz*, 21 Conn. App. 111, 115, 572 A.2d 71 (same), cert. denied, 215 Conn. 806, 576 A.2d 537 (1990).

The majority's principal reliance on a case that issued an open-ended remand order "for further proceedings not inconsistent with [the court's] opinion"; *Beccia* v. *Waterbury*, supra, 185 Conn. 463; and on the fact that the Appellate Court's opinion was silent about whether a substitute information could be filed is unpersuasive. The Appellate Court did not issue an open-ended remand for a new trial but, instead, ordered a new trial on those charges in the original information that remained after that court concluded that the state could not prosecute the defendant on certain charges. Although the Appellate Court's opinion did not address whether a substitute information could be filed, we cannot construe the absence of something as permission for such an action, as such a construction conflicts with the remand. "[W]here the language used in the body of an appellate decision conflicts with the directions given for remand, the directions given for remand control." 5 Am. Jur. 2d 482, Appellate Review § 732 (2007). Nor can we construe such a void as similar to circumstances in which we have allowed a party to pursue a claim or defense based on events that occurred subsequent to the initial proceeding on appeal. See, e.g., *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 522, 686 A.2d 481 (1996) (defendant could be allowed to amend answer on remand to raise defense based on events that occurred after trial). The charges advanced in the substitute information in the present case could have been brought at the outset of the defendant's trial.

In addition to violating our remand jurisprudence, I am concerned that the majority's view allows for the reinvention of this case. Like civil pleadings, the pur-

pose of an information "is to frame, present, define, and narrow the issues and to form the foundation of, and to limit, the proof to be submitted" at trial. (Internal quotation marks omitted.) *Perez* v. *Cumba*, 138 Conn. App. 351, 367, 51 A.3d 1156, cert. denied, 307 Conn. 935, 56 A.3d 712 (2012); 71 C.J.S. 33, Pleading § 2 (2011). By permitting the filing of a substitute information containing entirely new charges against the defendant, the majority allows the state to expand, rather than narrow, the issues as the case has proceeded, thereby undermining the wisdom of our rule that "a case cannot be presented by halves." *Fitch* v. *State*, 139 Conn. 456, 460, 95 A.2d 255 (1953). More importantly, the majority gives the state an unwarranted second bite at the apple. We have stated that parties should never be permitted "to go back [after] all that had been done, and be allowed to change their pleadings and try the case de novo, when they had taken their chance of success in the course they had chosen to pursue, and had lost. Indeed, the door would have been closed to them if the request had been made . . . ." *Crane* v. *Eastern Transportation Line*, 50 Conn. 341, 343 (1882). Accordingly, I cannot agree that it is proper to allow the state to file a substitute information charging the defendant with new offenses after it recognized that it could not obtain a conviction on the crimes on which it chose to originally charge the defendant following the defendant's successful appeal. While I do not suggest that the state should overcharge in anticipation of the possibility of such a failure of proof, I am of the opinion that litigants should frame and present all of the good faith claims or charges that the facts warrant at the outset of a case, in order to conserve the resources of the parties and the judicial system, and to spare all involved the piecemeal presentation of a case.

To be clear, I do not dispute the majority's assertion that the state could have filed a new information or

that doing so would have been more disadvantageous to the defendant than allowing the filing of a substitute information. In fact, that is precisely what should have happened under the circumstances of this case. The efficient operation of our judicial system depends on strict compliance with remand orders as issued. I foresee a day, probably in the not too distant future, where this court will be forced to distance itself from today's holding because of the mischief that it will yield in both our criminal and civil courts.

JOSEPHINE SMALLS MILLER *v.* APPELLATE COURT (SC 19436)

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

Syllabus

The plaintiff in error, M, sought a writ of error from the orders of the defendant in error, the Appellate Court, entered in connection with, inter alia, M's failure to adhere to the appellate rules of procedure and deadlines while appearing as counsel before that court in four different cases. In one case, M failed to file certain certifications, pursuant to the rules of practice (§ 67-2), that must accompany the filing of the brief and appendix despite receiving two notices from the Appellate Clerk's Office regarding those omissions. In a second case, M failed to filed a brief and appendix after being granted two extensions. Although M filed a motion for a third extension, it was filed after the expiration of the first two extensions and, therefore, was denied. In a third case, M failed to file, pursuant to the rules of practice (§ 63-8 [b]), a certificate indicating the estimated date of delivery of the transcript of the trial court proceedings, failed to appear at a previously scheduled hearing, and falsely certified that certain documents had been sent to opposing counsel. In a fourth case, the trial court rendered judgment of nonsuit on the basis of the failure of M and her client to comply with the opposing party's request to revise. M then refiled that action under the accidental failure of suit statute (§ 52-592). Thereafter, the trial court granted the opposing party's motion for summary judgment on the refiled action and made a special finding pursuant to statute (§ 52-226a) that the refiled action was meritless and not brought in good faith. On appeal to the Appellate Court from the trial court's determination in the fourth case that § 52-592 did not apply, the Appellate Court dismissed that

appeal as frivolous. After a hearing to show cause before the Appellate Court, that court issued an order stating that, in light of her conduct and omissions in the four cases, M had exhibited a persistent pattern of irresponsibility in handling her professional obligations before that court. The Appellate Court suspended M from the practice of law before that court for a period of six months, required M to apply for reinstatement after the six month period, referred M to the Chief Disciplinary Counsel, and dismissed the appeals in the four cases. In her writ of error, M claimed, inter alia, that the Appellate Court had abused its discretion in suspending her from practice before that court. *Held* that the Appellate Court did not abuse its discretion in suspending M from the practice of law before that court for a period of six months on the basis of her repeated failure to meet deadlines, to comply with the rules of practice, and for filing a frivolous appeal; M could not prevail on her claim that the Rules of Professional Conduct (rule 8.4) provided the exclusive list of misconduct for which an attorney may be sanctioned or her claim that the record belied the Appellate Court's determination that she had exhibited a persistent pattern of irresponsibility in the handling of her cases, and, although the order of referral to the Chief Disciplinary Counsel could have been clearer, in light of the number and nature of M's transgressions in the Appellate Court, that court, having concluded that M's persistent pattern of missing deadlines and violating court rules threatened the vital interests of her clients, had the discretion to bring those transgressions to the attention of the Chief Disciplinary Counsel for whatever action may be appropriate with respect to M's conduct in the Superior Court.

Argued November 13, 2015—officially released April 5, 2016

Procedural History

Writ of error from the orders of the Appellate Court suspending the plaintiff in error from the practice of law before the Appellate Court for a period of six months, requiring the plaintiff in error to apply for reinstatement after the six month period, referring the plaintiff in error to the Chief Disciplinary Counsel, and dismissing certain appeals that the plaintiff in error had filed on behalf of her clients, brought to this court. *Writ of error dismissed.*

Josephine Smalls Miller, self-represented, the plaintiff in error.

Alayna M. Stone, assistant attorney general, with whom were *Jane R. Rosenberg*, assistant attorney gen-

eral, and, on the brief, *George Jepsen*, attorney general, for the defendant in error.

Opinion

PALMER, J. This case is before us on a writ of error brought by the plaintiff in error, Josephine Smalls Miller, who claims that the Appellate Court abused its discretion in suspending her from the practice of law before that court for a period of six months, in addition to imposing other sanctions, due to her failure to comply with Appellate Court rules and deadlines, and for filing a frivolous appeal. We disagree and, accordingly, dismiss the writ of error.

The record reveals the following facts and procedural history. Miller is an attorney licensed to practice law in the state of Connecticut. On November 3, 2014, the Appellate Court issued an order directing her to appear before an en banc panel of that court and to show cause "why she should not be sanctioned . . . for her failure [as appellate counsel] to meet deadlines and to comply with the rules of appellate procedure in [*Addo* v. *Rattray*, Docket No.] AC 36837, [in which] she . . . failed to timely file the appellant's brief and appendix in compliance with the appellate rules; for her failure [as appellate counsel] to meet deadlines and to comply with the rules of appellate procedure and [court] orders . . . in *Willis* v. *Community Health Services*, [Docket No.] AC 36955, and *Cimmino* v. *Marcoccia*, [Docket No.] AC 35944, and for her presentation of a frivolous appeal . . . [on behalf of the plaintiff] in *Coble* v. [*Board of Education*, Docket No.] AC 36677." The order further stated that "[t]he sanctions being considered by the Appellate Court include a prohibition against appearing in the Appellate Court or filing any papers in the Appellate Court for a period of time, the imposition of a fine

pursuant to General Statutes § 51-84,[1] and costs and payment of expenses, including attorney's fees, to the opposing part[ies]." (Footnote added.) The Appellate Court also ordered opposing counsel in three of the aforementioned cases to appear at the hearing and to present argument on the following then pending motions: (1) the defendant's motion for attorney's fees in *Coble*; (2) the plaintiff's motion to open the dismissal of the appeal in *Willis*; and (3) the plaintiff's motion to set aside rule nisi No. 142267 in *Cimmino*.

On December 3, 2014, the Appellate Court conducted a hearing at which Miller presented oral argument as to why she believed sanctions in the aforementioned matters were unwarranted. Miller also submitted a written memorandum of law in support of her position.

With respect to the claim that she had failed to properly file the appellant's brief and appendix in *Addo*, Miller argued that she did, in fact, file those materials on two separate dates, September 15, 2014, and October 4, 2014. Miller asserted that someone in the Appellate Clerk's Office must have tampered with the Judicial Branch website (website) to make it appear that she had not filed them. In her memorandum of law, Miller accused the Appellate Clerk's Office of "serious misconduct," stating that, "[o]bviously, someone has deliberately manipulated [the] electronic website information in order to justify the claim that no filing has been made by [her]."

In response to Miller's assertions, one of the judges of the Appellate Court explained that the issue was not that Miller had not filed the brief and appendix but,

[1] General Statutes § 51-84 provides: "(a) Attorneys admitted by the Superior Court shall be attorneys of all courts and shall be subject to the rules and orders of the courts before which they act.

"(b) Any such court may fine an attorney for transgressing its rules and orders an amount not exceeding one hundred dollars for any offense, and may suspend or displace an attorney for just cause."

rather, that she had failed to file the certifications that must accompany them pursuant to Practice Book § 67-2 (g),[2] (i),[3] and (j),[4] and, as a consequence, the materials were rejected by the Appellate Clerk's Office. Miller responded that she was not aware that she had not filed the required certifications until early November, 2014, around the time of the order to show cause, and that she subsequently filed the materials on November 10, 2014. The record reveals, however, that, by letter dated September 22, 2014, the Appellate Clerk's Office informed Miller that the brief and appendix she had

[2] Practice Book § 67-2 (g) provides in relevant part: "Every attorney filing a brief shall submit an electronic version of the brief and appendix in accordance with guidelines established by the court and published on the judicial branch website. The electronic version shall be submitted prior to the timely filing of the party's paper brief and appendix pursuant to subsection (h) of this section. . . . Counsel must certify that electronically submitted briefs and appendices: (1) have been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and (2) have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law."

[3] Practice Book § 67-2 (i) provides: "The original and all copies of the brief filed with the supreme court or the appellate court must be accompanied by: (1) certification that a copy of the brief and appendix has been sent to each counsel of record in compliance with Section 62-7 and to any trial judge who rendered a decision that is the subject matter of the appeal; (2) certification that the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically pursuant to subsection (g) of this section; (3) certification that the brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and (4) certification that the brief complies with all provisions of this rule. The certification that a copy of the brief and appendix has been sent to each counsel of record in compliance with Section 62-7, and to any trial judge who rendered a decision that is the subject matter of the appeal may be signed by counsel of record or the printing service, if any. All other certifications pursuant to this subsection shall be signed by counsel of record only."

[4] Practice Book § 67-2 (j) provides: "A copy of the electronic confirmation receipt indicating that the brief and appendix were submitted electronically in compliance with subsection (g) of this section shall be filed with the original brief."

filed on September 15, 2014, "fail[ed] to comply with the requirements of . . . [§] 67-2 . . . . The electronic submission and the paper filings must be certified [in accordance with that rule of practice] . . . . Please resubmit the electronic version of the brief and appendix containing the required certification. Please submit proper certifications for the printed brief and appendix and please also submit the electronic confirmation receipt for the refiled electronic version." Miller subsequently received a second letter, entitled "SECOND NOTICE," dated October 10, 2014, stating that the brief and appendix still did not comply with the requirements of § 67-2 and, therefore, that they would have to be refiled. As in the first letter, the second letter set forth in detail what Miller needed to do to comply with § 67-2. The letter concluded: "Please immediately resubmit the electronic version of the brief and appendix containing the required certifications for the uploaded brief and appendix. Please immediately submit all of the proper certifications listed [in the second letter] for the printed brief and appendix. Please also submit the electronic confirmation receipt for the refiled electronic version." As of the date of the show cause hearing, Miller had not filed the required certifications and confirmation in *Addo*.

With respect to the claim that she had failed to timely file the brief and appendix in *Cimmino*, Miller argued that she had not filed those materials because she did not discover until the week that they were due that the trial transcript, which had been delivered to her more than one year before the show cause hearing, was incomplete, and, according to Miller, she could not complete the brief without the missing transcript pages. The record reveals that, prior to the issuance of the order to show cause, Miller had been granted two extensions of time to file the appendix and brief. Miller was granted a four month extension on September 24, 2013,

followed by a six month extension on December 16, 2013, with a due date for the brief and appendix of July 1, 2014. Six weeks after that date, on August 19, 2014, Miller requested a third extension, which the Appellate Court denied. On August 26, 2014, the Appellate Court issued an order nisi to Miller advising her that the appeal in *Cimmino* would be dismissed if the brief and appendix were not filed by September 9, 2014. The record indicates that, at the time of the December 3, 2014 show cause hearing, those materials still had not been filed.

Miller also presented argument in support of her motion in *Willis* to open the dismissal of that appeal. The Appellate Court dismissed the appeal after Miller failed to respond to a July 31, 2014 order nisi informing her that the appeal would be dismissed if, by August 11, 2014, she did not file a certificate indicating the estimated date of delivery of the transcript pursuant to Practice Book § 63-8 (b). Miller, a solo practitioner, explained that she was out of the country when the order was issued and that the appeal was dismissed before she returned. Miller further explained that the transcript in question had been filed with the Appellate Court on February 24, 2014, in connection with an earlier appeal in the case, which the Appellate Court had dismissed for lack of a final judgment. Miller explained that, after obtaining a final judgment, she refiled the appeal without realizing that she had to refile the transcript and certification. Miller argued that the mere failure to file those documents should not serve as a ground for imposing sanctions or for the dismissal of the appeal. In response, opposing counsel argued that, if Miller's only misstep in *Willis* had been a failure to file the transcript and corresponding certification, then she would agree that a dismissal would be too severe a sanction. Opposing counsel argued, however, that there were many other examples of Miller's failure to diligently prosecute the appeal, including Miller's fail-

ure to appear at a previously scheduled hearing and her act of falsely certifying that certain documents had been sent to opposing counsel. When a judge of the Appellate Court asked Miller, at the show cause hearing, whether, prior to leaving the country, she had made arrangements for another attorney to cover her practice, Miller responded that she had not done so because she did not believe that there was any reason to make such arrangements. When asked what assurance she could provide the court that such lapses would not occur in the future, Miller stated that, because of her limited resources as a solo practitioner, she could assure the court only that she would try to find someone to cover her practice on a pro bono basis if she were to travel again for an extended period of time. Miller also admonished the court that, "[r]ather than being sanctioned, [she] should be commended" for her work because, according to Miller, all of her appellate work is performed on a pro bono basis. Miller further indicated that the Appellate Court's treatment of her appeared to be racially motivated and reminded her of how she was treated in the late 1970s as a court employee in Georgia.

Finally, the Appellate Court considered the defendant's motion for attorney's fees in *Coble* as well as Miller's argument that sanctions were unwarranted in that case because the appeal was not frivolous. The record reveals that the action in *Coble* was originally brought in May, 2009. In July, 2010, the trial court rendered a judgment of nonsuit on the basis of the plaintiff's failure to, inter alia, comply with the defendant's request to revise. See Practice Book § 10-37. Miller, on behalf of the plaintiff, thereafter filed a motion to open the judgment pursuant to General Statutes § 52-212 (a), which was denied. That ruling was appealed to the Appellate Court, which determined that the trial court did not abuse its discretion in denying the motion to

open the judgment and, accordingly, affirmed the trial court's judgment.[5]

In 2013, Miller refiled the action in *Coble* on behalf of the plaintiff in that case pursuant to the accidental failure of suit statute, General Statutes § 52-592. Thereafter, the defendant filed a motion for summary judgment. In a deposition of Miller taken in connection with that motion, she stated that the original action had failed because, as a solo practitioner, she had no one to teach her the "ins and outs" of Connecticut practice, and, as a result, she was "ignorant" of the rules of practice. Miller also stated that she was overwhelmed by work in her practice and had adopted a "hit or miss" approach to civil procedure.

The trial court granted the defendant's motion for summary judgment in *Coble*. In a subsequent articulation of its ruling, the court explained that the nonsuit in the original action was not the result of mistake, inadvertence or excusable neglect, and, therefore, Miller could not rely on the accidental failure of suit statute to refile the action. Specifically, the court stated: "In reading the extensive history outlined by the defendant in the initial motion and a review of the Appellate Court's [decision] denying the plaintiff's motion to set aside a dismissal of the previous matter, it is obvious that [Miller] appears [to have] exhibited an inherent failure to comply throughout the previous matter, as [w]as [n]oted by the Appellate Court, as well as failure to comply with various orders of [the trial] court. It was on that basis [that the trial] court found [and] does find again that, as a matter of law, the termination

[5] "The [plaintiff] could have challenged the merits of the judgment of dismissal by taking a timely appeal therefrom. On an appeal from a judgment following a denial of a motion to open pursuant to § 52-212 (a), however, the standard of appellate review is whether the trial court's judgment was an abuse of its discretion." *Ruddock* v. *Burrowes*, 243 Conn. 569, 571 n.4, 706 A.2d 967 (1998).

of the previous matter was not the result of mistake, inadvertence, or excusable neglect." The trial court also granted the defendant's motion for a special finding pursuant to General Statutes § 52-226a[6] that the second action was meritless and not brought in good faith.

Miller, on behalf of the plaintiff in *Coble*, appealed to the Appellate Court, claiming that the trial court incorrectly determined that the earlier nonsuit was not the result of mistake, inadvertence or excusable neglect and, as a result, also improperly concluded that the accidental failure of suit statute did not apply. Thereafter, the defendant in *Coble* filed a motion to dismiss the appeal as frivolous, which the Appellate Court granted. In its order dismissing the appeal, the Appellate Court stated that "[t]he entire panel recommends that the full court [also] consider the imposition of sanctions against [Miller]." At the December 3, 2014 hearing to show cause, Miller argued that such sanctions were unwarranted because reasonable minds could differ as to whether the appeal was frivolous, as evidenced by the fact that one of the judges of the Appellate Court had voted to deny the defendant's motion to dismiss the appeal.

On December 9, 2014, the Appellate Court issued an order stating that, "[a]fter reviewing . . . Miller's conduct in [*Coble*, *Willis*, *Cimmino* and *Addo*], the Appellate Court has determined that [Miller] has exhibited a persistent pattern of irresponsibility in handling her professional obligations before [the Appellate] [C]ourt.

[6] General Statutes § 52-226a provides: "In any civil action tried to a jury, after the return of a verdict and before judgment has been rendered thereon, or in any civil action tried to the court, not more than fourteen days after judgment has been rendered, the prevailing party may file a written motion requesting the court to make a special finding to be incorporated in the judgment or made a part of the record, as the case may be, that the action or a defense to the action was without merit and not brought or asserted in good faith. Any such finding by the court shall be admissible in any subsequent action brought pursuant to section 52-568."

. . . Miller's conduct has included the filing of [a] frivolous [appeal] and the failure to file, or to file in timely and appropriate fashion, all documents and materials necessary for the perfection and prosecution of appeals before [the Appellate] [C]ourt.

"[Miller's] conduct . . . has threatened the vital interests of her own clients while consuming an inordinate amount of [the Appellate] [C]ourt's time and her opponents' resources. . . . Miller has neither accepted personal responsibility for the aforesaid conduct nor offered [the] court any assurance that such conduct will not be repeated, based [on] either her commitment to improving her knowledge of appellate practice and procedure or her institution of changes in her law practice to monitor her cases more effectively and ensure timely compliance with [the] rules of procedure." In light of the foregoing, the Appellate Court suspended Miller from practice before that court for a period of six months with the exception of the appeal in *Addo*. The court further ordered that Miller, before being reinstated to practice before the court, be required to file a motion for reinstatement that includes an affidavit in which she (1) "commits herself to discharging her professional responsibilities before [the Appellate] [C]ourt in a timely and professional manner," (2) "provides documentary proof of successful completion of a seminar on legal ethics and a seminar on Connecticut appellate procedure," (3) "documents any other efforts since the date of [the court's] order to improve her knowledge of appellate practice and procedure," and (4) "offers [the court] detailed, persuasive assurances that she has implemented changes in her law practice designed to ensure full compliance with the rules of appellate procedure, including a written plan indicating what procedures she has implemented in her office to ensure her compliance with the appellate rules and procedures and to protect her clients' interests."

Finally, the Appellate Court ordered "that these matters [be] referred to the Chief Disciplinary Counsel for review and further action as it is deemed appropriate."

In separate simultaneous orders, the Appellate Court dismissed the appeal in *Cimmino*, denied the plaintiff's motion to open the dismissal of the appeal in *Willis*, and denied the defendant's motion for attorney's fees in *Coble*.[7] The Appellate Court permitted Miller to continue prosecuting the appeal in *Addo*, however, as long as Miller filed, within ten days of the issuance of the court's order, the missing "certifications . . . [and] a copy of the November 10, 2014 electronic confirmation receipt indicating that the brief and appendix were submitted electronically in compliance with Practice Book [§] 67-2 (g) . . . ." When Miller failed to file those documents in a timely manner, however, the Appellate Court dismissed the appeal in *Addo* as well.

In her writ of error, Miller claims that the Appellate Court abused its discretion in suspending her from practice before that court because the conduct for which she was sanctioned does not violate rule 8.4 of the Rules of Professional Conduct,[8] which, in Miller's view,

[7] The defendant's motion for attorney's fees in *Coble* was denied without prejudice to the defendant's right to seek such fees in the trial court.

[8] Rule 8.4 of the Rules of Professional Conduct, which sets forth specific behavior that constitutes attorney misconduct, provides: "It is professional misconduct for a lawyer to:

"(1) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

"(2) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

"(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

"(4) Engage in conduct that is prejudicial to the administration of justice;

"(5) State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

"(6) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law."

provides the exclusive list of misconduct for which an attorney may be sanctioned. Indeed, Miller contends that "[t]here have been no reported cases found [in which] Connecticut courts have sanctioned an attorney for alleged failures to comply with rules of appellate procedure such as filing deadlines, electronic filing requirements, or the filing of a transcript." Miller also argues that the sanctions that the Appellate Court imposed, namely, a six month suspension, referral to the Chief Disciplinary Counsel for consideration of whatever further action might be appropriate, and dismissal of Miller's four Appellate Court cases, were disproportionate to the alleged misconduct. Miller maintains, in fact, that a close examination of each of those cases "shows no irresponsibility" on her part. We are not persuaded by Miller's claims.

It is beyond dispute that courts "[have] the authority to regulate the conduct of attorneys and [have] a duty to enforce the standards of conduct regarding attorneys." *Bergeron* v. *Mackler*, 225 Conn. 391, 397, 623 A.2d 489 (1993); see also *Gionfrido* v. *Wharf Realty, Inc.*, 193 Conn. 28, 33, 474 A.2d 787 (1984) ("[i]t is an inherent power of the court to discipline members of the bar, and to provide for the imposition of reasonable sanctions to compel the observance of its rules" [internal quotation marks omitted]). "There are three possible sources for the authority of courts to sanction counsel and pro se parties. These are inherent power, statutory power, and the power conferred by published rules of the court. The power of a court to manage its dockets and cases by the imposition of sanctions to prevent undue delays in the disposition of pending cases is of ancient origin, having its roots in judgments . . . entered at common law . . . and dismissals . . . . That power may be expressly recognized by rule or statute but it exists independently of either and arises because of the control that must necessarily be vested in courts in order

for them to be able to manage their own affairs so as to achieve an orderly and expeditious disposition of cases." (Internal quotation marks omitted.) *Srager* v. *Koenig*, 42 Conn. App. 617, 620, 681 A.2d 323, cert. denied, 239 Conn. 935, 936, 684 A.2d 709 (1996); see also *Briggs* v. *McWeeny*, 260 Conn. 296, 335, 796 A.2d 516 (2002) ("[a] court is free to determine in each case, as may seem best in light of the entire record before it, whether a sanction is appropriate and, if so, what the sanction should be" [emphasis omitted; internal quotation marks omitted]).

Disciplinary proceedings are "for the purpose of preserving the courts of justice from the official ministration of persons unfit to [practice] in them." *Ex parte Wall*, 107 U.S. 265, 288, 2 S. Ct. 569, 27 L. Ed. 552 (1883). "The proceeding to . . . [suspend] an attorney is neither a civil action nor a criminal proceeding, but is a proceeding sui generis, the object of which is not the punishment of the offender . . . but the protection of the court. . . . Once the complaint is made, the court controls the situation and procedure, in its discretion, as the interests of justice may seem to it to require. . . . [T]he power of the courts is left unfettered to act as situations, as they may arise, may seem to require, for efficient discipline of misconduct and the purging of the bar from the taint of unfit membership. [Statutes governing attorney discipline] are not restrictive of the inherent powers [that] reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct. . . . In [disciplinary] proceedings . . . therefore, the attorney's relations to the tribunal and the character and purpose of the inquiry are such that unless it clearly appears that [the attorney's] rights have in some substantial way been denied him, the action of the court will not be set aside upon review." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn.

232, 238–39, 558 A.2d 986 (1989), cert. denied, 502 U.S. 1094, 112 S. Ct. 1170, 117 L. Ed. 2d 416 (1992). "As with any discretionary action of the . . . court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue . . . is whether the . . . court could have reasonably concluded as it did. . . . Therefore, whether this court would have imposed a different sanction . . . is irrelevant." (Citations omitted; internal quotation marks omitted.) *Thalheim* v. *Greenwich*, 256 Conn. 628, 656, 775 A.2d 947 (2001). A uniform standard of clear and convincing evidence applies to attorney disciplinary proceedings, "regardless of the nature of the sanction ultimately imposed." *Statewide Grievance Committee* v. *Presnick*, 215 Conn. 162, 171–72, 575 A.2d 210 (1990).

Applying the foregoing principles to the facts of the present case, we conclude that the Appellate Court did not abuse its discretion in suspending Miller from the practice of law before that court for a period of six months on the basis of her repeated failure to meet deadlines, to comply with the rules of practice, and for filing a frivolous appeal. See, e.g., *Srager* v. *Koenig*, supra, 42 Conn. App. 621–24 (attorney suspended from practice before Appellate Court for six months on basis of repeated noncompliance with rules of practice and failure to timely file court documents). This court previously has observed that, "[i]n order to fulfill our responsibility of dispensing justice we in the judiciary must adopt an effective system of caseflow management. Caseflow management is based [on] the premise that it is the responsibility of the court to establish standards for the processing of cases and also, when necessary, to enforce compliance with such standards. Our judicial system cannot be controlled by the litigants and cases cannot be allowed to drift aimlessly through the system." *In re Mongillo*, 190 Conn. 686, 690–91, 461 A.2d 1387 (1983), overruled in part on other grounds

by *State* v. *Salmon*, 250 Conn. 147, 735 A.2d 333 (1999). Thus, General Statutes § 51-84 (a) provides that "[a]ttorneys admitted by the Superior Court shall be attorneys of all courts and shall be subject to the rules and orders of the courts before which they act." Section 51-84 (b) provides that "[a]ny such court may fine an attorney for transgressing its rules and orders an amount not exceeding one hundred dollars for any offense, and may suspend or displace an attorney for just cause." Practice Book § 85-2, in turn, provides in relevant part that, in the appellate courts, "[a]ctions which may result in the imposition of sanctions include, but are not limited to," the "[f]ailure to comply with rules and orders of the court," "[r]epeated failures to meet deadlines," and the "[p]resentation of a frivolous appeal or frivolous issues on appeal." Practice Book § 85-2 further provides that "[o]ffenders will be subject, at the discretion of the court, to appropriate discipline, including the prohibition against appearing in the court or filing any papers in the court for a reasonable and definite period of time . . . ."

Thus, Miller's contention that rule 8.4 of the Rules of Professional Conduct provides the exclusive list of misconduct for which an attorney may be sanctioned is patently frivolous. Nor is the present case, as Miller argues, the first in which an attorney has been sanctioned by a Connecticut court for failing to comply with the rules or orders of the court. Indeed, our case law is replete with examples of instances in which our courts have exercised their authority, whether inherent or pursuant to statute or the rules of practice, to sanction an attorney for such conduct. See, e.g., *Thalheim* v. *Greenwich*, supra, 256 Conn. 635, 657 (court did not abuse its discretion in concluding that appropriate sanction for attorney who filed amicus curiae brief without first obtaining permission from court was "to read the Connecticut Practice Book, to listen to audiocassettes

available from the Connecticut Bar Association pertaining to civil practice and procedure in Connecticut courts, and to certify to the court within four months that he had listened to the tapes and read the entire Connecticut Practice Book, including the rules concerning professional conduct'' [internal quotation marks omitted]); *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 386, 685 A.2d 1108 (1996) (appeal was dismissed on basis of attorney's failure to comply with rules of practice and court's order nisi), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 735 A.2d 333 (1999); see also *Gionfrido* v. *Wharf Realty, Inc.*, supra, 193 Conn. 31, 34 (trial court did not abuse its discretion in dismissing case on basis of attorney's failure to appear for voir dire); *In re Mongillo*, supra, 190 Conn. 690 ("It is undisputed that a rule of the Superior Court required the appellant's attendance at the call of the calendar at 10 a.m. It is also undisputed that he was late. It is therefore not open to question that the Superior Court had the authority to impose a fine against the appellant for his tardiness."); *Venezia* v. *Kennedy*, 165 Conn. 183, 184–85, 332 A.2d 102 (1973) (trial court did not abuse its discretion in dismissing case due to plaintiff's failure to prosecute case diligently).

In her brief to this court, Miller attempts to minimize the professional lapses that ultimately convinced the Appellate Court that it had no choice but to suspend her temporarily from practice before that court. She also argues that the record belies that court's determination that she exhibited a persistent pattern of irresponsibility in the handling of her cases. Miller's arguments reveal a disturbing disregard for or ignorance of the facts underlying this case. With respect to *Cimmino*, Miller argues that there is "no clear and convincing evidence that [she] knowingly or intentionally violated any appellate rule of practice." Miller further maintains

that "[t]he essence of the [A]ppellate [Court's] finding against [her] is that the trial [transcript was] . . . not timely ordered." Contrary to Miller's assertion, the Appellate Court did not dismiss the appeal in *Cimmino* because the transcript was not timely ordered. The Appellate Court dismissed the appeal because, after granting Miller two extensions to file the brief and appendix, she failed to file them when they were due on July 1, 2014. Instead, Miller waited six weeks and then filed a motion for an additional extension of time, which the Appellate Court had little choice but to deny pursuant to Practice Book § 66-1 (e), which provides: "A motion for extension of time shall be filed at least ten days before the expiration of the time limit sought to be extended or, if the cause for such extension arises during the ten day period, as soon as reasonably possible after such cause has arisen. *No motion under this rule shall be granted unless it is filed before the time limit sought to be extended by such motion has expired.*" (Emphasis added.) Thus, on August 26, 2014, the court informed Miller that the appeal would be dismissed if the brief and appendix were not filed within two weeks. As we previously noted, Miller missed that deadline as well.

With respect to *Addo*, Miller contends that the Appellate Court incorrectly concluded that she failed to file her brief and appendix in a timely manner. Miller maintains that "[o]ne or more persons with access to the [court's] official website appear to have tampered with the documents in order to give an appearance of a failure to file by [Miller]." Miller further argues that it is "shocking that the court should have so little regard for the integrity of its official website and documents and yet [admonish Miller] for alleged procedural violations." On the contrary, what is shocking is Miller's persistence in making such reckless allegations when even a cursory review of the file in *Addo* reveals that

they are wholly unfounded. As we previously indicated, prior to the issuance of the order to show cause in *Addo*, Miller was notified by the Appellate Court on two separate occasions that the brief and appendix she previously had filed in that case were not compliant with Practice Book § 67-2 and would have to be refiled. In light of these notices, which we can only assume Miller ignored or did not read, her repeated assertion that the brief and appendix were removed from the website in an effort to damage her credibility with the Appellate Court underscores the propriety of that court's determination not only that Miller's handling of her cases threatened the vital interests of her clients, but also that she had demonstrated a regrettable inability to accept personal responsibility for her professional mistakes.

With respect to *Willis*, Miller claims that the sole allegation in that case concerns the transcript that was not timely filed, which, according to Miller, provides insufficient cause for the Appellate Court to have denied her motion to set aside the dismissal of the appeal in that case and to suspend her from practice before that court. As we previously indicated, the record reveals that the Appellate Court dismissed that appeal after Miller, who was out of the country at the time, failed to respond to an order nisi informing her that the appeal would be dismissed if she did not file the transcript certifications required by Practice Book § 63-8 (b) within ten days. In response to questioning by the court, Miller stated that, prior to leaving the country, she had not arranged for anyone to cover her practice. She also did not dispute opposing counsel's assertion that her failure to file the transcript was not her only miscue in *Willis* but one of many, which included her failure to appear at a scheduled hearing and the filing of a false certification stating that certain documents had been sent to opposing counsel when, in fact, they had not. More important, as the Appellate Court noted, when

Miller was asked to provide assurances to the Appellate Court that such conduct would not be repeated going forward, Miller could offer no such assurances. In light of the foregoing, the Appellate Court did not abuse its discretion in denying the motion to set aside the dismissal of the appeal in *Willis*. Nor did it abuse its discretion in considering Miller's transgressions in *Willis* as further reason to suspend her from practice before the Appellate Court until such time as she improved her knowledge of the appellate rules of practice and could offer that court persuasive assurances that she would implement the necessary changes in her law practice to ensure compliance with those rules.

Miller next maintains that the Appellate Court improperly sanctioned her for filing a frivolous appeal in *Coble*. We note that Miller did not file a petition for certification to appeal from the judgment of the Appellate Court dismissing the appeal but, instead, attempts to collaterally attack that judgment in this writ of error by arguing that the appeal was not frivolous. As we previously indicated, after the Appellate Court affirmed the trial court's judgment of nonsuit in *Coble* on the basis of Miller's failure to comply with the defendant's request to revise, Miller refiled the action in *Coble* pursuant to the accidental failure of suit statute. The defendant then moved for summary judgment on the ground that that statute did not apply because Miller's noncompliance with the rules of practice in the earlier filed action in *Coble* was not the result of mistake, inadvertence, or excusable neglect.[9] In its memorandum

[9] It is well established that, in order to avail herself of the accidental failure of suit statute, Miller was required "to make a factual showing that the prior dismissal was a matter of form in the sense that the . . . noncompliance with a court order occurred in circumstances such as mistake, inadvertence or excusable neglect . . . [and], even in the disciplinary context, only egregious conduct will bar recourse to [the statute]." (Emphasis omitted; internal quotation marks omitted.) *Worth* v. *Commissioner of Transportation*, 135 Conn. App. 506, 518–19, 43 A.3d 199, cert. denied, 305 Conn. 919, 47 A.3d 389 (2012).

of law in support of its motion for summary judgment, the defendant in *Coble* outlined in painstaking detail the torturous procedural history culminating in the judgment of nonsuit. In granting the motion for summary judgment in *Coble*, the trial court specifically relied on that history, as outlined in the defendant's motion for summary judgment, as the basis for its determination that the plaintiff in *Coble* could not avail herself of the accidental failure of suit statute. The trial court subsequently supplemented its decision with a special finding pursuant to § 52-226a that the refiled action in *Coble* was meritless and not brought in good faith. Miller did not seek an articulation of that finding.

On appeal to the Appellate Court from the granting of summary judgment in *Coble*, Miller did not challenge the trial court's determination that the action was meritless and not brought in good faith. Instead, she argued that the trial court incorrectly concluded that the accidental failure of suit statute did not apply because, according to Miller, her failure to comply with the rules of practice when she filed the initial action in *Coble* was the result of an honest misunderstanding of the applicable rules. Because Miller failed to challenge the trial court's determination that the refiled action in *Coble* was without merit and not brought in good faith, however, the Appellate Court properly credited that determination and granted the defendant's motion to dismiss the appeal as frivolous. In her writ of error, Miller again fails to explain why the trial court's judgment regarding the merits of the refiled action in *Coble* was improper. We, therefore, like the Appellate Court, have no occasion to disturb that determination.

Finally, Miller claims that the Appellate Court abused its discretion in referring her to the Chief Disciplinary Counsel without alleging the violation of any Rule of Professional Conduct or otherwise providing guidance as to the nature of the inquiry to be conducted. Miller

also expresses concern that the referral could result in duplicative sanctions for the conduct described herein.

Although the order of referral could have been clearer, we do not understand it to be a request for an investigation into the specific conduct giving rise to this writ of error but, rather, a request for a determination of whether Miller's conduct before the Appellate Court was part of a larger pattern of irresponsibility in Miller's handling of her professional obligations. As we have previously noted, "[j]udges . . . possess the inherent authority to regulate attorney conduct and to discipline members of the bar. . . . In exercising their inherent supervisory authority, the judges have authorized grievance panels and reviewing committees to investigate allegations of attorney misconduct and to make determinations of probable cause. . . . In carrying out these responsibilities, these bodies act as an arm of the court. . . . Accordingly, a formidable array of [actions], including referrals to the [S]tatewide [G]rievance [C]ommittee for investigation into alleged misconduct, is available to courts and dissatisfied litigants who seek redress in connection with an attorney's . . . conduct." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Simms* v. *Seaman*, 308 Conn. 523, 552–54, 69 A.3d 880 (2013). The Appellate Court not only has the authority to refer an attorney to the Chief Disciplinary Counsel, it has an obligation to do so when, as in the present case, it concludes that that attorney's persistent pattern of missing deadlines and violating court rules threatens the vital interests of his or her clients. Of course, we do not know whether the Chief Disciplinary Counsel will find instances of neglectful or otherwise unacceptable conduct by Miller in the Superior Court, but, in light of the number and nature of Miller's transgressions in the Appellate Court, the Appellate Court certainly had the discretion to bring those transgressions to the attention of the Chief Disci-

plinary Counsel for whatever action, if any, may be appropriate with respect to Miller's conduct in the Superior Court.

The writ of error is dismissed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* CHYWON WRIGHT
(SC 19233)
(SC 19234)

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

Syllabus

Pursuant to the rape shield statute (§ 54-86f [4]), although, in a prosecution for sexual assault, evidence of a victim's sexual conduct is generally inadmissible, such evidence is admissible when it is "so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights."

The defendant was convicted of the crimes of aggravated sexual assault in the first degree, conspiracy to commit aggravated sexual assault in the first degree, conspiracy to commit kidnapping in the first degree, assault in the third degree, and conspiracy to commit assault in the third degree in connection with an incident in which the victim, over the course of hours, was allegedly assaulted and compelled to have sex with multiple persons. The victim had agreed to have sex with F, one of the defendant's fellow gang members, and another person for money. The victim went to an apartment where she consensually engaged in sexual activities with F and the other person. After those activities concluded at the first apartment, F stated that he did not have the money that he owed the victim but that it was at another nearby apartment. The victim accompanied F to the second apartment for the purpose of retrieving the money that she was owed. After the victim entered the second apartment, someone immediately locked the door behind her, after which the victim was repeatedly assaulted and forced to engage in sexual activities with several persons, including the defendant. The defendant appealed to the Appellate Court, claiming that the trial court improperly had precluded the defense from introducing certain evidence at trial regarding the victim's prior sexual conduct, thereby violating the defendant's constitutional rights of confrontation and to present a defense. The defendant also claimed that his sentence on all three conspiracy counts violated the double jeopardy clause of the United States constitution

insofar as those counts were based on a single agreement with multiple criminal objectives. The Appellate Court rejected the defendant's evidentiary claim, concluding that, although the trial court first precluded the defense from introducing such evidence, it later allowed it to present that evidence to the jury. The Appellate Court agreed, however, with the defendant's double jeopardy claim and concluded that the proper remedy for such a violation was to remand the case to the trial court with direction to vacate the judgment as to two of the three conspiracy counts, to render judgment of conviction on one of the conspiracy counts, and to resentence the defendant. The Appellate Court affirmed the defendant's conviction of the crimes of aggravated sexual assault in the first degree and assault in the third degree. On the granting of certification, the defendant and the state filed separate appeals with this court. *Held*:

1. This court concluded, in light of the text and legislative history of § 54-86f, that it incorrectly had construed, in *State* v. *DeJesus* (270 Conn. 826), the term "material" in § 54-86f (4) in the constitutional rather than the evidentiary sense, and it overruled *DeJesus* insofar as that case held that evidence is material for purposes of § 54-86f (4) only if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been presented at trial, and insofar as that case held that a court's exclusion of evidence properly admissible under § 54-86f (4) requires reversal with no additional evaluation of harm; contrary to this court's holding in *DeJesus*, the legislature intended that the term "material" in § 54-86f (4) be construed to describe evidence that has an influence, effect, or bearing on a fact in dispute at trial.

2. Contrary to the Appellate Court's conclusion, the trial court, by virtue of its application of § 54-86f, limited the defense from questioning the victim in the presence of the jury about certain of the victim's prior sexual conduct, including the victim's alleged offer to F to have sex with multiple men, for multiple hours, in return for money, and the victim's act of engaging in consensual sex with F and the other person at the first apartment for money: because that evidence was relevant and material to critical issues in the case, namely, the victim's actual consent and the defendant's reasonable belief regarding the victim's consent, because the exclusion of such evidence violated the defendant's constitutional right to present a defense insofar as defense counsel was precluded from presenting the theory that the victim's sexual conduct at both the first and second apartments was part of a single, continuous, sex-for-hire transaction, and because the exclusion of the evidence violated the defendant's right of confrontation insofar as defense counsel was precluded from exploring whether the victim had a motive to fabricate her allegations of sexual assault because she never was paid for the consensual encounter with F and the other person, the trial court abused its discretion in excluding this evidence under § 54-86f (4); however, the trial court's error was harmless beyond a reasonable

doubt, as the defense had available to it other means of directly testing the victim's credibility, testimony from multiple witnesses refuted the existence of an agreement on the part of the victim to engage in prostitution at the second apartment, the victim's testimony was largely uncontradicted and supported by the testimony of the defendant's confederates, the defendant's statement to the police indicated that his sexual contact with the victim was not consensual, and the defense was not entirely precluded from exploring whether the victim had consented to an act of prostitution.

(*One justice concurring separately*)

3. The Appellate Court correctly concluded that, pursuant to this court's decision in *State* v. *Polanco* (308 Conn. 242), the defendant's conviction on three counts of conspiracy arising from a single agreement with multiple criminal objectives constituted a violation of the double jeopardy clause of the federal constitution and that the appropriate remedy for such a violation was to remand the case to the trial court with direction to vacate the defendant's conviction on two of the three counts of conspiracy, to render judgment of conviction on one of the conspiracy counts, and to resentence the defendant on that one conspiracy count.

State v. *DeJesus* (270 Conn. 826), to the extent that it held that evidence is material for purposes of § 54-86f (4) only if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been presented at trial, and to the extent that it held that a court's exclusion of evidence properly admissible under § 54-86f (4) requires reversal with no additional evaluation of harm, overruled.

Argued February 10, 2015—officially released April 19, 2016

Procedural History

Substitute information charging the defendant with two counts of the crime of aggravated sexual assault in the first degree and one count each of the crimes of conspiracy to commit aggravated sexual assault in the first degree, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, assault in the third degree, and conspiracy to commit assault in the third degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cremins*, *J.*; verdict and judgment of guilty of two counts of aggravated sexual assault in the first degree and one count each of conspiracy to commit aggravated sexual assault in the first degree, conspiracy to commit kidnapping in the first degree, assault in the third

degree, and conspiracy to commit assault in the third degree, from which the defendant appealed to the Appellate Court, *Beach*, *Bear* and *Sheldon*, *Js.*, which reversed in part the trial court's judgment and remanded the case to that court with direction to vacate the judgment with respect to two of the conspiracy counts and to resentence the defendant accordingly, and the state and the defendant, on the granting of certification, filed separate appeals with this court. *Affirmed.*

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *David A. Gulick*, senior assistant state's attorney, and *Rocco A. Chiarenza*, assistant state's attorney, for the appellant in Docket No. SC 19233 and the appellee in Docket No. SC 19234 (state).

Annacarina Jacob, senior assistant public defender, for the appellee in Docket No. SC 19233 and the appellant in Docket No. SC 19234 (defendant).

Opinion

ZARELLA, J. The defendant in these certified appeals, Chywon Wright, was convicted of various crimes stemming from his involvement in a sexual assault that occurred on November 1, 2008. On that date, "the victim[1] accompanied Bryan Fuller, a member of a street gang, to a vacant second floor apartment at 19 Taylor Street in [the city of] Waterbury. The victim went to the apartment expecting Fuller to pay her $250. Fuller's fellow gang members, including the defendant, were present at the apartment. Inside the apartment, several of the gang members, including the defendant, took turns openhandedly hitting the victim on her breasts, buttocks and vagina, and engaged in oral intercourse with the victim for approximately one-half hour.

[1] In accordance with our policy of protecting the privacy interests of sexual assault victims, we decline to identify the victim. See General Statutes § 54-86e.

"The victim was then moved to a second room. In this room, the defendant engaged in oral intercourse with the victim and vaginally penetrated the victim while wearing a black plastic convenience store bag on his penis. Also, in that room, several of the defendant's fellow gang members engaged in oral, vaginal and anal intercourse with the victim. These events lasted for approximately one and one-half hours. Eventually, the victim left the apartment, wearing her clothes but leaving her shoes, cell phone and purse behind. Shortly thereafter, the victim went to Saint Mary's Hospital in Waterbury, where she reported the sexual assault and the medical staff [examined her and utilized] a sexual assault evidence collection kit . . . ." (Footnote added.) *State* v. *Wright*, 144 Conn. App. 731, 733–34, 73 A.3d 828 (2013).

Subsequently, the defendant was charged with, and found guilty of, two counts of aggravated sexual assault in the first degree in violation of General Statutes § 53a-70a (a) (4) and one count each of conspiracy to commit aggravated sexual assault in the first degree in violation of General Statutes §§ 53a-70a (a) (4) and 53a-48 (a), conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (A) and 53a-48 (a), assault in the third degree in violation of General Statutes § 53a-61 (a) (1), and conspiracy to commit assault in the third degree in violation of §§ 53a-61 (a) (1) and 53a-48 (a).[2] The trial court, *Cremins*, *J.*, rendered judgment in accordance with the jury verdict and sentenced the defendant to a total effective term of twenty years of incarceration and ten years of special parole.

The defendant appealed to the Appellate Court from the trial court's judgment, claiming, first, that the trial

[2] The defendant also was charged with kidnapping in the first degree in violation of § 53a-92 (a) (2) (A); however, the jury found him not guilty of that crime.

court improperly had precluded him from introducing certain evidence of the victim's prior sexual conduct, thereby violating his constitutional rights of confrontation and to present a defense. Id., 735–36. Second, the defendant claimed that his sentence on all three conspiracy counts, which were based on a single agreement with multiple criminal objectives, violated the double jeopardy clause of the federal constitution. Id., 745. The Appellate Court rejected the defendant's first claim, concluding that "[t]he record demonstrates that although the [trial] court initially precluded the [defense] from presenting evidence as to the victim's prior sexual conduct, it later allowed the [defense] to present such evidence to the jury." Id., 744–45. The Appellate Court did agree, however, with the defendant's double jeopardy claim. See id., 747. The Appellate Court further concluded that, under *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), the proper remedy for such violation was to remand the case to the trial court with direction to vacate the judgment as to two of the conspiracy counts, to render judgment on one of the conspiracy counts, and to resentence the defendant accordingly. *State* v. *Wright*, supra, 144 Conn. App. 748–49. The defendant and the state each appealed from the Appellate Court's judgment, and we granted certification in both appeals. The defendant claims that the Appellate Court incorrectly concluded that the trial court had appropriately limited, under General Statutes § 54-86f,[3] his ability to present evidence of the victim's prior sexual conduct. In its appeal, the state argues that the Appellate Court incorrectly concluded that vacatur was the appropriate remedy for the double jeopardy

[3] We note that, subsequent to oral argument in the present case, the legislature amended § 54-86f. See Public Acts 2015, No. 15-207, § 2. The amendments to the statute, however, have no bearing on the merits of this appeal. All references to the statute are to the preamendment version of the statute, which was the version in effect at both the time of the charged crimes and the defendant's trial.

violation stemming from the sentence for the defendant's conviction on the three conspiracy counts. After oral argument, we ordered supplemental briefing in the defendant's appeal. The parties were asked to brief (1) whether *State* v. *DeJesus*, 270 Conn. 826, 856 A.2d 345 (2004), should be overruled to the extent that it construed the term "material," as used in § 54-86f (4), to refer to material in the constitutional sense rather than the evidentiary sense, (2) if the first question is answered in the affirmative, whether the trial court improperly excluded the challenged evidence, and, if so, whether such error is subject to harmless error analysis, and (3) if questions one and two are answered in the affirmative, whether the exclusion of the challenged evidence was harmless beyond a reasonable doubt. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's argument that the trial court violated his constitutional rights of confrontation and to present a defense through its application of § 54-86f. The defendant contends that the trial court's application of § 54-86f, the rape shield statute, improperly precluded defense counsel from questioning the victim in the presence of the jury about certain sexual conduct that closely preceded the Taylor Street incident, namely, (1) the victim's offer to Fuller to have sex with multiple men, for multiple hours, for $500, and (2) the victim's act of engaging in consensual oral sex with Fuller and his friend at a different residence on Wolcott Street in Waterbury for the promise of $250. The defendant argues that these lines of inquiry would have supported his defense theory that the Wolcott Street conduct was part of a larger, consensual, sex-for-hire transaction that extended to Taylor Street, and that the victim had fabricated allegations of sexual assault and other crimes after she was not paid for the

transaction. His alternative defense theory was that he reasonably believed that the victim had consented to having sexual relations with him at Taylor Street. Citing *State* v. *DeJesus*, supra, 270 Conn. 826, and *Demers* v. *State*, 209 Conn. 143, 547 A.2d 28 (1988), the defendant maintains that evidence of a victim's prostitution may be relevant and material in a sexual assault case if consent is raised as a defense. Thus, the defendant argues that defense counsel should have received greater latitude in his examination of the victim under the exception to the rape shield statute providing that evidence of the sexual conduct of a victim may be admissible if it is "so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights." General Statutes § 54-86f (4). In his supplemental brief, the defendant further claims that this court incorrectly concluded in *DeJesus* that evidence must be material in the constitutional sense to be admissible under § 54-86f (4) and, therefore, should be overruled. Moreover, the defendant avers that the excluded evidence was both relevant and material in an evidentiary sense and that its exclusion violated his constitutional rights of confrontation and to present a defense. Finally, the defendant claims that the state cannot demonstrate that such error was harmless beyond a reasonable doubt.

In response, the state argues that defense counsel was allowed to question the victim about the two aforementioned prostitution related topics and thus was not actually restricted from developing either of the defense theories of consent.[4] In its supplemental brief, the state agrees with the defendant that *DeJesus* should be over-

[4] We note that the state originally argued, in the alternative, that the prostitution related evidence was not material in the constitutional sense and, therefore, not admissible under § 54-86f (4) and *DeJesus*. We need not reach this argument, however, because we agree with the parties that *DeJesus* incorrectly construed the term "material."

ruled insofar as this court held that the term "material," in the context of § 54-86f (4), means material in the constitutional sense. Nevertheless, the state maintains that the trial court allowed defense counsel to question the victim and others regarding the $250 payment and the offer to engage in sexual activities for $500, and, thus, the court reasonably exercised its discretion and upheld the defendant's constitutional rights. The state also claims that, even if the trial court improperly excluded the evidence, such error was harmless beyond a reasonable doubt.

A

The record reveals the following additional facts and procedural history that are relevant to the resolution of this claim. On the first day of trial, the state commenced its case by calling the victim as a witness. The victim testified before the jury to the following facts: On November 1, 2008, she went into a second floor apartment on Taylor Street because Fuller owed her money and told her that it was inside. After she entered the apartment, someone immediately locked the door behind her. The defendant and his fellow gang members crowded around the victim, yelled curses at her, yanked at her clothes, and took turns openhandedly hitting her breasts, buttocks, and vagina. The victim was frightened and scared of being hurt, and complied with an order from Elizer Gibbs, who was the gang's ringleader, to remove her clothes and to get on her knees. The defendant then made the victim perform oral sex on him. Five or six of the defendant's fellow gang members similarly forced the victim to have oral sex with them.

The victim later went into a different room where Gibbs urinated on her face and body. The defendant then took a plastic bag from the floor, covered his penis with it, and vaginally penetrated the victim. The victim explained that this felt as though "there [were] a thou-

sand knives in [her] vagina." Other gang members thereafter took turns having compelled oral, vaginal, and anal sex with the victim. They also penetrated the victim with sex toys that they found in her purse. The gang members tried to convince a nearby woman, Yamile Rivera, to partake in penetrating the victim with the sex toys, but Rivera rebuffed their efforts and instead punched the victim in the face.

At one point, while the victim was with the gang members, she used her cell phone to call a friend, Catherine Jortner. The victim was allowed to make the call, while being monitored on speakerphone, after she told everyone that "another girl would come up and . . . join the fun . . . ." When no one appeared to be paying attention, the victim told Jortner, "I need help . . . ." One of the gang members noticed this cry for help, however, and "took the cell phone and said into it, 'your friend's about to get fucked up,' and then threw the phone against the wall."[5] Eventually, after being forced to engage in additional sexual activities, the victim was allowed to take a cigarette break on a second floor porch. On the porch, someone commented that they could be the victim's "pimp . . . ." Gibbs interrupted the victim's cigarette break by telling her, "get back in the house, we're not done with you yet." Members of the gang resumed forcing the victim to have various forms of sex but complained that her vagina was dry. Someone then inserted a forty ounce beer bottle into the victim's vagina and poured beer inside of her. The victim later saw Fuller in a bathroom and remarked that what had happened "was really messed up," to

[5] Jortner also was a witness for the state. She testified that the victim called her on the night in question and that, "[i]n the beginning, [the victim] was trying to act normal, [to] ask me if I would come . . . to Waterbury." Jortner testified that the victim started to sound scared and whispered "[t]hat she was in trouble and she was on Taylor Street." After the victim said she was in trouble, "a male voice came on the phone . . . said 'your girl's about to get fucked up,' and the phone went dead."

which Fuller responded that "it wasn't supposed to go down like that." She explained that she understood that to mean "that his friends got out of control and that they weren't supposed to do that."

Finally, the victim was able to dress and leave Taylor Street but was in such a hurry to do so that she left her shoes and other personal belongings behind. As the victim walked home, the defendant followed her, asking if she "like[d] what happened in there?" The victim, who was crying, replied, "no," and the defendant proceeded to taunt her by telling male bystanders that she would "get [them] off" for $20. When she arrived home, the victim told three different friends that she had been raped and needed to go to the hospital. The victim went to Saint Mary's Hospital later that night, where she was examined and the police were contacted. The victim's direct examination concluded with her testimony that she never consented to having any form of sex with the defendant, or anyone else, while she was at Taylor Street.

During cross-examination of the victim,[6] defense counsel attempted to ask her why Fuller owed her money. After the assistant state's attorney (prosecutor) objected to that question on the ground that it was covered by a motion in limine, the trial court excused

[6] In his brief, the defendant argues that the victim's "memory failed her on important facts." Based on our review of the record, we disagree with aspects of how the defendant has attempted to characterize the victim's testimony on cross-examination. For example, after the victim testified that she was led up to the second floor of Taylor Street, she merely admitted that she could not remember the precise position of the stairway because that was an insignificant part of a "traumatic" memory that was three years old. Moreover, although the victim was unsure of exactly how many people went into the apartment, she did list many of the entrants by name, including the defendant. Furthermore, the victim qualified that she did not "blackout" the night's events but simply could not recall whether her transition between the two rooms was prompted by a summons or by someone physically moving her.

the jury from the courtroom. Defense counsel explained that, although he had not filed any response to the state's motion in limine, he was raising consent as a defense and wished to question the victim about certain prior sexual conduct pursuant to § 54-86f (4). Under the circumstances, the trial court determined that it was necessary to hold a rape shield hearing before the jury returned.

During the hearing, the victim testified that, prior to going to Taylor Street, she had a conversation with Fuller in which she had offered to have sex with him and three other people for four hours in exchange for $500. The victim further testified that, ultimately, she engaged in sexual activities with Fuller and another person at Wolcott Street for the promise of $250. Fuller did not have any money when those sexual activities concluded, however, and took the victim to Taylor Street. On the way, Fuller explained that there would be three or four other people at Taylor Street, but the victim did not believe that there was a plan for her to have sex with them. After hearing this testimony and arguments from the state and the defense, the trial court determined that there was an insufficient offer of proof to establish the victim's consent to engage in sexual relations with the defendant or the defendant's reasonable belief that such consent had occurred. Consequently, the trial court ruled that questions about the victim's prior sexual conduct at Wolcott Street would be precluded until the defense presented an adequate offer of proof as to consent.

Later, during the state's case-in-chief, the prosecutor sought to admit a redacted version of the defendant's statement to the police into evidence. After excusing the jury from the courtroom, the trial court reviewed the redacted text. This portion of the text stated that, after Fuller and the victim arrived at Taylor Street, Fuller had pulled the defendant aside to say "that he

told this girl that he was gonna give her some money because he was with her all day, and she was giving him and another boy head all day.'' The trial court found that this text reflected the defendant's knowledge that the victim was a prostitute and thus implicated the issue of consent. The trial court ruled that, if the prosecutor wanted to admit the defendant's statement to the police into evidence, he needed to do so using a version that was not redacted.

Once the jury returned, a complete version of the defendant's statement to the police was read into evidence. It included the following admissions: "[A]round Halloween, I was over on Taylor Street . . . chilling with my homies. . . . [We] are all 'Bloods.' . . . While we was there, another guy that is a Blood showed up, he is [Fuller], and he was with [the victim]. . . . Then [Fuller] grabbed me aside and said that he told this girl that he was gonna give her some money because he was with her all day, and she was giving him and another boy head all day. Giving head means getting oral sex. I heard [Fuller] tell this girl that the money he owes her is upstairs on the second floor but I knew he was lying to her because he told me that and I also know that the second floor is a vacant apartment. The girl kept asking him for the money, so we all went up to the second floor . . . . The whole time this was going on the girl thought she was gonna get her money, but [Fuller] was telling all of us that we was gonna fuck this girl. . . . I was the first one to get my dick sucked. [Gibbs] told the girl to suck me first. . . . Then [Gibbs] was telling us all to smack her ass, so we all took turns doing it. The reason we do what [Gibbs] says is because he is a General in the Bloods, which means he is in charge . . . . I know she didn't like us smackin her ass because she told us it hurt and to stop. [Gibbs] told her to shut up and take it. . . .

"After some time, I started to fuck this girl from behind. I didn't have a rubber so I used a black plastic bag . . . . Then this girl said she wanted to call a friend . . . to come over. She said that her friend would want to do this too. While she was on her cell phone, [Gibbs] snatched the phone from her and threw it. . . . Then I grabbed the . . . girl and put her head on my dick so she would suck it. . . . Then the other guys took turns telling this girl that she better suck their dicks . . . . We kept telling her that she likes it. I could tell at this point that this girl wasn't liking this and she started to look scared. . . . Then [Gibbs] found some [sex toys] in this girl's pocketbook and took them out and started to use them on the girl. . . . Then the girl was on her knees and [Gibbs] told her to open her mouth and, when she opened her mouth, [Gibbs] pissed in her mouth and all over her. . . . [Gibbs] was telling [Rivera] to smack the girl but [Rivera] just punched her in the face. We were all trying to get [Rivera] to mess around with this girl . . . . The . . . girl then said that she was scared and afraid that we was gonna kill her. We was telling her that we ain't gonna kill her but we wanna fuck her. I told her to shut up and put my dick in her mouth, so she did. . . . [W]e wasn't letting her leave until we were done with her. . . . [Later on, someone] put a [forty ounce] bottle of beer in the girl's [vagina]. . . . Then the girl left and walked down the street. A few minutes after she left Taylor Street, I left too. . . . [A]s I walked by her, I asked her if she liked what happened, and she was like, 'no.' I could see she was crying real hard. I didn't say nothing else and just kept walking and I went home."

Subsequently, the prosecutor called Steven Garrett, one of the defendant's fellow gang members who was present at 19 Taylor Street on November 1, 2008. In large part, Garrett's testimony was consistent with the undisputed facts. In his brief, however, the defendant

claims that "Garrett testified that [the victim] had not been forced to engage in sex" and "consented" to the sexual acts. This characterization of Garrett's testimony is generous. Garrett testified that he *personally* did not force the victim to have oral sex and that she seemingly "accepted" having sexual relations with others "at first . . . ." Indeed, Garrett disclaimed any knowledge as to whether the defendant had forced the victim to engage in any sexual acts. Garrett also testified that the victim looked afraid after Gibbs urinated on her. While he was in the apartment, Garrett did not think that the victim was free to leave because Gibbs would not have let her. In fact, throughout the course of the sexual assault, Garrett left the apartment at least three times, and, upon returning each time, the apartment door was locked.

Garrett further testified that, during the victim's cigarette break, he talked to the victim about "pimping" her. Specifically, he said "she don't need to be doing what she's doing at that moment in time to get money when I know people, older guys, that get . . . Social Security [Income] checks . . . that would . . . give more for less." The victim did not respond to Garrett. Later, Garrett took credit for pouring beer into the victim's vagina and laughing about it.

The prosecutor also called Fuller as a witness, who gave inconsistent testimony regarding what the victim knew prior to and when arriving at Taylor Street. Fuller initially testified that he brought the victim to Taylor Street with assurances that she would be paid after she "[took] care of [his] boys . . . ." Fuller then refreshed his memory with a copy of his statement to the police, however, and repeatedly testified that the victim was unaware that she was being brought to Taylor Street to have sex.[7] Near the conclusion of his testimony,

[7] We do note, however, that Fuller repeated his testimony to the contrary, namely, that the victim was aware that she was going to Taylor Street to have sex with his fellow gang members and that the $250 he owed the victim was in return for the sexual acts at Taylor Street. Fuller also testified that,

Fuller clarified that there was no preexisting arrangement for the victim to have sex with the gang members at Taylor Street for money; rather, the victim was merely expecting to retrieve a $250 payment there. Without the victim's knowledge, however, Fuller had called ahead to two gang members at Taylor Street and *told them* that he was bringing the victim over to have sex.[8] In his own words, Fuller's "whole intention [was] for [the victim] to go there and [to] have sex with them," and he "set the whole thing up without her know[ledge] [of that intention] . . . ." Fuller testified that, following the victim's arrival at Taylor Street, she was forced to give the defendant oral sex at Gibbs' urging.[9] According to Fuller, Gibbs was swearing and angrily saying things like "give them head, have sex with us or you're not going nowhere." Fuller verified that the victim was urinated on, penetrated with a plastic bag, and penetrated with a forty ounce beer bottle. Fuller also testified that, during the victim's subsequent cigarette break, the gang members told the victim that she could leave, but Fuller "could tell by [her] facial expression and by her voice . . . she was a little scared [that], if she left, something would happen to her." Eventually, Fuller encountered the victim in the bathroom immediately before she departed and told her that "it wasn't supposed to go down like that."

The defense commenced its case by recalling the victim as a witness. The victim testified that she had told Fuller that she would "do some stuff for 500 bucks."

while the victim was standing next to him, he told Gibbs that she "was willing to do whatever" and explained that she wanted to have sex with them before collecting the money.

[8] The defendant was *not* one of the people Fuller called.

[9] At a divergent point in his testimony, Fuller claimed that the victim "seemed like she wanted to" have oral sex with all of the gang members—or at least wanted to up until the urination and forty ounce beer bottle episodes. Portraying Gibbs as the instigator, Fuller also stated that the defendant had not forced the victim to have oral sex or vaginal intercourse.

As defense counsel attempted to explore this topic through questioning, the prosecutor objected, and the trial court excused the jury from the courtroom. The victim then explained that the $500 was supposed to be compensation for activities on Wolcott Street. She also reiterated that Fuller had told her that she could collect $250 at Taylor Street. The victim testified that she had no intention of having sexual relations with the men at Taylor Street and that she had received no payment for doing so. Interjecting, the trial court explained that it was not persuaded that the Wolcott Street and Taylor Street incidents were part of a single transaction, and ruled that asking the victim about her prior sexual conduct on Wolcott Street would not be allowed pursuant to § 54-86f.

The jury returned, and defense counsel continued questioning the victim. She denied ever making an offer to Fuller to have sex with multiple people at Taylor Street for $250 or $500. When the victim was asked, more generically, if she had a conversation with Fuller during which "$500 came up as a fee for [her] services," she responded, "[r]ight, for Wolcott Street." Using a copy of the victim's statement to the police, defense counsel attempted to refresh her recollection with respect to the details of this conversation about the $500 fee, but the trial court interrupted and again excused the jury. Defense counsel explained that, in the victim's statement to the police, she had described telling Fuller "he could do whatever he wanted for four hours [for $500]." The trial court cautioned that, "[t]o the extent that the $500 related to discussions at Wolcott Street, I am not allowing that."

Defense counsel then called Fantasia Daniels as the final defense witness. Daniels testified that she saw the victim at Taylor Street on the night of the incident and, moreover, that the victim had said that she was there "for sex with the guys." According to Daniels, the victim

stated that "[s]he [had] to use her [sex] toys to get started" and seemed to like what had transpired because she was smiling during the cigarette break. Daniels testified that, at the end of the night, the victim asked Fuller where her $250 was. After Fuller replied "there's no [$250]," the victim said she was going to report the matter to the police.[10] After this questioning of Daniels, the defense rested its case.

B

Prosecutions for sexual assault are governed by special rules of evidence, including § 54-86f. That statute "was enacted specifically to bar or limit the use of prior sexual conduct of an alleged victim of a sexual assault because it is such highly prejudicial material." (Internal quotation marks omitted.) *State* v. *Rolon*, 257 Conn. 156, 176, 777 A.2d 604 (2001). In enacting § 54-86f, the legislature intended to "[protect] the victim's sexual privacy and [shield the victim] from undue harassment, [encourage] reports of sexual assault, and [enable] the victim to testify in court with less fear of embarrassment. . . . Other policies promoted by the law include avoiding prejudice to the victim, jury confusion and waste of time on collateral matters." (Citation omitted; internal quotation marks omitted.) *State* v. *Christiano*, 228 Conn. 456, 469–70, 637 A.2d 382, cert. denied, 513 U.S. 821, 115 S. Ct. 83, 130 L. Ed. 2d 36 (1994).

Thus, to determine whether the prostitution related evidence was properly excluded, we must begin our analysis with the relevant language of the rape shield statute. Section 54-86f prohibits a defendant from pre-

[10] When recalled to the witness stand, the victim denied talking to Daniels on the night of the Taylor Street incident. Moreover, the victim specifically denied having any conversation about sex toys with Daniels and also denied stating that she was going to the police because she did not receive $250. Additionally, Fuller testified that, while speaking with the victim immediately before she left, he said that he knew she was going to leave and call the police. He did not mention, however, that the victim had made such a threat.

senting evidence of an alleged sexual assault victim's prior sexual conduct, "unless such evidence is [among other things] . . . otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights." General Statutes § 54-86f (4).

In *State* v. *DeJesus*, supra, 270 Conn. 841–42, we addressed the meaning of "material" in the context of § 54-86f (4). In that case, we concluded that subdivision (4) of § 54-86f referred to the constitutional standard for materiality, and, relying on *United States* v. *Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), and *United States* v. *Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), held that evidence was material only "if, considering the case without the excluded evidence, there is a probability sufficient to undermine confidence in the guilty verdict." *State* v. *DeJesus*, supra, 842. In the present case, we consider whether *DeJesus* was correct on this point.

The defendant and the state both argue that *DeJesus* should be overruled insofar as it held that § 54-86f (4) refers to materiality in the constitutional sense. The defendant claims that the plain language of the statute demonstrates that the legislature was referring to nothing more than the ordinary test for the admissibility of evidence, namely, that the evidence is relevant and material, and that evidence is material in the evidentiary sense "if it is of consequence to the determination of the action." He further asserts that such a reading of the statute is supported by the legislative history. In addition, the defendant contends that our current reading of the statute places trial courts in the nearly impossible position of having to apply an appellate standard of review at trial. Similarly, the state claims that "material" is a legal term of art with two plausible meanings, namely, materiality in the constitutional sense or materiality in the evidentiary sense, and that the structure

of the rape shield statute supports the inference that the legislature intended to refer to material in the evidentiary sense. The rape shield statute establishes four exceptions to the inadmissibility of an alleged victim's prior sexual conduct. The first three cover specific types of sexual conduct evidence[11] and the fourth is a catchall exception that allows for the admission of unspecified sexual conduct evidence. The first three exceptions to the rape shield statute, the argument goes, reflect the legislature's judgment as to what types of sexual conduct evidence are material, whereas the fourth exception allows for the admission of other types of sexual conduct evidence after materiality has been established.[12] The state claims that there is nothing to

[11] The following evidence is admissible under the first three exceptions to the rape shield statute: evidence "(1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant . . . ." General Statutes § 54-86f (1) through (3).

[12] The defendant and state make additional arguments as to why § 54-86f (4) should be understood to use the term "material" in the evidentiary sense. The defendant contends that our current interpretation violates the rules of statutory construction because, if "material" refers to the constitutional standard of materiality, it would render subdivision (4)'s requirement that the exclusion violate the defendant's constitutional rights superfluous. We note, however, that this argument overlooks the possibility that the exclusion of evidence may violate a defendant's constitutional rights but nonetheless not be constitutionally material to the outcome of the trial. The defendant also refers to our conclusion in *DeJesus* that constitutionally material evidence cannot be excluded even if its prejudice to the victim outweighs its probative value and argues that such a result is absurd because it requires a trial court to ignore the plain directive of § 54-86f that the court conduct a weighing of all relevant sexual conduct evidence to determine whether its probative value is outweighed by its prejudicial effect. Finally, the defendant claims that, in states with similar rape shield statutes, courts have analyzed the materiality of sexual conduct evidence using the evidentiary standard, and that, as with the federal analogue; see Fed. R. Evid. 412 (b) (1) (C); subdivision (4) was likely intended to protect defendants in circumstances in which sexual conduct evidence does not fit within an enumerated rape

suggest that the legislature intended it to be more difficult to introduce evidence under the fourth exception than it is under the first three exceptions.

The interpretation of the term "material" is a question of statutory construction. When construing a statute, we strive to determine the legislative intent, and, in doing so, we begin with the text of the statute. See, e.g., *State* v. *Smith*, 317 Conn. 338, 347, 118 A.3d 49 (2015); see also General Statutes § 1-2z. If the legislature's intent is clear from the statute's language, our inquiry ends. See *State* v. *Smith*, supra, 346–47. If, however, the statute is ambiguous or its plain meaning yields an absurd result, we go on to consider extratextual evidence of its meaning, such as the statute's legislative history, the circumstances surrounding its enactment, the legislative policy the statute implements, and the statute's relationship with existing legislation and common-law principles. E.g., *State* v. *LaFleur*, 307 Conn. 115, 126, 51 A.3d 1048 (2012).

The relevant text of § 54-86f (4) provides: "In any prosecution for sexual assault . . . no evidence of the sexual conduct of the victim may be admissible unless such evidence is . . . otherwise so relevant and mate-

shield exception but in which the exclusion of such evidence would violate the defendant's constitutional rights.

The state claims that our current reading of § 54-86f (4) undermines the legislative purpose of the rape shield statute by dispensing with the weighing of sexual conduct evidence, thereby allowing the admission of such evidence regardless of how prejudicial it may be to the victim. The state next argues that *DeJesus* encroaches on the trial court's wide discretion over evidentiary matters by transmuting the standard of review for rulings on the admissibility of evidence under subdivision (4) from abuse of discretion to plenary review. Lastly, the state contends that *DeJesus* is not consistent with the view that we have taken in subsequent cases addressing the admissibility of evidence under § 54-86f (4).

We need not address these additional arguments because we agree that the rape shield statute's language and structure, as well as its legislative history, support our conclusion that "material," in the context of § 54-86f (4), refers to the evidentiary standard.

rial to a critical issue in the case that excluding it would violate the defendant's constitutional rights." The statute does not define the term "material." Generally, when a statutory term is not defined, we presume that it was intended to have its ordinary meaning as expressed in standard dictionaries. See, e.g., *State* v. *LaFleur*, supra, 307 Conn. 128. In the present case, however, we believe that "material" is a legal term of art because it is used in conjunction with "relevant" and is found in an evidentiary statute. Thus, we will look to legal dictionaries and authorities to ascertain its meaning.

Around the time § 54-86f was enacted in 1982; see Public Acts 1982, No. 82-230; Black's Law Dictionary defined "material" as: "[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. Representation relating to matter which is so substantial and important as to influence party to whom made is material." (Internal quotation marks omitted.) Black's Law Dictionary (5th Ed. 1979) p. 880. The fifth edition of Black's Law Dictionary also provided the following definition for "material evidence": "That quality of evidence which tends to influence the trier of fact because of its logical connection with the issue. Evidence which has an effective influence or bearing on question in issue is material. . . . Materiality of evidence refers to pertinency of the offered evidence to the issue in dispute. . . . Material evidence is evidence which is material to question in controversy, and which must necessarily enter into the consideration of the controversy, and which by itself or in connection with other evidence is determinative of the case." (Citations omitted; internal quotation marks omitted.) Id., p. 881. In light of the foregoing definitions, we might conclude that § 54-86f (4) refers to the evidentiary standard of "material," that is, evidence is material when it has an influence, effect, or bearing on a fact in dispute at trial.

That is not, however, the only plausible definition. The law has given "material" another meaning as well, as we noted in *DeJesus*. See *State* v. *DeJesus*, supra, 270 Conn. 841–42. In *DeJesus*, we adopted the United States Supreme Court's constitutional standard for materiality in determining the meaning of material in § 54-86f (4). Id., 841. Under the constitutional standard, "[e]vidence is material only if there is a reasonable probability that, had the evidence been [presented at trial], the result of the proceeding would have been different." Id., quoting *United States* v. *Bagley*, supra, 473 U.S. 682 (opinion announcing judgment). Because there are two plausible meanings of "material" in the context of § 54-86f (4), we also must consider extratextual evidence, specifically, the circumstances surrounding the enactment of § 54-86f, the statute's legislative history, and the policy objectives that § 54-86f was intended to implement. See, e.g., *State* v. *LaFleur*, supra, 307 Conn. 126.

It is important to understand the state of the law when the rape shield statute was enacted. See, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 19, 981 A.2d 427 (2009) ("the legislature is presumed . . . to know the state of existing relevant law when it enacts a statute" [internal quotation marks omitted]). In 1978, this court decided *State* v. *Mastropetre*, 175 Conn. 512, 400 A.2d 276 (1978), in which the defendant, Michael Mastropetre, argued that the trial court improperly ruled that a sexual assault victim did not have to answer defense counsel's question regarding whether she had had sexual relations with men other than Mastropetre prior to the assault. Id., 514. On direct examination, the victim was asked if Mastropetre had achieved an orgasm during the assault, to which she replied: " 'I think so.' " Id. Then, during cross-examination, defense counsel asked the victim whether she was certain that Mastropetre had an orgasm. Id. The victim responded that she was

not sure. Id. Defense counsel then asked the victim if, prior to the assault, she had had sexual relations, to which she responded " 'With him? No.' " Id. She was then asked, " '[w]ith anyone else?' " Id. She replied: " 'That has nothing to do with this. Why should I answer that?' " Id. The trial judge agreed that the victim did not have to answer the question. Id.

On appeal, Mastropetre argued that the victim's prior sexual conduct was relevant to the issues of consent and the victim's credibility. Id., 515, 518. We first concluded that the evidence was not admissible as to the issue of consent because Mastropetre denied engaging in sexual conduct with the victim, and, therefore, consent was not truly at issue. Id., 516. Moreover, we acknowledged that the victim's prior sexual conduct with people other than Mastropetre was irrelevant to consent because "[t]he fact that a [victim] may have consented to sexual relations with others before does not, without more, tend to establish that consent was given on the occasion in question." Id., 517.

We next considered whether such evidence was relevant in weighing the victim's credibility. See id., 518–20. We began by dividing that question into two issues: "(1) whether the question [posed by defense counsel] was admissible to impeach the [victim], and (2) whether it was admissible to clarify the source of semen found in the [victim] on the night of the alleged crime . . . ." Id., 518. On the issue of impeachment, we concluded that, as a general rule, a victim's sexual conduct does not "reflect [on] his or her credibility," and, therefore, evidence of such conduct is not admissible for impeachment purposes. Id., 518–19. We did note, however, an exception to that general rule. When a victim testifies regarding her chastity prior to the assault, a defendant is entitled to test that statement during cross-examination. Id., 518.

As to Mastropetre's second credibility argument, namely, clarification regarding the source of the semen, we approved of his reasoning: "[Mastropetre's] reasoning is correct: that is, had [defense counsel] asked whether the [victim] had had sexual relations with someone other than [Mastropetre] at any time within the two or three days prior to the assault, the question would have been [proper] on the issue of whether [Mastropetre] was responsible for the semen, raising doubts as to the [victim's] credibility." Id., 519. Defense counsel's question was not limited to the period immediately preceding the assault, however, and we thus determined that the exclusion of the question was proper. See id., 519–20. Furthermore, we noted that evidence regarding the semen was not admitted until after defense counsel's question was asked. Id., 520. We also stated that it is "elementary" that the question would be improper under this theory until after evidence of the semen was presented. Id.

Finally, Mastropetre asserted that barring defense counsel's question regarding the victim's prior sexual conduct violated his confrontation rights. Id. In resolving this claim, we recognized that due process requires that a criminal defendant be afforded a fair opportunity to present a defense and to confront the witnesses against him, and that excluding evidence offered by a defendant, even when such exclusion is in accord with evidentiary rules, infringes on these rights to some extent. See id., 520–21. We further noted, however, that, in cases in which courts had found that the exclusion of a defendant's proffered evidence violated his due process and confrontation rights, "the excluded evidence was clearly relevant and material to a critical issue in the case." Id., 521. Because we had determined that the evidence of the victim's prior sexual conduct was not relevant to any issue in Mastropetre's case, we concluded that the exclusion of defense counsel's

question regarding such conduct did not violate Mastropetre's confrontation rights. Id.

In summary, the following can be gleaned from our decision in *Mastropetre*. In a trial on sexual assault charges, the victim's prior sexual conduct is generally not relevant to the issues and is therefore inadmissible. Evidence of such conduct is admissible, however, in some circumstances. Those circumstances include: (1) when there is evidence of semen in the victim and the victim is questioned about his or her sexual conduct with individuals other than the defendant in the days prior to the assault to prove the source of that semen; (2) the victim testifies regarding his or her prior sexual conduct or chastity, and the defendant tests such assertions on cross-examination; (3) consent is an issue at trial, and the defendant offers evidence of prior sexual conduct between the victim and the defendant; and (4) when excluding the evidence would violate the defendant's right to confront witnesses and to present a defense.[13] Also evident from *Mastropetre* is that we were concerned with excluding evidence that was material, in the evidentiary sense, to a matter at issue. When we spoke of evidence being material, we spoke of its materiality to a *critical issue*, and not to the trial as a whole, as we do when we are concerned about materiality in a constitutional sense. We also noted that, when the defendant's evidence is irrelevant or more prejudicial than probative, it could be excluded without violating his constitutional rights and without the need to consider whether the exclusion of such evidence would undermine our confidence in the outcome of the trial.

We presume, as we must, that the legislature was aware of *Mastropetre* when it enacted § 54-86f in 1982.

[13] We realize that some of our conclusions in *Mastropetre* were dicta and not binding precedent. Nonetheless, we find our reasoning in *Mastropetre* persuasive.

See, e.g., *State* v. *Fernando A.*, supra, 294 Conn. 19. Even without such a presumption, it is apparent that the statute was modeled after *Mastropetre*. For example, the four instances we have identified in which a victim's sexual conduct can be admitted into evidence are the same exceptions codified in § 54-86f. Additionally, the Office of Legislative Research prepared a document that compared the proposed legislation that became § 54-86f to our decision in *Mastropetre*; Letter from George Coppolo, Research Attorney, Office of Legislative Research, to Representative Alfred J. Onorato, Connecticut General Assembly (March 10, 1982); and, in a letter to the Judiciary Committee, the Office of the Chief State's Attorney noted that the proposed legislation was consistent with our decision in *Mastropetre*. Letter from Austin J. McGuigan, Chief State's Attorney, Office of the Chief State's Attorney, to Members of the Judiciary Committee (September 22, 1982). Therefore, it seems likely that the legislature, when it codified subdivision (4), used material in the same manner we did, namely, the evidentiary sense. There is no evidence that the legislature intended to modify our holding in *Mastropetre*. In fact, Senator Howard T. Owens, Jr., in calling for the passage of the rape shield statute, stated: "The history of it is that there was case law that kind of left this with some ambiguity and we wanted to bring this to a head." 25 S. Proc., Pt. 10, 1982 Sess., p. 3250. Thus, it appears that § 54-86f was intended to clear up whatever ambiguities the legislature found in *Mastropetre* and not to modify or supersede that decision.

Our construction of the term "material" also is supported by a close look at the legislative history of § 54-86f. Section 54-86f was enacted in 1982 through the passage of No. 82-120 of the 1982 Public Acts (P.A. 82-120). When P.A. 82-120 was discussed on the floor of the Senate, Senator Owens made clear that the intent of the bill was to ensure that a victim of sexual assault

could not be questioned about his or her sexual conduct when such conduct was *irrelevant* to the issue at trial, specifically, whether the alleged sexual assault had occurred. See 25 S. Proc., supra, pp. 3249–50. Senator Owens noted that such evidence would be admissible, however, when it was so "relevant and material to a critical issue of the case that excluding it would violate the defendant's constitutional rights." Id., p. 3249. Senator Owens illustrated this exception: "For example, if an individual were to claim . . . as part of his defense that the person that he had the contact with was in fact a prostitute and then there was later a claim of rape or a situation where someone was hanging around an [A]rmy base or an [A]ir [F]orce base and enticed people into these types of situations that would be one of the situations that would call for constitutional confrontation and due process would require that." Id.

On the House floor, Representative Onorato noted that P.A. 82-120 dealt with the admissibility of evidence concerning a sexual assault victim's prior sexual conduct and outlined three instances in which such evidence would be admissible, referring to what would become subdivisions (1), (2), and (3) of § 54-86f. 25 H.R. Proc., Pt. 11, 1982 Sess., p. 3532. He further explained: "There's also protection . . . for the violation of constitutional rights . . . ." Id.

Consideration of these statements leads us to conclude that it is difficult to imagine that the term "material" meant anything other than material in the evidentiary sense. Neither Senator Owens nor Representative Onorato described a situation in which courts would consider whether the exclusion of prior sexual conduct evidence would change the outcome of the trial or undermine confidence in the verdict. In fact, Senator Owens gave an example that is particularly instructive in the present case. He explained that evidence suggesting that a sexual assault victim was a

prostitute would be admissible under the exception codified in subdivision (4) because the exclusion of such evidence would violate the defendant's constitutional rights to due process and confrontation.[14] See 25 S. Proc., supra, p. 3249.

In *DeJesus*, we decided "that § 54-86f (4) refers to materiality in its constitutional sense" with little explanation. *State* v. *DeJesus*, supra, 270 Conn. 842. Indeed, we did not even consider the other plausible meaning of "material" discussed in this opinion. Instead, we chose to follow the definition for material evidence provided in *United States* v. *Bagley*, supra, 473 U.S. 682 (opinion announcing judgment), without explaining why. *State* v. *DeJesus*, supra, 841. We did not engage in our normal process of statutory construction, and § 1-2z was never mentioned, even though it was in effect at that time.[15]

Moreover, the construction of § 54-86f (4) set forth in *DeJesus* yields an unworkable result, and the court seemed to acknowledge as much. See id., 842 n.17. Under the construction we gave the term "material" in that case, trial courts are left to decide, either prior to or during trial, whether the exclusion of a particular piece of evidence will, in the event that the trial results in a guilty verdict, undermine the court's confidence in that verdict. This is a precarious position for a trial court. First, there will not yet be a guilty verdict when the court is ruling on the admissibility of the evidence

[14] We do not suggest, nor do we think Senator Owens meant, that evidence of prostitution on the part of a sexual assault victim will be admissible in all cases. Instead, such evidence would be admissible in a prosecution for sexual assault only when it is *so relevant* and *material* to a critical issue that its exclusion would violate the defendant's constitutional rights, for example, when the defendant raises consent as a defense, such as in the present case.

[15] Section 1-2z became effective on October 1, 2003; see Public Acts 2003, No. 03-154, § 1; nearly one year before *DeJesus* was decided on September 7, 2004. See *State* v. *DeJesus*, supra, 270 Conn. 826.

under § 54-86f (4). Second, the court is asked to determine whether the evidence would affect the trial's outcome before all the evidence has been presented and all the testimony heard, making it difficult to determine the impact that the proffered evidence might have on the trial. Third, implicit in *DeJesus* is a perplexing proposition. In that case, we appear to suggest that the trial court could commit error by excluding evidence that the constitution requires the court to admit and, thereafter, determine the harmfulness of the court's error. Finally, *DeJesus* directs trial courts, when making an evidentiary ruling, to consider the impact a single piece of evidence may have on a case, a task we have never before asked trial courts to conduct when making evidentiary rulings. Instead, the analysis required by *DeJesus* is typically reserved for appellate courts, after all the trial evidence has been introduced, a record created, and a verdict reached.

In sum, in light of the statute's text and legislative history, along with the unworkable result that the court in *DeJesus* reached, we conclude that *DeJesus* improperly construed § 54-86f (4) and now overrule that decision to the extent that it determined that "material" refers to the constitutional standard for materiality. Instead, we hold that the legislature intended material to refer to the evidentiary standard, that is, evidence is material when it has an influence, effect, or bearing on a fact in dispute at trial. In addition, we overrule *DeJesus* insofar as the court in that case held that "an evidentiary ruling that excludes evidence properly admissible under § 54-86f (4) . . . requires reversal with no additional evaluation of harm . . . ." Id., 845.

C

We now turn to the facts of the present case. Because the state contends that defense counsel was not prevented from questioning the victim with respect to the

defendant's theories of consent, we must make a threshold determination as to whether the trial court used the rape shield statute to limit the questioning of the victim in the presence of the jury about the following sexual conduct: (1) the victim's offer to Fuller to have sex with multiple men, for multiple hours, for $500; and (2) the victim's act of engaging in consensual oral sex with Fuller and his friend at Wolcott Street for the promise of $250. Our review of the record reveals that, following the initial rape shield hearing, the court was steadfast in its ruling that defense counsel could not question the victim in the presence of the jury about her sexual conduct that took place prior to the Taylor Street incident. At multiple points during the victim's testimony before the jury, defense counsel posed questions regarding the two prostitution related topics. At each of these points, the trial court ultimately sustained the prosecutor's objections to the questions or excused the jury from the courtroom. The closest defense counsel came to being able to explore the first prostitution related topic with the victim in the presence of the jury was when the victim testified that she told Fuller that she would "do some stuff for 500 bucks" and that she had a conversation with Fuller in which $500 came up as a fee "for [her] services . . . ." This vague testimony does not, however, reflect specifically whether the victim expressed a willingness, shortly before the Taylor Street incident, to have sexual relations with multiple partners for multiple hours. Moreover, defense counsel was unable to question the victim in the presence of the jury about the second prostitution related topic, namely, her act of engaging in consensual oral sex with Fuller and his friend at Wolcott Street for the promise of $250. Accordingly, we agree with the defendant that defense counsel was prevented, by virtue of the trial court's application of the rape shield statute, from pursuing his desired lines of inquiry before the jury with respect to the victim's prior sexual conduct.

Having determined that defense counsel was indeed precluded from questioning the victim in the presence of the jury about certain sexual conduct, we must proceed to consider whether such testimony was so relevant and material to a critical issue in this case—namely, actual consent or a reasonable belief of consent—that precluding the testimony amounted to a violation of the defendant's constitutional rights. See General Statutes § 54-86f (4). "Determining whether evidence is relevant and material to critical issues in a case is an inherently fact-bound inquiry. Relevance [and materiality depend] on the issues that must be resolved at trial, not on the particular crime charged." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 270 Conn. 837.

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . In considering whether evidence [is] sufficiently relevant to fall under one of the exceptions enumerated in § 54-86f, we have drawn a distinction between, on the one hand, evidence that is relevant to establish some portion of the theory of defense or [to] rebut some portion of the state's case . . . and, on the other hand, evidence that is offered as an impermissible attempt to establish the victim's general unchaste character [which is] prohibited by [§ 54-86f]." (Internal quotation marks omitted.) *State* v. *Shaw*, 312 Conn. 85, 104–105, 90 A.3d 936 (2014).

We first underscore that the defense did not offer this sexual conduct evidence to establish the victim's "general unchaste character . . . ." (Internal quotation marks omitted.) Id., 105; see also id., 104 ("the defendant bears the burden of showing that the proffered evidence . . . [is] relevant to the case, rather than . . . relevant merely to demonstrate the unchaste character of the victim" [internal quotation marks omitted]). Moreover, the defense did not argue that the victim's unchaste character was relevant to the jury's determination of her credibility. See *Demers* v. *State*, supra, 209 Conn. 156–57 ("[i]t is . . . generally held that a witness' reputation for being unchaste or a prostitute, or her prior acts of sexual misconduct are not, in and of themselves, relevant to her credibility or veracity as a witness"). Instead, as defense counsel explained during the initial rape shield hearing, he was seeking to show that the victim negotiated and willingly consummated a multipartner, multihour, sex-for-hire transaction that began at Wolcott Street and ended after the ensuing intercourse with the defendant at Taylor Street. Later, outside of the presence of the jury, defense counsel also attempted to support this theory of actual consent by establishing that the victim had a motive to fabricate her allegations of sexual assault and other crimes because she had not been paid for the transaction at the end of the night.

The defense's theory of actual consent harmonized with the proffered evidence. Defense counsel did not attempt to elicit testimony of the victim's prior conduct as a prostitute that was unrelated to the charges against the defendant. Instead, the defense wanted the jury to hear that the victim, shortly before arriving at Taylor Street, (1) offered to engage in sexual relations with Fuller and three other men for four hours in exchange for $500, and (2) engaged in consensual sexual relations with Fuller and his friend for the promise of $250. The

proffered evidence had a strong temporal connection with the sexual assault and showed that the victim's offer to engage in a multipartner, multihour, sex-for-hire transaction was made to Bryan Fuller, the individual who accompanied her to Taylor Street. There can be no doubt that this excluded testimony makes the defendant's wholesale transaction theory of consent more probable. These two pieces of information could suggest that the victim brokered a consensual prostitution deal with Fuller that was only partially performed at Wolcott Street, with an expectation that more sexual relations and complete payment would follow at Taylor Street.[16] Moreover, the excluded testimony also was relevant to the defendant's claim that the victim had fabricated her allegations. Without the testimony that the victim had offered to engage in sexual relations with multiple men, there was no evidence that would explain to the jury why she may have fabricated the sexual assault allegations as a result of not receiving the promised $250. See *State* v. *DeJesus*, supra, 270 Conn. 840 ("[e]vidence suggesting a motive for a false allegation was relevant to the jury's assessment of the victim's credibility").

Next, we address the materiality of the evidence. Material evidence is evidence that has an influence, effect, or bearing on a fact in dispute at trial. See part I B of this opinion. As we just noted, the proffered evidence was relevant to the question of whether the sexual conduct on Taylor Street was a continuing, sex-for-hire transaction. In turn, whether the sexual relations on Wolcott and Taylor Streets were part of a continuous transaction influences or bears on the criti-

[16] Although this theory was largely refuted by Fuller's testimony that the victim did not know she was going to Taylor Street to engage in sexual activities, it is nonetheless relevant. See, e.g., *State* v. *Rinaldi*, 220 Conn. 345, 353, 599 A.2d 1 (1991) ("[t]o be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion, even to a slight degree").

cal issue in the case, namely, whether the victim consented to the sexual conduct with the defendant at Taylor Street or, alternatively, whether the defendant could reasonably have so believed that she had done so. Thus, because the evidence has a bearing on the critical issue of consent, it is material.

Our conclusion that the excluded testimonial evidence was relevant and material does not end our analysis as to whether it should have been admitted pursuant to § 54-86f (4). That provision also demands that the exclusion of such evidence deprive the defendant of a constitutionally protected right. See General Statutes § 54-86f (4).[17]

[17] It is hard to imagine a scenario in which evidence is *so* relevant and material to a critical issue in a case but could nonetheless be excluded without violating a defendant's constitutional rights. On the other hand, we can imagine a situation in which evidence is relevant and material to a critical issue *but not so much* so that its exclusion would deprive a defendant of his or her constitutional rights. One example is a sexual assault prosecution in which consent is raised as a defense. Suppose that, in that case, the alleged victim is a prostitute. Certainly, it can be argued that the alleged victim's status as a prostitute is relevant and material to the issue of consent, a critical issue in any sexual assault prosecution in which it is raised as a defense. See, e.g., *Demers* v. *State*, supra, 209 Conn. 159 (evidence of victim's prostitution "could lead to a reasonable conclusion that the victim had agreed on at least one occasion in the past to perform sexual acts for money and that under the circumstances that conclusion would have been relevant to the issue of consent in the petitioners' criminal trial"). It is possible, however, that such evidence is not *so* relevant and material to the critical issue of consent under the facts of that particular case and therefore could be excluded without violating the defendant's constitutional rights. For instance, perhaps the defendant was unaware, at the time of the alleged assault, that the victim was a prostitute. Under those facts, it seems likely that the evidence of prostitution could be excluded without violating the defendant's constitutional rights. Another example may be a case in which there are no facts to support the allegation that the assault was in fact a sex-for-hire transaction, for example, when there is no exchange of money or no offer of proof that the victim proposed to engage in sex for money. In such instances, when the defendant did not know of the victim's status as a prostitute or the facts do not suggest that the victim and the defendant understood that they were engaged in a sex-for-hire transaction, it is plausible that evidence that the victim has engaged in past acts of prostitution, despite its relevance and materiality to consent, could be excluded without violating the defendant's constitutional rights.

It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

Excluding the evidence in the foregoing situations would be consistent with our precedent on this issue. In *Demers*, we concluded that evidence of the victim's prior arrest for prostitution should have been admitted at trial when the petitioners, Mark Demers and William J. Corcoran, Jr., argued that the sexual conduct between them and the victim was a sex-for-hire transaction. Id., 158–59. However, the connection between the consent defense and the victim's prior arrest in *Demers* was stronger than a mere allegation that the victim had agreed to sex in exchange for money. The victim's prior arrest occurred after she propositioned a plainclothes police officer at the intersection of Central Avenue and Grove Street in Waterbury. Id., 158. Similarly, Demers and Corcoran contended that the victim had approached them at North Elm Street and Cherry Street in Waterbury. Id. Therefore, the victim's prior arrest became so relevant and material to a critical issue because she was arrested for propositioning a police officer only a few blocks west of where Demers and Corcoran contended she propositioned them.

The facts in *DeJesus* also suggested a connection between the defendant's consent defense and the victim's prior prostitution. In *DeJesus*, the defendant, Luis DeJesus, Jr., gave the victim $30. *State* v. *DeJesus*, supra, 270 Conn. 832. At trial, DeJesus wanted to present evidence that the victim admitted to an investigating officer that she was a prostitute and that DeJesus, at the time of the alleged assault, knew she was a prostitute. Id., 833. In that case, we concluded that the evidence should have been admitted, in part, because, without it, the jury was deprived of the "necessary contextual framework to evaluate properly [DeJesus'] version of [the] events," i.e., why he gave the victim $30. Id., 839. Additionally, the present case is consistent with the foregoing. In this case, as we previously discussed, there also is a strong connection between the consent defense and the sexual conduct evidence. First, there is the temporal relationship. It was merely hours before the charged conduct occurred that the victim offered Fuller to engage in sexual conduct with him and three other men for $500. Second, the Wolcott Street and Taylor Street sexual conduct is connected by common actors, namely, Fuller and the victim. Thus, these cases all involved instances where the circumstances from which the sexual assault allegations arose made the victim's prior prostitution so relevant and material to a critical issue that its exclusion violated the defendant's constitutional rights. In the absence of the highlighted facts, however, the evidence likely could have been properly excluded.

witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . .' "A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . . See, e.g., *Crane* v. *Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). Furthermore, the sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment. *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (right to confrontation); see *Washington* v. *Texas*, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (right to compulsory process)." (Internal quotation marks omitted.) *State* v. *West*, 274 Conn. 605, 622–23 n.26, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005).

In plain terms, the defendant's right to present a defense is "the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." (Internal quotation marks omitted.) Id., 624. It guarantees "the right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . ." (Internal quotation marks omitted.) Id. Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense. See, e.g., *State* v. *Crespo*, 303 Conn. 589, 604, 35 A.3d 243 (2012); *State* v. *Christiano*, supra, 228 Conn. 474

The right of confrontation is "the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive,

interest, bias and prejudice is a matter of right and may not be unduly restricted. . . .

"Impeachment of a witness for motive, bias and interest may also be accomplished by the introduction of extrinsic evidence. . . . The same rule that applies to the right to cross-examine applies with respect to extrinsic evidence to show motive, bias and interest; proof of the main facts is a matter of right, but the extent of the proof of details lies in the court's discretion. . . . The right of confrontation is preserved if defense counsel is permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . .

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 798–99, 91 A.3d 384 (2014).

These sixth amendment rights, although substantial, do not "suspend the rules of evidence . . . ." (Internal quotation marks omitted.) Id., 799; see also *State* v. *Hedge*, 297 Conn. 621, 634, 1 A.3d 1051 (2010). A court is not required to admit all evidence presented by a defendant; nor is a court required to allow a defendant to engage in unrestricted cross-examination. See, e.g., *State* v. *Baltas*, supra, 311 Conn. 799. Instead, "[a] defendant is . . . bound by the rules of evidence in presenting a defense . . . ." (Internal quotation marks omitted.) *State* v. *Hedge*, supra, 634. Nevertheless, "exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights

. . . .” (Internal quotation marks omitted.) Id. “Thus, [i]f the proffered evidence is not relevant [or constitutes inadmissible hearsay], the defendant's right[s] to confrontation [and to present a defense are] not affected, and the evidence was properly excluded.” (Internal quotation marks omitted.) *State* v. *Baltas*, supra, 799; see also *State* v. *Mastropetre*, supra, 175 Conn. 521 (“The defendant's right to confront witnesses against him is not absolute, but must bow to other legitimate interests in the criminal trial process. . . . Such interests are implicit in a trial court's accepted right, indeed, duty, to exclude irrelevant evidence . . . .” [Citations omitted; internal quotation marks omitted.]).[18]

There are special considerations in sexual assault prosecutions that trial courts must keep in mind when ruling on the admissibility of evidence, such as shielding an alleged victim from embarrassing or harassing questions regarding his or her prior sexual conduct. See, e.g., *State* v. *Christiano*, supra, 228 Conn. 469–70. “Although the state's interests in limiting the admissibility of this type of evidence are substantial, they cannot by themselves outweigh [a] defendant's competing constitutional interests.” Id., 470. As we previously have

[18] Insofar as *Mastropetre* suggested, or has been read to suggest, that a defendant's constitutional right to present evidence that is so relevant and material to a critical issue must bow to the state's general interest in protecting a sexual assault victim from prejudice; see *State* v. *Mastropetre*, supra, 175 Conn. 521; that suggestion was incorrect. In *Mastropetre*, we rightly acknowledged that a defendant's right to confront witnesses was not absolute and must yield to “other legitimate interests . . . .” (Internal quotation marks omitted.) Id. We noted that one of those legitimate interests was the exclusion of evidence that has “a greater prejudicial than probative effect.” Id. In making that observation, however, we cited a case in which the prejudice we were concerned with was the prejudice to the defendant, not a third party. See id. We do not think that the prejudice to the victim ever could outweigh a defendant's right to present evidence that is *so relevant and material to a critical issue* that its exclusion would violate a defendant's constitutional rights. Such a suggestion was dictum and should not be followed.

observed, evidentiary rules cannot be applied mechanistically to deprive a defendant of his constitutional rights. E.g., *State* v. *Hedge*, supra, 297 Conn. 634.

"We must remember that [t]he determination of whether the state's interests in excluding evidence must yield to those interests of the defendant is determined by the facts and circumstances of the particular case. . . . In every criminal case, the defendant has an important interest in being permitted to introduce evidence relevant to his defense. Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial or merely cumulative. . . . Whenever the rape shield statute's preclusion of prior sexual conduct is invoked, a question of relevancy arises. If the evidence is probative, the statute's protection yields to constitutional rights that assure a full and fair defense. . . . If the defendant's offer of proof is . . . more probative to the defense than prejudicial to the victim, it must be deemed admissible at trial. . . . When the trial court excludes defense evidence that provides the defendant with a basis for cross-examination of the state's witnesses, [despite what might be considered a sufficient offer of proof] such exclusion may give rise to a claim of denial of the right[s] to confrontation and to present a defense." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Rolon*, supra, 257 Conn. 176–77.

In the present case, the defendant advanced a single, continuous transaction theory of the case: (1) the victim offered to engage in sexual relations with Fuller and three other men in exchange for $500; (2) shortly before arriving at Taylor Street, the victim engaged in oral sex with Fuller and one other man at Wolcott Street; and (3) Fuller and the victim came to Taylor Street to continue the bargained for transaction. The evidence that

the defense proffered was, as we previously noted, relevant and material to a single, continuous transaction theory. By excluding the evidence, however, the trial court prevented the defense from presenting its version of the events to the jury, in violation of the defendant's right to present a defense. See, e.g., *State* v. *Hedge*, supra, 297 Conn. 634 ("in plain terms the right to present a defense [is] the right to present the defendant's version of the facts . . . to the jury" [internal quotation marks omitted]). More troubling, the excluded testimony was the only evidence the defense presented to support its theory of the case. Therefore, the exclusion of such testimony completely foreclosed the ability of the defense to present this version of the events to the jurors.[19] Additionally, the defense theory related to a central and critical question before the jury, namely, whether the victim consented to the sexual conduct at Taylor Street. Accordingly, we conclude that the defendant's right to present a defense was violated when the trial court excluded the foregoing evidence. See id., 636–37.

We further conclude that the trial court's restriction of defense counsel's cross-examination of the victim limited his ability to explore her possible motive for fabricating her claims of sexual assault, in violation of the defendant's right of confrontation. See, e.g., *State* v. *Baltas*, supra, 311 Conn. 798 ("[c]ross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted" [internal quotation marks omitted]). Testimony that the victim had not been paid for sexual con-

[19] We acknowledge that, when the defense recalled the victim for its case-in-chief, the victim was allowed to testify that she offered to "do some stuff for 500 bucks," and, when asked if the $500 was a fee for her services, the victim responded, "[r]ight, for Wolcott Street." Defense counsel was not allowed, however, to further explore the specifics of the offer to "do some stuff" or whether it was limited to Wolcott Street. Thus, the defense was effectively precluded from presenting its continuous transaction theory.

duct, particularly if such admission came from the victim herself, would have allowed the jury to weigh the victim's credibility and to consider her possible motive for fabricating her allegations. We recognized the defendant's right to explore this possible motive in *DeJesus*. See *State* v. *DeJesus*, supra, 270 Conn. 840. In that case, counsel for the defendant, Luis DeJesus, Jr., who was charged with sexual assault, wanted to question the victim about "whether she had engaged in prostitution, whether she had told an investigating officer that she had engaged in prostitution, and whether [DeJesus] was aware that she had engaged in prostitution." Id., 831. Defense counsel sought to offer the testimony to establish that the sex with DeJesus was consensual and to show the victim's motive for fabricating the sexual assault claim. Id., 833–34. The defense claimed that the victim had fabricated the charges because, when she demanded $50 after the sexual relations had concluded, DeJesus gave her only $30 and refused to pay her the balance. See id., 832–34. The trial court excluded the evidence, and we concluded that such exclusion was improper. Id., 834–35. We reasoned that, "without evidence of the victim's prior history of prostitution, the jury heard no evidence to explain why she would have had a reason to fabricate a sexual assault allegation against [DeJesus]." Id., 840. Similarly, in the present case, without the victim's testimony that she was owed $250 for engaging in sexual conduct with Fuller, a confederate of the defendant's, and another person, the jury was without the proper contextual framework to evaluate the victim's testimony.

The evidence that the defense proffered, through the testimony of the victim, was both relevant and material to a critical issue in this case, namely, consent. Moreover, the exclusion of that evidence deprived the defendant of his constitutional rights of confrontation and

to present a defense. Thus, we conclude the excluded evidence was admissible under § 54-86f (4)[20] and that the trial court abused its discretion by excluding such evidence.[21] As with all improper evidentiary rulings of

[20] We note that § 54-86f requires that a trial court, after determining that sexual conduct evidence is admissible under one of the four enumerated exceptions, proceed to determine whether the probative value of the evidence outweighs its prejudicial effect on the victim. See, e.g., *State* v. *Crespo*, supra, 303 Conn. 602. Under subdivision (4), however, that step is unnecessary because it is subsumed in the relevancy and materiality determinations. That is, all evidence that is *so* relevant and material to a critical issue that its exclusion would violate the defendant's constitutional rights is, by its nature, more probative to the defense than prejudicial to the victim. See, e.g., *State* v. *Rolon*, supra, 257 Conn. 177; see also *State* v. *DeJesus*, supra, 270 Conn. 844 ("evidence cannot be excluded as more prejudicial to the victim than probative when that exclusion has already been determined to violate the defendant's constitutional rights").

In their supplemental briefs, both parties argued that this court's construction of § 54-86f (4) in *DeJesus* was incorrect because, among other things, it dispensed with the statute's requirement that the probative value of the evidence be weighed against its prejudicial effect. The defendant claims that *DeJesus* led to the absurd result of requiring trial courts to ignore the plain language of the statute that required the application of this balancing test, and the state contends that *DeJesus* "contravenes the legislative purposes behind the rape shield statute" by allowing prior sexual conduct evidence to be admitted without consideration of the prejudicial effect that such evidence has on the victim. We assume that the parties would make the same arguments regarding our conclusion that the balancing test is subsumed in subdivision (4)'s relevancy and materiality determinations. Nevertheless, we are not persuaded.

First, trial courts are not instructed to ignore the weighing required by § 54-86f. Indeed, such weighing is still required when a defendant offers evidence under the other exceptions in § 54-86f. Moreover, our holding in this case does not ignore the legislature's mandate that the court admit only evidence that is more probative to the defense than prejudicial to the victim. Instead, it acknowledges that, when such evidence is *so relevant and material* to a critical issue that its exclusion would deprive a defendant of a constitutionally protected right, no amount of prejudice would outweigh its probative value. Second, this conclusion does not contravene the legislative purpose of § 54-86f. The rape shield statute is intended to prevent a defendant from introducing *irrelevant* evidence of the victim's prior sexual conduct, shielding the victim from embarrassment and harassment. That purpose will continue to be served under our holding in the present case because subdivision (4) does not permit the admissibility of irrelevant evidence.

[21] The concurring justice concludes that the challenged evidence is neither relevant nor material to the defendant's defense of consent or reasonable belief of consent and, therefore, that the trial court did not abuse its discretion in excluding the evidence. Instead, she argues that there is no nexus

between the conduct on Wolcott Street, including the victim's offer to engage in a multipartner, multihour, sex-for-hire transaction, on the one hand, and the incident on Taylor Street, on the other. The concurring justice further contends that, at its essence, the defendant's consent defense is nothing more than an argument that the victim had engaged in an act of prostitution earlier in the day and, therefore, must have engaged in a similar act at Taylor Street. Certainly, the concurring justice might be correct if the defendant was making such an argument and the only proffered evidence was the prior act of prostitution with Fuller and one other person. See, e.g., *State* v. *Shaw*, supra, 312 Conn. 104–105 (noting that evidence offered in "an . . . attempt to establish the victim's general unchaste character . . . [is] prohibited by [§ 54-86f]" [internal quotation marks omitted]). That, however, is not the case. Instead, the defendant's consent theory is that the victim entered into a consensual, multiperson prostitution transaction that began on Wolcott Street and continued at Taylor Street. In addition, the proffered evidence includes not only testimony regarding the prior act of prostitution with Fuller and one other person, *but also* testimony that the victim offered to engage in sexual relations with Fuller *and three other men* for four hours in exchange for $500. The concurring justice gives the evidence of such an offer little weight by contending that it was never accepted by Fuller. Moreover, the concurring justice argues that we cannot refer to any testimony that "evinces that such a transaction was bargained for, agreed [on], or acted out." Our review of the trial transcript, however, uncovers testimony from the victim suggesting that such an offer was bargained for and carried out. In turn, we did not discover any testimony suggesting that Fuller did not accept the offer. During the state's case-in-chief, on cross-examination and outside the presence of the jury, the victim confirmed that she had "a conversation with . . . Fuller [in which she] told him that, for $500, [she] would have sex with him and three other people for four hours . . . ." She was then asked, "[a]nd then you did have sex. [Fuller] didn't have $500, right? That's what he told you?" The victim responded: "[r]ight," but the prosecutor's hearsay objection was sustained. At a later point in the trial, this time during the defense's case-in-chief and in the jury's presence, the victim testified that she told Fuller she would "do some stuff for 500 bucks." Then, after the jury had been excused, the victim testified that she had offered to provide sexual services to four men for $500 and that the $500 was supposed to be for Wolcott Street. Surely, the victim's affirmation that she made the offer and then engaged in sexual conduct suggests that such a transaction was bargained for, agreed on, and acted out. Moreover, this testimony does not suggest that Fuller did not accept the victim's offer. It is true that the second time the victim was questioned about this offer, she testified that the offer was for Wolcott Street, but that is a question of fact for the jury to decide. In addition to the foregoing testimony regarding the $500 offer, there was evidence that the victim had engaged in sexual activities with two men just hours before arriving at Taylor Street with Fuller, the purported deal broker.

The concurring justice also argues that the defendant's consent theory is contradicted by the testimony of both the victim and Fuller, as well as the defendant's own statement to the police. Such a consideration, however, goes to the weight of the defendant's theory and the evidence proffered,

constitutional proportion, we now must consider whether the exclusion of the evidence was harmless beyond a reasonable doubt. See, e.g., *State* v. *Shaw*, supra, 312 Conn. 102. "Whether such error is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must

not its admissibility. Cf. *State* v. *Andrews*, 313 Conn. 266, 275, 96 A.3d 1199 (2014) ("[t]o be relevant, the evidence need not exclude all other possibilities" [internal quotation marks omitted]). In addition, the concurring justice overlooks the contradictions in Fuller's testimony and assumes that the defendant's statement proves more than it actually does. First, acknowledging that there was no money at Taylor Street for the victim is not the same as admitting the conduct was not consensual. Second, although the defendant's other statements may suggest that the sex was compelled, they do not necessarily require such a conclusion. For example, the victim did not have to like that the defendant and others were "smackin her ass" in order for the sexual conduct to be consensual. Finally, that Fuller did not engage in sexual conduct with the victim at Taylor Street does not refute that Fuller was the link between Taylor Street and Wolcott Street. In fact, we do not understand this suggestion considering that Fuller engaged in sex with the victim at Wolcott Street and accompanied the victim from Wolcott Street to Taylor Street.

This is not a case, as the concurring justice suggests, in which the prior sexual act has absolutely no connection to the charged sexual assault. Fuller, the defendant, and their confederates were members of the same gang and, therefore, knew each other. Moreover, Fuller was not the victim's romantic partner. Instead, Fuller was the victim's sexual customer who, if the defendant's theory is believed, brokered a multipartner, multihour, sex-for-hire transaction that began on Wolcott Street and ended on Taylor Street. Moreover, the sexual conduct on Wolcott and Taylor Streets was close in time, *and* the prior act of prostitution was not the only evidence that the defense proffered in support of the defendant's theory. Indeed, the defense also presented the victim's offer to engage in sexual activities with four men for four hours for $500. Our conclusion in the present case does not lead to the conclusion that prostitutes cannot be raped or that prior acts of prostitution always will be admissible in sexual assault prosecutions when the victim is alleged to be a prostitute. As we noted previously, more than a mere allegation of the victim's prior acts of prostitution is required for evidence of such acts to be admissible under § 54-86f (4).

examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) Id.

After a complete and thorough review of the record, we conclude that the trial court's error was harmless beyond a reasonable doubt. We first observe that the defense had available to it other means of directly testing the victim's credibility. Indeed, defense counsel questioned the victim in the presence of the jury more than one-half dozen times about whether she had intended to collect money in exchange for having sexual relations at Taylor Street. Every time, the victim responded to the various permutations of that question with the answer "no."

Second, Fuller's testimony, although equivocal at first, also refutes the existence of an agreement on the part of the victim to engage in prostitution at Taylor Street. In fact, he testified that the $250 he owed the victim was *not* for sex on Taylor Street. In addition, Fuller admitted that it was his intention that the victim have sex with his fellow gang members at Taylor Street but that the victim was not aware of that intention. Instead, she accompanied him to Taylor Street under the false pretense that it was there that she would receive the money he owed her.

Third, during the assault, the victim called a friend, namely, Jortner. Both the victim and Jortner testified that, during the call, the victim stated that she needed help, after which the phone was taken and a male voice exclaimed, " 'your friend's about to get fucked up . . . .' " Jortner also testified that the victim sounded scared during the call and that, after the call, she attempted to repeatedly reach the victim, but her calls went directly to voice mail. The occurrence of this call

also was corroborated by the defendant's statement to the police, which was admitted into evidence.

Fourth, the victim's testimony was not the sine qua non of the state's case, nor was this case a credibility contest between the victim and the defendant. Indeed, the victim's testimony was largely uncontradicted and, in fact, supported by the testimony of the defendant's confederates, Garrett and Fuller, and the defendant's own statement to the police. Moreover, the defendant, through his statement, and Garrett and Fuller, in their testimony, all acknowledged that the victim appeared to be scared. For example, the defendant admitted to the police that he could tell "that this girl wasn't liking this and she started to look scared" and that the victim said "she was scared and afraid that we was gonna kill her."

Fifth, Garrett testified that, when the victim and the other men first entered the second floor apartment at 19 Taylor Street, he remained outside with a few others. When he did decide to enter, the apartment door was locked. Subsequently, Garrett left the apartment on three separate occasions, and, when he returned each time, the door was locked.

Sixth, and perhaps most damaging, the defendant, in his statement to the police, stated that he "grabbed [the victim] and put her head on [his] dick so she would suck it." He also said, "[t]he [victim] kept asking [Fuller] for the money, so we all went up to the second floor [at Taylor Street] . . . . The whole time this was going on the [victim] thought she was gonna get her money, but [Fuller] was telling all of us that we was gonna fuck this girl." In addition, Fuller testified that the victim was *forced* to give the defendant oral sex at Gibbs' urging. Even Garrett seemed to suggest that, at least at some point, the conduct was not consensual.

Lastly, and importantly, defense counsel was not entirely precluded from testing whether the victim consented to an act of prostitution, although, as we already noted, he was precluded from exploring the defendant's continuous transaction theory. Defense counsel was allowed to question the victim about whether the $250 she was owed was for sexual intercourse on Taylor Street. The victim also testified that she had made an offer to Fuller to "do some stuff for 500 bucks" and had a conversation with Fuller in which $500 came up as a fee "for [her] services . . . ." In addition, the defendant's statement to the police contained the following admission: "Then [Fuller] grabbed me aside and said that he told [the victim] that he was gonna give her some money because he was with her all day, and she was giving him and another boy head all day." A jury could reasonably conclude, from the victim's testimony and the defendant's statement, that the victim had offered to engage in a sex-for-hire transaction. The defendant seems to concede as much in his brief: "Through the testimony [of] Fuller, Garrett and . . . Daniels, and through [the defendant's] police statement, the jury heard evidence to support a reasonable conclusion that [the victim] was a prostitute who engaged in consensual sexual acts with the men at the Taylor Street apartment." In light of all this evidence, we are convinced that the trial court's error was harmless beyond a reasonable doubt.

II

DOUBLE JEOPARDY CLAIM

We next address the state's claim that the Appellate Court improperly concluded that, pursuant to *State* v. *Polanco*, supra, 308 Conn. 242, vacatur is the appropriate remedy for the double jeopardy violation caused by the defendant's conviction of the three counts of conspiracy arising from a single agreement with multi-

ple criminal objectives. As an initial matter, the state acknowledges that, under Connecticut law; see, e.g., *State* v. *Ortiz*, 252 Conn. 533, 559, 747 A.2d 487 (2000); it is a double jeopardy violation to impose cumulative punishments for conspiracy offenses if they arise from a single agreement with multiple criminal objectives.[22] Furthermore, the state recognizes that, pursuant to the United States Supreme Court's decision in *Rutledge* v. *United States*, 517 U.S. 292, 302, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), a cumulative conviction can be a form of punishment in and of itself because it may lead a defendant to suffer adverse collateral consequences. With these concessions in mind, the state narrowly focuses its argument on the type of remedy that exists for the defendant's conviction on the three conspiracy counts. Specifically, the state argues that "[t]his court should limit the reach of *Polanco* and . . . hold that, when a defendant receives multiple punishments for cumulative conspiracy convictions arising from a single agreement, merger, rather than vacatur, is the proper remedy . . . ." We disagree and conclude that the Appellate Court properly determined that vacatur was the appropriate remedy for the defendant's conviction on the three conspiracy counts.

In *Polanco*, we readopted vacatur as the remedy for a cumulative conviction that violates double jeopardy protections. *State* v. *Polanco*, supra, 308 Conn. 248–49, 255. Although the holding in *Polanco* was limited to cases involving greater and lesser included offenses, in light of the issue presented, this court remarked in dictum that it was "aware of no reason why our holding, of logical necessity, would not apply with equal force to other scenarios in which cumulative convictions violate

[22] We note that the state conceded before the Appellate Court that the defendant's conviction on the three conspiracy counts was "supported by evidence of a single agreement to sexually assault the victim." (Internal quotation marks omitted.) *State* v. *Wright*, supra, 144 Conn. App. 747.

the double jeopardy clause . . . .'' Id., 249 n.3. Since *Polanco*, we have ''continue[d] to end our use of the merger approach'' and have required that vacatur be utilized in other scenarios in which a defendant has been subject to cumulative convictions in violation of the double jeopardy clause. *State* v. *Miranda*, 317 Conn. 741, 753, 120 A.3d 490 (2015); see also id., 743, 757 (vacating conviction as to felony murder and murder counts, which violated protection against double jeopardy, because they were cumulative of capital felony count).

As we already have explained at some length, extending the vacatur approach ''promote[s] inter-jurisdictional and intra-jurisdictional harmony, and better safeguard[s] against unconstitutional multiple punishments.'' Id., 753. Moreover, we continue to see ''no substantive obstacle to resurrecting a cumulative conviction that was once vacated on double jeopardy grounds—provided that the reasons for overturning [a] controlling conviction would not also undermine the vacated conviction.'' Id. Accordingly, we conclude that the Appellate Court correctly determined that the trial court was required to vacate the defendant's conviction on two of the three conspiracy counts, to render judgment of conviction on one of the conspiracy counts, and to resentence him on that one conspiracy count.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and PALMER, McDONALD, ROBINSON and VERTEFEUILLE, Js., concurred.

ESPINOSA, J., concurring. I generally agree with and join parts I and II of the majority opinion and I agree with the majority that the judgment of the Appellate Court, affirming in part the conviction of the defendant, Chywon Wright, should be affirmed. I write separately, however, because I am not persuaded by the majority's

conclusion in part I C of its opinion that the trial court abused its discretion by excluding evidence of the victim's[1] actions and statements to Bryan Fuller at a Wolcott Street residence in Waterbury (Wolcott Street) prior to the sexual assault committed by the defendant at a Taylor Street apartment in Waterbury (Taylor Street). In my view, it was not an abuse of discretion for the trial court to have excluded evidence that, under the evidentiary sense of "material" as articulated in the majority opinion, has no bearing on the defendant's theories of consent, or reasonable belief of consent, as to the Taylor Street incident. Accordingly, I concur.

In revisiting our decision in *State* v. *DeJesus*, 270 Conn. 826, 845, 856 A.2d 345 (2004), the majority concludes—and I fully agree—that this court improperly construed the term "material" in General Statutes (Rev. to 2015) § 54-86f (4), the rape shield statute, in its constitutional, rather than evidentiary, sense. The majority concludes, under our renewed understanding of the rape shield statute, that "[t]he evidence that the defense proffered, through the testimony of the victim, was both relevant and material to a critical issue in this case," and, therefore, that "the excluded evidence was admissible under [General Statutes (Rev. to 2015)] § 54-86f (4) and that the trial court abused its discretion by excluding such evidence." In my opinion, the majority's conclusion is not reconcilable with the applicable abuse of discretion standard of review. Applying that standard, I conclude that the trial court did not abuse its discretion in excluding the victim's testimony about the events at Wolcott Street as such events had no nexus to the defendant's subsequent acts at Taylor Street and, therefore, were neither material nor relevant to his defense.

This court has consistently recognized that it will "set aside an evidentiary ruling only when there has

[1] See footnote 1 of the majority opinion.

been a clear abuse of discretion. . . . The trial court has wide discretion in determining the relevancy of evidence and the scope of cross-examination and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Santos*, 318 Conn. 412, 423, 121 A.3d 697 (2015). Generally, a trial court abuses its discretion when the court "could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 555, 122 A.3d 555 (2015). When this court reviews a decision of the trial court for abuse of discretion, "the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Citation omitted; internal quotation marks omitted.) *State* v. *Cancel*, 275 Conn. 1, 18, 878 A.2d 1103 (2005). Accordingly, "the abuse of discretion standard reflects the context specific nature of evidentiary rulings, which are made in the heat of battle by the trial judge, who is in a unique position to [observe] the context in which particular evidentiary issues arise and who is therefore in the best position to weigh the potential benefits and harms accompanying the admission of particular evidence." (Internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 593 n.24, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

At trial, the defendant's main theory of defense was that the victim consented to his sexual contact at Taylor Street as part of an overarching sex-for-hire transaction encompassing both the Taylor Street incident and the prior transaction at Wolcott Street where the victim

performed oral sex on Fuller and another individual in exchange for $250. When defense counsel initially asked the victim during cross-examination why it was that Fuller owed her money, the state objected on the ground that such a line of inquiry was irrelevant to the events that transpired at Taylor Street. The defendant countered that the testimony was relevant to his defense that the victim consented via an extended sex-for-hire transaction that spanned both locations. In response, the trial court dismissed the jury from the courtroom and held a hearing pursuant to the rape shield statute in order to vet whether the testimony was relevant and material to the theory of defense.

At the hearing, the trial court stated that the defendant's argument would support the conclusion that the prior transaction at Wolcott Street was relevant "if . . . Fuller were the defendant in this case," but it did not see the connection between the victim's transactions with other individuals and the defendant's theory that the victim consented to a sexual transaction with him specifically. Defense counsel responded that his theory was that the defendant was a "third-party beneficiary" of the sexual transaction between Fuller and the victim. Significantly, however, counsel offered no evidence in support of that assertion. Throughout the hearing, the state maintained that the testimony regarding the victim's sexual contact with Fuller at Wolcott Street was irrelevant to the issue of whether the victim consented to the defendant's conduct at Taylor Street. Ultimately, the trial court concluded that it would allow "[n]o questions about what happened prior" to the incident at Taylor Street until the defendant was able to proffer evidence "appropriate to establish the issue of consent . . . ."

During the presentation of his case, the defendant recalled the victim as a witness and again attempted to question her as to her interactions with Fuller at

Wolcott Street. After having the jury dismissed from the courtroom, the trial court informed defense counsel that it still would not allow questions about events that transpired at Wolcott Street. In response, defense counsel repeated his theory that the Wolcott Street and Taylor Street incidents were "one [and] the same." The trial judge reaffirmed his previous restriction on questions concerning Wolcott Street: "I'm trying to give you as much leeway here as I can, considering both the rape shield statute and your client's constitutional rights. But what's important in my view and *relevant* is what happened at 19 Taylor Street, and I don't consider it, in my view, as one transaction. . . . The questions related to Taylor Street, I'm going to listen to, but not related to Wolcott Street. That, I don't consider to be a continuation of the same transaction." (Emphasis added.) Accordingly, again having determined that the inquiry into Wolcott Street was not relevant to the defendant's theory of consent, the trial court continued to prevent questioning on that point. During this second colloquy outside the presence of the jury, the defendant did not offer any additional evidence that would have explained how the events that took place at Wolcott Street between the victim and Fuller were relevant and material to his theory that she consented to the events at Taylor Street.

When viewed in the context of the other evidence presented at trial, the trial court's application of the rape shield statute to prevent the defendant from questioning the victim about the events at Wolcott Street was clearly well within the trial court's discretion. Indeed, there is no evidentiary support for the defendant's contention that the victim's sexual activity with *Fuller* at Wolcott Street implied the victim's consent to *the defendant's* sexual contact with her at Taylor Street. The defendant's theory that Fuller negotiated a sexual transaction at Wolcott Street for the benefit of the defendant and

the other individuals at Taylor Street was repeatedly disavowed at the rape shield hearing by both the victim's testimony and the defendant's statement to the police that the victim was unaware that the defendant and others at Taylor Street planned to sexually assault her. There is simply no link between the two incidents other than the fact that the victim was a prostitute and that Fuller was present at both locations. In my view, the trial court properly concluded, therefore, that any testimony relating to the victim's actions with Fuller at Wolcott Street was irrelevant and immaterial to the charges brought against the defendant for his actions at Taylor Street.

The other evidence presented at trial—which was before the trial court when it made its determination to exclude testimony related to Wolcott Street—plainly demonstrates that the victim's actions at Wolcott Street have no relevant and material link to the defendant's defense of consent. First, the victim's testimony both at trial and at the hearing establishes that the events at Taylor Street were not a continuation of the transaction at Wolcott Street. Indeed, there is no evidence that the victim went to Taylor Street for the purpose of offering sexual services to the defendant or his fellow gang members in exchange for money, rather than for the benign reason of collecting payment from Fuller for her previous services. At the Wolcott Street residence, the victim and Fuller negotiated for her services. In the course of doing so, the victim offered to have sex with Fuller and three other men for $500. The victim testified, however, that Fuller never accepted that offer. Instead, the victim performed oral sex on Fuller and a companion for the agreed sum of $250. The victim then accompanied Fuller to Taylor Street because "Fuller owed [her] money" for her services at Wolcott Street. On cross-examination at the hearing, defense counsel asked the victim: "[W]hile you were on your way over

there, [Fuller] said that there was going to be three or four other guys there . . . . At Taylor Street? . . . So you understood that to have sex with those three or four other guys. Correct?" The victim denied any such understanding between her and Fuller, testifying that she expected the individuals at Taylor Street to "holler" and "catcall" at her, and "[t]hat's what [she] took it as, *not sex*." (Emphasis added.) Fuller told the victim that the money was located on the second floor of the Taylor Street residence, where, instead, she was ultimately sexually assaulted by the defendant and his fellow gang members. On further questioning by the defense, the victim specifically stated that she was *not* going to Taylor Street to have sex with additional men for more money. The victim repeated numerous times in response to questions from defense counsel and the prosecutor that she did not go to Taylor Street in order to have sex pursuant to an earlier agreement with Fuller.[2] When the victim entered the second floor of the

[2] "[Defense Counsel]: Did you get any money for Wolcott Street?

"[The Victim]: No.

"[Defense Counsel]: So when you went to Taylor Street, your purpose was to sexually service a number of other guys to get the $250?

"[The Victim]: No.

"[Defense Counsel]: It wasn't?

"[The Victim]: No.

* * *

"[Defense Counsel]: Okay. And so prior to that, you knew you were going to Taylor Street for the purposes of having sex. Correct?

"[The Victim]: No.

* * *

"[Defense Counsel]: Did you have a conversation with . . . Fuller where the figure $500 came up as a fee for your services?

"[The Victim]: Right. For Wolcott Street.

* * *

"[Defense Counsel]: You had no expectations of having sex with anybody in that [Taylor Street] apartment?

"[The Victim]: No.

"[Defense Counsel]: Isn't it true that you went there, agreed to have sex for money, and there wasn't any force involved? Isn't that true?

"[The Victim]: No.

* * *

"[The Prosecutor]: When you went to 19 Taylor Street, did you intend to have sex with anyone?

Taylor Street residence, someone locked the door and she was forced to comply with the demands of the defendant and other individuals for sexual acts because, as she testified: "I was scared that if I didn't, that I was going to get hurt and not be able to get out of there." The victim testified that the defendant himself "took his hand and put it only the back of my head and forced my mouth [o]nto his penis."

Second, Fuller's own testimony confirms the victim's assertion that she did not intend to have sexual relations with anyone at Taylor Street pursuant to a deal made with Fuller at Wolcott Street. In his testimony, Fuller reiterated multiple times that at Taylor Street, "[he] was just supposed to pay [the victim]. There was no arrangement for anything," and the victim believed only that she would be collecting $250 at Taylor Street. Fuller further testified: "That was my whole intention for her to go there and have sex with them. I basically set the whole thing up *without her knowing* . . . . [S]he was standing by me and she didn't know what was going on at the time. She didn't know nothing. All she knew that she was supposed to get paid and that was it." (Emphasis added.) Thus, while the victim remained unaware of Fuller's designs en route to Taylor Street, Fuller telephoned his friends "Yajo" and "T Money" and informed them that he was bringing the victim to Taylor Street to have sex with them. Notably, Fuller did *not* call ahead to the defendant to inform him of his plans concerning the victim. Following the assault, Fuller confronted the victim as she was leaving and told her that "it wasn't supposed to go down like that," and acknowledged that the victim "felt violated." Fuller's testimony

"[The Victim]: No.

"[The Prosecutor]: When you went into that second floor apartment, did you intend to have sex with anyone?

"[The Victim]: No.

"[The Prosecutor]: Did you consent to have sex with anyone?

"[The Victim]: No."

therefore comports with the victim's testimony that the Taylor Street incident was distinct and separate from the events at Wolcott Street and was not linked by an overarching sexual transaction that spanned both locations. The evidence reveals only that the victim was deceived by Fuller into believing that the sole purpose of going to Taylor Street was to obtain payment for the transaction at Wolcott Street. The fact that Fuller deceived the victim in this manner did not render the transaction between Fuller and the victim relevant to the issue of whether she consented to sexual acts with the defendant at Taylor Street.

Finally, and perhaps most tellingly, the defendant's own postarrest statement to the police—that was fully admitted into evidence—demonstrates that the events at Taylor Street were not an outgrowth of the consensual, sex-for-hire transaction that previously occurred at Wolcott Street between Fuller and the victim. The defendant stated that when Fuller and the victim arrived at Taylor Street he heard Fuller "tell [the victim] that the money he owes her is upstairs on the second floor but *I knew he was lying to her* because he told me that [he was lying to her] and I also know that the second floor is a vacant apartment. The [victim] kept asking him for the money so we all went up to the second floor . . . . The whole time this was going on the [victim] *thought she was gonna get her money but* [*Fuller*] *was telling all of us that we was gonna fuck this girl*." (Emphasis added.)

The defendant's further statements reveal that his actions were not part of a consensual interaction: "I know [the victim] didn't like us smackin her ass because she told us it hurt and to stop. . . . I grabbed [the victim] and put her head on my dick so she would suck it. . . . I could tell at this point that the [victim] wasn't liking this and she started to look scared. . . . The [victim] then said that she was scared and afraid that

we was gonna kill her. We was telling her that we ain't gonna kill her but we wanna fuck her. . . . [W]e wasn't letting her leave until we were done with her." Notably, when recounting how the victim was forced to perform oral sex, the defendant specifically stated that he "didn't see [Fuller] get his dick sucked [at Taylor Street]," despite his own contention that Fuller was the link between the Taylor Street and Wolcott Street incidents. The defendant's own account further reinforces the conclusions drawn from both the victim's and Fuller's testimony that the Taylor Street incident was not a consensual outgrowth of the sex-for-hire transaction consummated by Fuller and the victim at Wolcott Street. Perhaps if the defendant had testified at trial he may have added additional detail that would have supported a defense of consent or reasonable belief thereof. The defendant, however, decided not to testify, due likely in part to his knowledge that he would possibly have been impeached and discredited on cross-examination by the content of his written statement, which clearly contradicts any potential evidence of consent.

Overall, the defendant's statement and the testimony of Fuller and the victim all convey a similar sequence of events: the victim performed oral sex on Fuller in exchange for money at Wolcott Street; Fuller brought the victim to Taylor Street under the pretext of collecting her payment; and Fuller, the defendant, and the other gang members actually intended, without any previous indication to the victim, to sexually assault her at Taylor Street. In my examination of the evidence, there is absolutely no link between the consensual transaction consummated by the victim and Fuller at Wolcott Street and the issue of whether the victim consented to the defendant's actions at Taylor Street. In my view, the trial court did not abuse its discretion in likewise determining that there was no connection

between the two incidents that would render the Wolcott Street evidence material to the defendant's consent defense. Indeed, the defendant's theory of consent essentially boils down to the argument that because the victim had sexual relations with Fuller in exchange for money at Wolcott Street, she also consented to the defendant's acts at Taylor Street.

I am unconvinced, as the trial court apparently was as well, that consent granted to one individual at a particular location implies consent to a completely different person at a geographically distinct location with no clear connection to the events at the first location. The only fact that could possibly support such a theory is the victim's prostitution[3] at Wolcott Street, which the trial court excluded as irrelevant to the issue of consent at Taylor Street. The majority opinion contends that the victim's prior prostitution with Fuller was *not* the only evidence supporting the defense theory and that the alleged multiperson, sex-for-hire transaction was also relevant. The majority, however, points to no place in the record where the testimony of Fuller or the victim definitively evinces that such a transaction was bargained for, agreed upon, or acted out. In fact, the *only* place in the record where such a theory is mentioned is in defense counsel's questions on cross-examination and statements to the court during the rape shield hearing, not in the testimony of any of the witnesses. And the statements of counsel are, of course, *not* evidence. Under the majority's approach, however, the fact that the defendant presented a theory of consent in his questioning and arguments, but without any evidentiary basis in the trial testimony, is sufficient to render the

[3] It is difficult to imagine a defendant raising a defense similar to that in the present case in a case where the victim is *not* a prostitute. For example, it would severely strain credulity for a defendant to argue that because a victim had consensual sex with a romantic partner at one location, the victim's consent to the initial sexual encounter could be "transferred" to a group of unrelated individuals at a second location.

victim's prior prostitution at Wolcott Street relevant and material. Such self-fulfilling materiality, whereby evidence becomes material to the central theory of defense simply because defense counsel declares it so, erodes the discretion of the trial court under the rape shield statute to consider the materiality and relevancy of proffered evidence and determine the admissibility of such evidence.

Under my review of the record, the trial court properly rejected the theory that a woman's act of prostitution with one individual, without more, is necessarily relevant to the issue of whether she has consented to have sex with a different individual. When stating its opposition to the defense theory at the rape shield hearing, the state summed up its counterpoint before the trial court in clear, unmistakable language: "Prostitutes [can] be raped, Your Honor." Had it been *Fuller* presenting this defense and not *the defendant*, the theory of consent via an extended sex-for-hire transaction would be much more plausible given Fuller's clear connection with both locations. The defendant, however, presented no evidence of such a connection to the trial court. Our decisions in this context recognize that "[e]vidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy . . . to be admitted in the proof of the latter." (Internal quotation marks omitted.) *State* v. *Crespo*, 303 Conn. 589, 603, 35 A.3d 243 (2012). The testimony concerning events at Wolcott Street is exactly that: entirely unconnected from the issue of consent at Taylor Street and therefore immaterial and irrelevant to the central theory of the defense.

Accordingly, I would conclude that the trial court properly exercised its discretion in excluding the Wolcott Street testimony because such testimony was not material and relevant to the defense and its exclusion

inflicted no harm on the defendant's constitutional rights. I therefore respectfully concur in the judgment.

STATE OF CONNECTICUT *v.* ANTHONY D., SR.* (SC 19382)

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

Syllabus

Convicted, on a plea of guilty, of the crime of sexual assault in the first degree, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly denied his motion to withdraw his plea without inquiring further as to his underlying claim of ineffective assistance of counsel. In the oral motion made at sentencing, defense counsel indicated to the trial court that the defendant had expressed concerns regarding the manner in which he was represented, but did not cite any specific facts or present any evidence regarding how or why counsel's representation was allegedly ineffective. The trial court thoroughly canvassed the defendant at the change of plea hearing and presented the defendant with numerous opportunities to voice any concerns he may have had with his counsel's representation or to inform the court that the sentence he was receiving was inconsistent with his plea agreement. The Appellate Court concluded that, because the defendant presented no factual basis for further inquiry by the trial court, the inquiry conducted by that court following the defendant's motion was sufficient and, accordingly, affirmed the judgment of the trial court. From that judgment, the defendant, on the granting of certification, appealed to this court. *Held* that the Appellate Court properly concluded that the trial court, without specific concerns or facts before it to justify the withdrawal of the defendant's plea at sentencing, did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea: after the acceptance of a plea but before sentencing, a defendant bears the burden of presenting facts sufficient to persuade the trial court that his guilty plea should be withdrawn under the applicable rule of practice (§ 39-26), and trial courts are not affirmatively required to conduct an inquiry into the factual basis of a defendant's motion to withdraw his plea where, as here, the defendant was afforded a reasonable opportunity to satisfy his burden of presenting a factual basis in support of his motion.

(*Three justices dissenting in one opinion*)

Argued January 22—officially released April 19, 2016

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* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the first degree and sexual assault in the second degree, and with the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Alexander*, *J.*, on a plea of guilty to one count of sexual assault in the first degree; judgment of guilty; thereafter, the state entered a nolle prosequi as to one count of sexual assault in the first degree, and as to the charges of sexual assault in the second degree, sexual assault in the fourth degree and risk of injury to a child; subsequently, the court denied the defendant's motion to withdraw the plea, and the defendant appealed to the Appellate Court, *Beach*, *Bear* and *Mintz*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Alan Jay Black, for the appellant (defendant).

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

Opinion

EVELEIGH, J. The sole issue in this certified appeal[1] is whether, under the facts of the present case, the trial

[1] We granted the defendant's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly affirm the trial court's decision to deny the defendant's oral motion to withdraw his plea due to ineffective assistance of counsel without conducting a further inquiry?" *State* v. *Anthony D.*, 314 Conn. 918, 100 A.3d 407 (2014).

court properly denied the oral motion of the defendant, Anthony D., Sr., to withdraw his guilty plea due to ineffective assistance of counsel without conducting a further inquiry into the underlying basis of his motion. The defendant appeals from the judgment of the Appellate Court affirming the trial court's judgment of conviction of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), rendered following the trial court's denial of his motion to withdraw his *Alford* plea.[2] See *State* v. *Anthony D.*, 151 Conn. App. 109, 110–11, 94 A.3d 669 (2014). On appeal, the defendant claims that the Appellate Court improperly concluded that the trial court had conducted a sufficient inquiry concerning the defendant's motion to withdraw. We conclude that the Appellate Court properly determined that the defendant was not entitled to a further inquiry into the basis of his motion to withdraw his guilty plea under the facts of the present case and, accordingly, we affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following undisputed facts and procedural history. "The defendant was arrested and charged with several crimes related to his sexual abuse of his girlfriend's child, with whom he had lived since the child was five years old. On December 5, 2011, the evidentiary portion of the defendant's trial commenced, and, on that day, the state presented six witnesses, including the then fifteen year old victim, who testified extensively about the defendant's sexual abuse, which began when she was six

[2] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Pentland*, 296 Conn. 305, 308 n.3, 994 A.2d 147 (2010).

years old. On December 6, 2011, the court conducted a hearing on the defendant's motion to suppress his confession to the police, in which he had admitted to sexually abusing the victim. Following the court's denial of that motion, the defendant entered a guilty plea under the *Alford* doctrine to one count of sexual assault in the first degree . . . and the state agreed to enter a nolle prosequi for each of the remaining criminal charges. The parties agreed to a sentence of ten years incarceration, with a five year mandatory minimum, followed by ten years of special parole." (Footnote omitted.) Id., 111.

"Before accepting the defendant's plea, the [trial] court . . . conducted a canvass of the defendant in which it asked the defendant if he understood the plea agreement, if he had discussed his plea with his attorney, if he understood the nature of an *Alford* plea and agreed that there was a likelihood of being found guilty if he went to trial, if he agreed that he likely would get a greater sentence if he proceeded to complete his trial, if he was pleading guilty to avoid the risk of trial, and if he understood that he was giving up his right to have the state prove the charges against him, to confront witnesses and to testify on his own behalf. The defendant answered yes to each of these questions. Additionally, the defendant acknowledged that he was not threatened or forced to enter his plea, that no one had made any promises to him other than the plea agreement, and that he was acting of his own free will.

"When the court explained the charge of first degree sexual assault to the defendant, he stated that he understood the charge but that he did not agree. The court again explained the *Alford* plea and again asked the defendant if he understood and still agreed that there was a likelihood that he would get a longer sentence if convicted after trial. The defendant said yes. The court then explained the sex offender registration and

treatment requirements to the defendant, and he acknowledged that he understood them. The court proceeded to ask the defendant if he knew that he would be subject to random searches, polygraph examinations and electronic monitoring; the defendant offered an inaudible response, and the court asked him if he had any questions for his attorney. The defendant responded by saying that 'nothing that I ask is gonna change anything.' The court then stated that it understood the defendant's point, but wanted to know if the defendant had any questions that he wanted to ask his attorney about what was occurring or about anything of a legal nature. The defendant said no. The court proceeded to accept the plea and to explain to the defendant that the agreement was binding and that the defendant could not come back and change his mind.

"On December 16, 2011, the defendant returned to the [trial] court for his sentencing hearing . . . . At the start of the hearing, the following colloquy took place:

" '[Defense Counsel]: . . . I'm sorry, before we begin, I understand that we are here for sentencing. I've met with [the defendant]. He is expressing to me concerns over the manner in which he was represented and is asking that he be permitted to withdraw his plea.

" 'The Court: Okay.

" '[Defense Counsel]: Under those circumstances, it would be my application to the court on his behalf that new counsel be appointed to investigate his claim.

" 'The Court: With respect to it, the court does not believe that there is any factual basis for it. This was the court that took the plea. This was done in the middle of evidence. [If the defendant] want[s] to claim at a time after that this was ineffective [assistance] or somehow coerc[ive] [he] can have a habeas proceeding. But, [defense counsel], as an officer of the court, do you

know of any defect in that plea canvass that would allow the court to, in fact, take back the plea at this time?

" '[Defense Counsel]: Your Honor, I think that I need to be precise in my language. The canvass itself I think was quite thorough.

" 'The Court: Right. I mean, we went back and forth. And my recollection was that I repeatedly advised him that this was a permanent agreement and that it could not be changed . . . .

" '[U]nless you can point out some defect, I am not inclined to have him withdraw his plea, nor am I inclined for purposes of an agreed sentencing to delay the sentencing, given the fact that the complainants are here. And . . . there was even the agreement, I believe, of the waiver of the [presentence investigation report] at the time. And the court wanted some record for probation; otherwise, the sentence would have been imposed on the date of the plea.

" 'So . . . while there may be reasons postjudgment for a different counsel, at this time, I am not going to grant your motion to withdraw because there is no prejudice. This is an agreed sentence. So, unless the court were going to give more and [defense counsel] had to persuade me to give less to maintain the agreement, there is no reason that [defense counsel] is not standing next to you today for an agreed disposition. . . . All right. The withdrawal—and I'll just take it as an oral motion, is denied.'

"The court then heard a statement from the victim's mother, and the state read a letter written by the victim, both of which explained how the defendant's actions had impacted their lives. Near the end of the hearing, before imposing [the agreed upon] sentence, the court asked the defendant if he wanted to say anything, to which the defendant responded, 'No.' " Id., 114–17.

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming that the trial court improperly denied his "timely oral motion to withdraw his plea without any type of inquiry or evidentiary hearing as to the underlying basis of [his] motion." Id., 112. The Appellate Court concluded that "the defendant presented no basis for further inquiry by the court" and that, therefore, on the basis of the facts of the present case, "the inquiry conducted by the court was sufficient." Id., 119. This certified appeal followed. See footnote 1 of this opinion.

On appeal to this court, the defendant claims that the trial court's failure to conduct a further inquiry into the factual basis of his motion to withdraw his guilty plea[3] violated his constitutional rights to the effective assistance of counsel and to due process of law as protected by the sixth and fourteenth amendments to the United States constitution[4] and his rights under Practice Book §§ 39-26 and 39-27.[5] Specifically, the

[3] We note that although defense counsel also made a motion for appointment of new counsel, the trial court did not rule on this motion and the defendant did not raise this issue on appeal.

[4] The defendant also raises due process and ineffective assistance of counsel claims pursuant to article first, § 8, of the constitution of Connecticut. "Because the defendant has not set forth a separate analysis of his claim[s] under the state constitution or asserted that our state constitution affords him greater protections with regard to his claim[s] than its federal counterpart, we confine our analysis to the defendant's federal constitutional claim[s]." *State* v. *Roger B.*, 297 Conn. 607, 611 n.7, 999 A.2d 752 (2010).

[5] Practice Book § 39-26 provides: "A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon proof of one of the grounds in Section 39-27. A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed."

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

"(1) The plea was accepted without substantial compliance with Section 39-19;

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

defendant claims that the Appellate Court improperly concluded that "the inquiry conducted by the court following the defendant's oral motion to withdraw his plea was sufficient under the circumstances of this case."[6] Id., 112. The defendant requests that we reverse the judgment of the Appellate Court affirming the trial court's judgment of conviction and that we order the trial court to either permit the defendant to withdraw his guilty plea or to conduct an evidentiary hearing on his motion to withdraw his guilty plea. In response, the state contends that the Appellate Court properly affirmed the trial court's denial of the defendant's motion to withdraw his guilty plea without first conducting a further inquiry or holding an evidentiary hearing on the defendant's motion. Specifically, the state contends that the defendant failed to state a specific basis for his motion and that the trial court properly disregarded defense counsel's vague statement that the defendant had "concerns" relating to his legal represen-

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

"(4) The plea resulted from the denial of effective assistance of counsel;

"(5) There was no factual basis for the plea; or

"(6) The plea either was not entered by a person authorized to act for a corporate defendant or was not subsequently ratified by a corporate defendant."

[6] The defendant further claims that the trial court's failure to advise the defendant during the plea canvass that he "ha[d] the right to plead not guilty or to persist in that plea" in violation of Practice Book § 39-19 (5) rendered his plea involuntary. We disagree. "This court has held repeatedly that . . . § 39-19 requires only substantial compliance." (Footnote omitted.) *State* v. *Ocasio*, 253 Conn. 375, 378, 751 A.2d 825 (2000). The trial court in the present case substantially complied with the requirement of § 39-19 (5) when it explained the nature of the *Alford* doctrine and asked the defendant whether he acknowledged that there was a likelihood that he would be convicted of additional offenses and would face a greater sentence if he decided to proceed with his trial. Furthermore, the trial court specifically told the defendant that by pleading guilty he was waiving certain constitutional rights, including the right to plead not guilty and to have the state prove his guilt beyond a reasonable doubt.

tation. We agree with the state and, accordingly, affirm the judgment of the Appellate Court.

As a preliminary matter, we set forth the applicable standard of review. It is well established that "[t]he burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty." (Internal quotation marks omitted.) *State* v. *Hall*, 303 Conn. 527, 533, 35 A.3d 237 (2012). "To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]. . . . Whether such proof is made is a question for the court in its sound discretion, and a denial of permission to withdraw is reversible only if that discretion has been abused." (Citation omitted; internal quotation marks omitted.) *State* v. *Carmelo T.*, 110 Conn. App. 543, 549, 955 A.2d 687, cert. denied, 289 Conn. 950, 960 A.2d 1037 (2008). "In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *State* v. *Lameirao*, 135 Conn. App. 302, 320, 42 A.3d 414, cert. denied, 305 Conn. 915, 46 A.3d 171 (2012).

Motions to withdraw guilty pleas are governed by Practice Book §§ 39-26 and 39-27. Practice Book § 39-26 provides in relevant part: "A defendant may withdraw his . . . plea of guilty . . . as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his . . . plea upon *proof* of one of the grounds in [Practice Book §] 39-27 . . . ." (Emphasis added.) Practice Book § 39-27 (4) provides, in turn, that a defendant may withdraw his guilty plea after acceptance if "[t]he plea

resulted from the denial of effective assistance of counsel. . . .' 'The standard for withdrawing a guilty plea is stringent because society has a strong interest in the finality of guilty pleas, and allowing withdrawal of pleas not only undermines confidence in the integrity of our judicial procedures, but also increases the volume of judicial work, and delays and impairs the orderly administration of justice.'' (Internal quotation marks omitted.) *United States* v. *Doe*, 537 F.3d 204, 211 (2d Cir. 2008).

We first note that the plain language of Practice Book § 39-26 expressly imposes limitations upon a defendant's ability to withdraw his guilty plea after it has been accepted. Although a defendant may withdraw his guilty plea ''as a matter of right until the plea has been accepted,'' after a guilty plea is accepted, the defendant's right to withdraw his plea is restricted to a narrow window of time. Practice Book § 39-26. After acceptance, but before the imposition of sentence, the trial court is required to permit a defendant to withdraw his guilty plea under Practice Book § 39-26 only ''upon proof of one of the grounds in [Practice Book §] 39-27.'' Once a defendant has been sentenced, he no longer maintains a right to withdraw his guilty plea. Practice Book § 39-26. Furthermore, we emphasize that Practice Book § 39-26 requires the trial court to grant the defendant's motion to withdraw his guilty plea only ''upon *proof*'' of one of the grounds in Practice Book § 39-27. (Emphasis added.) This language indicates that the defendant bears the burden to present facts sufficient to persuade the trial court that his guilty plea should be withdrawn at this point in the proceedings.

We further observe that there is no language in Practice Book §§ 39-26 and 39-27 imposing an affirmative duty upon the court to conduct an inquiry into the basis of a defendant's motion to withdraw his guilty plea. ''The rules of statutory construction apply with equal force to [our] rules [of practice]. . . . It is a principle

of statutory construction that a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them." (Citation omitted; internal quotation marks omitted.) *State* v. *Lameirao*, supra, 135 Conn. App. 322–23. A review of related rules of practice reveals that when the judges of the Superior Court intend to impose an affirmative duty on the trial court to conduct an inquiry of the defendant, they know how to do so. Specifically, unlike Practice Book §§ 39-26 and 39-27, Practice Book §§ 39-19 and 39-20,[7] which govern the acceptance of a defendant's guilty plea, explicitly mandate that the trial court "[address] the defendant personally . . . ." Practice Book § 39-20 also uses the following plain language to order the trial court to conduct a specific inquiry: "The judicial authority *shall also inquire* as to whether the defendant's willingness to plead guilty . . . results

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

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

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

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

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

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

Practice Book § 39-20 provides: "The judicial authority shall not accept a plea of guilty or nolo contendere without first determining, by addressing the defendant personally in open court, that the plea is voluntary and is not the result of force or threats or of promises apart from a plea agreement. The judicial authority shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecuting authority and the defendant or his or her counsel."

from prior discussions between the prosecuting authority and the defendant or his or her counsel." (Emphasis added.) Therefore, it would be improper for this court to engraft language requiring trial courts to affirmatively investigate the basis of a defendant's motion to withdraw his guilty plea onto our rules of practice. The task of creating such a requirement properly lies with the judges of the Superior Court, not this court.[8] See *State* v. *Obas*, 320 Conn. 426, 436, 130 A.3d 252 (2016) (noting that "[i]n the absence of any indication of the legislature's intent concerning this issue, we cannot engraft language onto the statute for [i]t is not the function of the courts to enhance or supplement a statute containing clearly expressed language" [internal quotation marks omitted]); *State* v. *Baker*, 141 Conn. App. 669, 672, 62 A.3d 595 (noting that " '[l]anguage directing the trial court to "address the defendant personally" could easily have been included in the original text of [Practice Book] § 43-10 [3] had that been the intention of the judges of the Superior Court in adopting the rule' "), cert. denied, 308 Conn. 950, 67 A.3d 292 (2013).

[8] The dissent notes that "the majority's reasoning that a trial court has no affirmative obligation to inquire as to the basis for the claim makes little sense in the present case, in which the trial court did affirmatively inquire as to the basis for a claim of a defective plea, even though that claim had not been made . . . ." See footnote 7 of the dissenting opinion. As previously noted in this opinion, in the present case, the trial court did not have an affirmative obligation to inquire as to whether there was any defect in the plea canvass that would invalidate the guilty plea. However, because Practice Book § 39-19 sets forth inquiries that the trial court is required to make before accepting a defendant's guilty plea, it was reasonable for the trial court to question whether there was a problem with its canvass of the defendant. See *State* v. *Lage*, 141 Conn. App. 510, 526, 61 A.3d 581 (2013) (noting that "[e]xcept for those inquiries which are constitutionally mandated or are required by our rules; [Practice Book §§ 39-19 through 39-21]; the court is not obliged to assume the role of the defendant's counselor" [internal quotation marks omitted]). The fact that the trial court took it upon itself to inquire as to the sufficiency of the plea canvass does not change the fact that it was not affirmatively required to inquire into the basis of the defendant's motion to withdraw his guilty plea.

In the present case, despite the fact that, at the outset of the sentencing hearing, defense counsel informed the trial court that the defendant had expressed to him "concerns over the manner in which he was represented," at no point during the proceedings did the defendant or his counsel cite facts or present evidence as to how or why counsel's representation was allegedly ineffective. At the time he made an oral motion to withdraw the defendant's guilty plea, it was incumbent upon defense counsel to provide the trial court with specific reasons to support the motion, but he failed to do so. The defendant offers no authority, and we know of none, that mandates a trial court to conduct an inquiry into the factual basis of a defendant's motion to withdraw his guilty plea when the defendant raises general "concerns" about his attorney's representation and proffers no facts in support of his motion. In fact, our case law requires that a defendant "show a plausible reason for the withdrawal" of a guilty plea; *State* v. *Hall*, supra, 303 Conn. 533; and "allege and provide facts" that warrant a trial court's consideration of his motion. *State* v. *Carmelo T.*, supra, 110 Conn. App. 549; see also *State* v. *Crenshaw*, 210 Conn. 304, 311–12, 554 A.2d 1074 (1989) (affirming trial court's denial of defendant's motion to withdraw guilty plea, reasoning that "[i]t [was] not enough for the defendant to claim that he was told what to say by his lawyer" without providing any facts or evidence in support of motion [internal quotation marks omitted]).

The defendant further claims that the Appellate Court improperly concluded that "[n]either the defendant nor his attorney were denied the opportunity to present a basis for a plea withdrawal." *State* v. *Anthony D.*, supra, 151 Conn. App. 119. Specifically, the defendant contends that the situation at issue in the present case is similar to the one the Appellate Court faced in *State* v. *Morant*, 13 Conn. App. 378, 536 A.2d 605 (1988). The defendant concedes that, unlike in *Morant*, the trial

court in the present case did not direct the defendant to stop speaking. The defendant, however, asserts that he was denied the opportunity to adequately present the factual basis for his motion to withdraw his guilty plea as a result of the trial court's statement at the sentencing hearing that if the defendant wished to "claim at a time after that this was ineffective [assistance] or somehow coerc[ive]" he could do so in a habeas proceeding.[9] We disagree, and find *Morant* inapplicable to the present case.

In *Morant*, "immediately after the defendant was sentenced but before the close of the sentencing proceed-

[9] The dissent concludes that "the trial court reasoned, mistakenly, that a claim of ineffective assistance was not a proper basis for a plea withdrawal." We find no support in the record for finding that the trial court misunderstood Practice Book § 39-27. The dissent seems to base its understanding that the trial court was mistaken on the fact that the trial court said that the defendant could make a claim of ineffective assistance of counsel in a collateral habeas proceeding and that such a statement demonstrates that the trial court believed that a habeas proceeding was the *only* proper forum for a claim of ineffective assistance. This is a logical leap that the majority will not make. It is too far a stretch to assume the trial court was under a misimpression of the grounds for withdrawal contained in § 39-27 based on its aforementioned comment.

Moreover, even if the trial court had been under a misimpression that a claim of ineffective assistance of counsel was not a proper basis for the withdrawal of a guilty plea, this would not change the fact that, in the present case, the only basis presented by defense counsel in support of the defendant's motion to withdraw his guilty plea was a conclusory statement that the defendant had "concerns" relating to his legal representation. As the dissent acknowledges, the case law of this state makes clear that the burden is upon the defendant to "allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]." (Internal quotation marks omitted.) *State* v. *Carmelo T.*, supra, 110 Conn. App. 549. The defendant failed to present such facts or any evidence in support of his motion to the trial court. Notably, defense counsel did not cite to or reference § 39-27 (4), or any rule of practice for that matter, when he moved to withdraw the defendant's guilty plea. The failure of the defendant and defense counsel to present a factual basis for the motion was the sole reason for the trial court's denial of the defendant's motion to withdraw his guilty plea. Thus, even if we were to assume that the trial court had been mistaken as to the allowable grounds for withdrawal of a guilty plea, the deficiencies in the defendant's motion remain.

ing the defendant informed the court that he had not entered his plea on his own 'recognition' " and that "he had been 'on a pressure force to plead guilty.' " *State* v. *Morant*, supra, 13 Conn. App. 384. When the defendant attempted to further explain his claim to the sentencing court, the court interrupted him, stating that he could " 'take that up with [his] next attorney if [he] want[ed]' " and that such a claim was " 'not appropriate' " at the time. Id., 382. When the defendant attempted to speak to the court again, "[t]he court responded with a thinly veiled threat telling the defendant that if he heard anymore from him the court might be sorry that it sentenced him to only ten years suspended after seven." (Emphasis omitted.) Id., 385. The Appellate Court concluded that "the statements made by the defendant [were] sufficient to require the holding of an evidentiary hearing because the trial court effectively precluded the defendant from making any more specific allegations of fact." Id.

We agree with the Appellate Court that the present case is factually distinct from *Morant*. See *State* v. *Anthony D.*, supra, 151 Conn. App. 118. In the present case, immediately following the defendant's oral motion, made through counsel, to withdraw his guilty plea, the trial court specifically stated that it did "not believe that there [was] any factual basis for" the motion. The court then asked defense counsel: "[A]s an officer of the court, do you know of any defect in that plea canvass that would allow the court to, in fact, take back the plea at this time?" We disagree with the dissent's suggestion that this inquiry by the trial court "limited [defense counsel] to any allegations regarding the adequacy of the plea canvass." See footnote 7 of the dissenting opinion. These statements by the trial court were an invitation to defense counsel to present a factual basis for the motion and defense counsel was free to answer the trial court's question as he wished.

Rather than present such support, defense counsel merely stated: "Your Honor, I think that I need to be precise in my language. The canvass itself I think was quite thorough."

Although the defendant attempts to equate the trial court's statement at the sentencing hearing that if the defendant wanted to "claim at a time *after* that this was ineffective [assistance] or somehow coerc[ive]" he could do so in a collateral habeas proceeding to the statements made by the court in *Morant*, we are not persuaded. (Emphasis added.) In *Morant*, the defendant and defense counsel repeatedly attempted to explain the basis of the motion to withdraw, but the trial court interrupted and affirmatively prevented them from proffering specific facts in support of the motion. *State* v. *Morant*, supra, 13 Conn. App. 382. Here, in contrast to the situation in *Morant*, at no point in the proceedings did the trial court cut short the defendant's explanation of the basis of his motion or direct him to stop talking. We interpret the trial court's statement as an attempt to convey to the defendant that there were no facts before it that would justify the withdrawal of his plea at that time, but that he remained entitled to make a claim of ineffective assistance of counsel following the sentencing hearing.[10]

Moreover, we do not examine the dialogue between defense counsel and the trial court at the sentencing

[10] The dissent asserts that the trial court in the present case "foreclosed the defendant from providing any specific allegations of fact to support the claim." (Emphasis omitted.) See footnote 9 of the dissenting opinion. As we have explained previously in this opinion, unlike in *Morant*, there is no evidence in the record that the trial court affirmatively precluded the defendant or defense counsel from stating a factual basis in support of the motion to withdraw the guilty plea. Defense counsel had the opportunity at this point in the proceedings to explain to the trial court that, while there was no defect in the plea canvass, the defendant had specific facts to support his claim that he had received ineffective assistance of counsel. Defense counsel failed to provide the trial court with those facts or make any further statement as to the defendant's "concerns."

hearing in isolation, and we find the particular circumstances of the present case relevant to our analysis. The record reveals that the trial court's canvass of the defendant at the change of plea hearing was thorough and presented the defendant with numerous opportunities to voice any concerns he may have had with his attorney's representation of him, or to inform the court that the sentence was inconsistent with the explanation of the plea agreement that his attorney had given him. During the plea canvass, the defendant indicated that he had spoken to his attorney about his decision to plead guilty and that the sentence the court was to impose corresponded with his understanding of the plea agreement. When asked whether anyone had forced or threatened him to plead guilty and whether he had been induced to plead guilty by any promises not contained in the plea agreement, the defendant responded in the negative. The defendant further indicated that he was pleading guilty under the *Alford* doctrine because he acknowledged that there was a chance that he would be convicted of additional offenses and would face a greater sentence if he decided to proceed with his trial. The trial court specifically asked both defense counsel and the state's attorney whether they knew of any reason why the plea should not be accepted, and they both replied that they did not. Finally, before accepting the defendant's plea, the trial court asked the defendant one last time[11] whether he understood the plea agreement, to which he replied that he did, and the trial court also made a specific finding that the defendant "had

[11] Throughout the entire colloquy between the trial court and the defendant, the trial court repeatedly asked whether the defendant understood the charge and the terms of the plea agreement and the defendant affirmed four times that he did. When the defendant indicated that he did not understand that, as a result of his conviction, he would be required to register as a sex offender for his lifetime, the trial court gave a thorough explanation of what that requirement and sex offender parole entailed.

the assistance of competent counsel."[12] Thus, despite the ongoing dialogue between the defendant and the trial court during the plea canvass, the hearing concluded without the defendant alluding to any perceived flaw in the entry of his guilty plea.

The defendant nevertheless claims that the trial court had been given notice that the defendant was dissatisfied with his attorney's representation of him at the change of plea hearing when the trial court asked whether he had any questions for his attorney and he responded that "nothing that I ask is gonna change anything." We are not persuaded. We find the defendant's statement to be ambiguous, at best, especially when taken in the context of the status of his case. Given the fact that the defendant changed his plea well after his trial had begun, during which the victim had testified extensively, and immediately after his motion to suppress his incriminating statement to the police had been denied, the defendant's statement could reasonably be interpreted as an expression of the defendant's acknowledgment of the strength of the state's evidence against him and the risk associated with proceeding with his trial.[13] Furthermore, the record reveals that if the defendant were dissatisfied with his attorney's representation of him, he had a clear opportunity to articulate to the court that he was not being adequately represented by his current attorney and to

[12] We note that the defendant was canvassed and sentenced by the same trial court judge. Consequently, the sentencing court was cognizant of the defendant's demeanor and responses to the court's inquiries during the plea proceeding. Furthermore, the trial court was also familiar with defense counsel's demeanor and representation of the defendant.

[13] We further note that the procedural posture of the defendant's case supports the trial court's denial of the defendant's motion to withdraw his guilty plea. Given the status of the case and the lack of an asserted factual basis for the defendant's motion to withdraw, it was reasonable for the trial court to infer that the motion was made as a dilatory tactic rather than for the purpose of obtaining a trial.

request the appointment of new counsel at this point in the plea canvass. The defendant, however, did not avail himself of this opportunity, and we cannot expect trial judges to be seers. See *Nicks* v. *United States*, 955 F.2d 161, 169 (2d Cir. 1992) (noting that "[i]n determining whether to hold a competency hearing, the applicable standard does not contemplate that a judge be omniscient, but simply that a trial court rule on the objective facts of which it has knowledge").

Additionally, we note that, procedurally, neither the defendant nor his attorney requested an evidentiary hearing or moved for a continuance. The record also discloses that the trial court continued the sentencing until ten days after the plea hearing for purposes related to the defendant's parole. If the defendant had concerns relating to his guilty plea, he had adequate time to develop a factual basis to support his motion to withdraw his guilty plea. The defendant, however, failed to do so. Furthermore, when given an opportunity to speak before the imposition of sentence, the defendant declined to say anything.[14] Thus, in light of the foregoing circumstances, we conclude that, contrary to the dissent's claim, the defendant was afforded a reasonable opportunity to satisfy his burden of presenting a factual basis in support of his motion to withdraw his guilty plea.

Finally, we recognize that the administrative need for judicial expedition and certainty is such that trial courts cannot be expected to inquire into the factual basis of

[14] The dissent claims that the defendant's failure to present a factual basis for his motion at this point in the proceedings should not be held against him because "the defendant very reasonably could have thought that the ineffective assistance of counsel matter was closed" at the time. See footnote 6 of the dissenting opinion. Although that may have been the case, we note that the defendant failed to express his dissatisfaction with defense counsel on the record, *both before and after* the trial court's denial of his motion to withdraw his guilty plea.

a defendant's motion to withdraw his guilty plea when the defendant has presented no specific facts in support of the motion. To impose such an obligation would do violence to the reasonable administrative needs of a busy trial court, as this would, in all likelihood, provide defendants strong incentive to make vague assertions of an invalid plea in hopes of delaying their sentencing. Because, as this court has previously stated, "the guilty plea and the often concomitant plea bargain are important components of [the] criminal justice system"; (internal quotation marks omitted) *State* v. *Revelo*, 256 Conn. 494, 505, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001); such a practice would undermine the "strong interest in the finality of guilty pleas." (Internal quotation marks omitted.) *United States* v. *Doe*, supra, 537 F.3d 211; see also id. ("[t]he standard for withdrawing a guilty plea is stringent because society has a strong interest in the finality of guilty pleas, and allowing withdrawal of pleas not only undermines confidence in the integrity of our judicial procedures, but also increases the volume of judicial work, and delays and impairs the orderly administration of justice" [internal quotation marks omitted]). As previously noted in this opinion, we emphasize that, at the defendant's request, the trial court in the present case interrupted the trial in order to conduct a canvass of the defendant pursuant to Practice Book § 39-19 and to accept the defendant's guilty plea. See footnote 7 of this opinion; see also *State* v. *Anthony D.*, supra, 151 Conn. App. 114. At the time the defendant changed his plea, the state had presented six witnesses, including the then fifteen year old victim, who had been called to testify at length about the defendant's sexual abuse of her. See *State* v. *Anthony D.*, supra, 111. Therefore, on the basis of the facts of the present case, for the trial court to have granted the defendant's motion to withdraw his guilty plea without any factual support

for the motion on the record would have greatly "delay[ed] and impair[ed] the orderly administration of justice." *United States* v. *Doe*, supra, 211.

We conclude that, without specific concerns or facts before it to justify the withdrawal of the defendant's guilty plea at sentencing, the trial court did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea without conducting a further inquiry into the underlying basis of the defendant's motion. Accordingly, the Appellate Court properly concluded that "the defendant presented no basis for further inquiry by the court." *State* v. *Anthony D.*, supra, 151 Conn. App. 119.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, ZARELLA and ESPINOSA, Js., concurred.

ROGERS, C. J., with whom McDONALD and ROBINSON, Js., join, dissenting. I respectfully dissent from the majority opinion because I believe, under the particular circumstances of this case, that the trial court abused its discretion in denying the motion of the defendant, Anthony D., Sr., to withdraw his plea without further inquiry. In my view, to hold otherwise disregards the remedy afforded by Practice Book §§ 39-26 and 39-27 (4),[1] which allow for withdrawal of a plea when a

[1] Practice Book § 39-26 provides: "A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon proof of one of the grounds in Section 39-27. A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed."

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

"(1) The plea was accepted without substantial compliance with Section 39-19;

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

plea is claimed to have been entered without effective assistance of counsel.

As the Appellate Court's opinion recounts, on December 16, 2011, the defendant appeared at a sentencing hearing before the same judge that had accepted his plea ten days earlier. At the hearing, the following discussion ensued between defense counsel and the court:

"[Defense Counsel]: . . . [B]efore we begin . . . I've met with [the defendant]. He is expressing to me *concerns over the manner in which he was represented* and is asking that he be permitted to withdraw his plea.

"The Court: Okay.

"[Defense Counsel]: Under those circumstances, *it would be my application to the court on his behalf that new counsel be appointed to investigate his claim.*

"The Court: With respect to it, the court does not believe that there is any factual basis for it. This was the court that took the plea. This was done in the middle of evidence. And, [defendant], *if you want to claim at a time after that this was ineffective or somehow coerci*[*ve*] *you can have a habeas proceeding.* But, [defense counsel], as an officer of the court, *do you know of any defect in that plea canvass that would allow the court to, in fact, take back the plea at this time*?

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

"(4) The plea resulted from the denial of effective assistance of counsel;

"(5) There was no factual basis for the plea; or

"(6) The plea either was not entered by a person authorized to act for a corporate defendant or was not subsequently ratified by a corporate defendant."

Practice Book § 39-19 governs plea canvassing and requires the trial court to apprise a defendant of several factors prior to accepting that defendant's plea.

"[Defense Counsel]: Your Honor, I think that I need to be precise in my language. The canvass itself I think was quite thorough.

"The Court: Right. I mean, we went back and forth. And my recollection was that I repeatedly advised him that this was a permanent agreement and that it could not be changed . . . .

"So, with respect to it, *unless you can point out some defect, I am not inclined to have him withdraw his plea* . . . .

"So, with respect to it, *while there may be reasons postjudgment for a different counsel*, at this time, I am not going to grant [the defendant's] motion to withdraw because there is no prejudice. . . . The withdrawal—and I'll just take it as an oral motion, is denied." (Emphasis added; internal quotation marks omitted.) *State* v. *Anthony D.*, 151 Conn. App. 109, 115–17, 94 A.3d 669 (2014).

As the foregoing makes clear, the trial court denied the defendant's motion to withdraw his plea summarily, without conducting any inquiry into the specific allegations regarding his claim of ineffective assistance of counsel.

The law governing withdrawal of a guilty plea, and whether the trial court should hold an evidentiary hearing to consider whether to allow such withdrawal, is well established. Practice Book § 39-27 permits the withdrawal of a plea before sentencing for a variety of grounds including, as the trial court recognized, involuntariness, the lack of an adequate plea canvass, or a change to the agreed upon sentence.[2] *Additionally*, a trial court must allow a defendant to withdraw his plea if that plea "resulted from the denial of effective assistance of counsel . . . ." Practice Book § 39-27 (4). As

[2] See footnote 1 of this opinion.

a general matter, "[a] claim of ineffective assistance of counsel is . . . made pursuant to a petition for a writ of habeas corpus rather than in a direct appeal. . . . *Section 39-27 . . . however, provides an exception to that general rule when ineffective assistance of counsel results in a guilty plea.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Sutton*, 95 Conn. App. 139, 145, 895 A.2d 805, cert. denied, 278 Conn. 920, 901 A.2d 45 (2006).

"After a guilty plea is accepted but before the imposition of sentence the court is obligated to permit withdrawal upon proof of one of the grounds in [Practice Book § 39-27]. An evidentiary hearing is not required [on a motion to withdraw a plea] if the record of the plea proceeding and other information in the court file conclusively establishes that the motion is without merit. . . . In considering whether to hold an evidentiary hearing on a motion to withdraw a guilty plea the court may disregard any allegations of fact, whether contained in the motion or made in an offer of proof, which are either conclusory, vague or oblique. For the purpose of determining whether to hold an evidentiary hearing, the court should ordinarily assume any specific allegations of fact to be true. If such allegations furnish a basis for withdrawal of the plea under [§ 39-27] and are not conclusively refuted by the record of the plea proceedings and other information contained in the court file, then an evidentiary hearing is required. . . . The burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [§ 39-27]." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Salas*, 92 Conn. App. 541, 544–45, 885 A.2d 1258 (2005). "[O]nce entered, a guilty plea cannot be withdrawn except by leave of the court, within its sound

discretion, and a denial thereof is reversible only if it appears that there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Crenshaw*, 210 Conn. 304, 308–309, 554 A.2d 1074 (1989).

Obviously, if the basis for a motion to withdraw is the inadequacy of a plea canvass, the record of the plea proceedings will be especially informative. In contrast, however, an ineffectiveness based motion for plea withdrawal typically will rest upon advice given or other aspects of counsel's performance that occur *outside* the courtroom. Accordingly, the factual basis underlying the motion, in all likelihood, will not be readily apparent from the plea proceedings.[3] See, e.g., *State* v. *Sutton*, supra, 95 Conn. App. 141 (alleging counsel's failure to investigate case, to prepare defense for trial, to locate and to interview alibi witnesses, and to provide

[3] Part of a plea canvass may be relevant to an ineffectiveness claim, for example, the defendant expressing satisfaction with his representation when queried about it. Reviewing courts have relied on such acknowledgment of satisfaction, along with other considerations, including the trial court's credibility determinations regarding the claim, to conclude that a defendant's motion to withdraw a guilty plea was without merit. See, e.g., *State* v. *Stith*, 108 Conn. App. 126, 132, 946 A.2d 1274 (finding, on basis of lack of evidence concerning ineffective assistance of counsel and defendant's statement during plea canvass that he was satisfied with his defense counsel, that defendant had failed to satisfy burden for motion to withdraw guilty plea), cert. denied, 289 Conn. 905, 957 A.2d 874 (2008); *State* v. *Barnwell*, 102 Conn. App. 255, 263–64, 925 A.2d 1106 (2007) (concluding that record of plea canvass conclusively refuted defendant's claim of ineffective assistance, because defendant had stated that he was very satisfied with his counsel's representation and there were no indicia to contrary); *State* v. *Brown*, 82 Conn. App. 678, 682, 846 A.2d 943 (in affirming denial of motion to withdraw plea, Appellate Court deferred to trial court's finding that testimony of defendant's former attorney was more credible than defendant's), cert. denied, 270 Conn. 906, 853 A.2d 522 (2004). Notably, in the present case, the record of the plea proceedings reveals that the defendant was not asked whether he was satisfied with the representation he had received, nor did he otherwise volunteer such an opinion. When the defendant was asked whether he had any questions for his attorney, he replied, "nothing that I ask is gonna change anything." Although I agree with the majority that the meaning of this statement is ambiguous, it does not inspire confidence that the defendant was entirely satisfied with his counsel's performance.

defendant with police reports and witness statements); *State* v. *Barnwell*, 102 Conn. App. 255, 262, 925 A.2d 1106 (2007) (alleging counsel's failure to obtain, in timely fashion, certain evidence); *State* v. *Stith*, 108 Conn. App. 126, 132, 946 A.2d 1274 (alleging counsel's failure to investigate medical evidence), cert. denied, 289 Conn. 905, 957 A.2d 874 (2008); *State* v. *Gray*, 63 Conn. App. 151, 162, 772 A.2d 747 (2001) (alleging counsel's failure to file motion to suppress), cert. denied, 256 Conn. 934, 776 A.2d 1151 (2001); *State* v. *Perez*, 57 Conn. App. 385, 387, 748 A.2d 384 (2000) (alleging that previous relationship with counsel prevented effective communication of appropriate legal advice).

My review of the cases in which a plea withdrawal was sought based on a claim of ineffective assistance of counsel demonstrates that, in each case, the defendant was provided with an opportunity to present allegations of fact in support of the claim. From those allegations of fact, the court could evaluate the merit of the motion to determine whether it should be denied or whether an evidentiary hearing should be held. In the present case, however, the trial court denied the defendant's motion without giving the defendant an opportunity to assert any allegations of fact, relying instead on its recollection of the plea proceeding. In my view, there are two problems with the trial court's actions.

First, contrary to Practice Book § 39-27 (4), the trial court reasoned, mistakenly, that a claim of ineffective assistance was not a proper basis for a plea withdrawal.[4]

[4] On June 29, 2012, more than six months after the sentencing hearing, the trial court issued a written memorandum of decision explaining its ruling on the defendant's motion to withdraw his guilty plea. In that decision, the trial court acknowledged that, pursuant to Practice Book § 39-27 (4), ineffective assistance was a proper ground for a plea withdrawal. Otherwise, however, the court's decision focused on the adequacy of its plea canvass, a point which the defendant did not contest.

In the trial court's view, as evidenced by its comments on the record, a habeas proceeding after sentencing was the proper forum for such a claim. Specifically, the court's immediate response to the defendant's claim was to suggest a habeas proceeding, and it thereafter suggested that the defendant may have reasons to seek new counsel "postjudgment . . . ." Although the trial court was correct that the defendant could make this claim in a habeas proceeding, the rules of practice make clear that he was not required to do so and could properly move to withdraw his plea at this earlier stage of the proceedings. See *State* v. *Sutton*, supra, 95 Conn. App. 145.

Second, the trial court was singularly focused on the plea proceedings.[5] Specifically, it repeatedly indicated that "unless [defense counsel could] point out some defect" in the plea canvass, it would not permit the defendant to withdraw his plea. By relying only on its impressions of the plea proceeding and inquiring no further, the trial court foreclosed the opportunity to obtain sufficient information to make a reasoned decision.

In *State* v. *Morant*, 13 Conn. App. 378, 536 A.2d 605 (1988), the trial court denied the defendant the opportunity to present his claim of ineffective assistance by misstating proper procedure and not allowing him to provide specific allegations of fact in support of his claim. See id., 380 and n.2, 385 (Appellate Court found that trial court "erroneously informed" defendant that "no claim that you have ineffective assistance of counsel . . . will do you any good to have your plea withdrawn at a future time" and stated that based on trial court's actions at sentencing "[u]nderstandably, the

[5] While not at issue in this case, the trial court did also mention that if it was going to impose a sentence that exceeded the agreed upon sentence, then a motion to withdraw could be appropriate. See Practice Book § 39-27 (3).

defendant failed to make more specific allegations of fact''). Likewise, in the present case, the trial court stated that the claim should be consigned to a habeas forum and limited its inquiry to the plea canvass. Accordingly, we have no way of knowing what specific allegations of fact, if any, the defendant would have provided in support of his motion.[6] In my view, the defendant should have had the opportunity to present allegations of fact to support his claim that his plea of guilty should be withdrawn for ineffective assistance of counsel before the court denied his motion.[7]

It is important to emphasize that if the court had provided an opportunity for the defendant to make fac-

[6] Addressing the defendant's conduct, the Appellate Court stated that, ''[c]learly, the facts of this case readily are distinguishable from the facts in *Morant*. Here, there was a vague allegation that the defendant had concerns about his attorney's representation but no specific facts, and, when the defendant was asked if he wanted to say anything before sentence was pronounced, he *specifically declined* the opportunity.'' (Emphasis added.) *State* v. *Anthony D.*, supra, 151 Conn. App. 118–19. The defendant's ''opportunity'' to speak was offered at the conclusion of the sentencing hearing, long after the trial court had denied his motion to withdraw. Given that the trial court denied the motion, the defendant very reasonably could have thought that the ineffective assistance of counsel matter was closed, because it was. See id., 117 (trial court stated, ''[t]he withdrawal—and I'll just take it as an oral motion, is denied'' [internal quotation marks omitted]). Accordingly, I would not hold the defendant's failure to press the matter further against him.

[7] The majority suggests that finding fault with the trial court in the present matter would equate to holding that a court, faced with a motion to withdraw a plea, has a duty in all cases to undertake some sort of formal inquiry of the defendant. I disagree. The court's only obligations are to recognize that an ineffective assistance of counsel claim can be the basis for a motion to withdraw a plea and to permit a defendant to articulate his allegations prior to denying the motion. In my view, the only fair reading of the colloquy regarding the motion was that the court was foreclosing defense counsel from providing information regarding the ineffective assistance claim and limited him to any allegations regarding the adequacy of the plea canvass.

Additionally, the majority's reasoning that a trial court has no affirmative obligation to inquire as to the basis for the claim makes little sense in the present case, in which the trial court did affirmatively inquire as to the basis for a claim of a defective plea, even though that claim had not been made, and foreclosed the defendant from discussing the ineffective assistance claim by incorrectly stating that it should be reserved for a habeas proceeding.

tual allegations and the trial court believed that they were vague or conclusory, it could have denied the motion without a hearing.[8] See *State* v. *Salas*, supra, 92 Conn. App. 544 ("[i]n considering whether to hold an evidentiary hearing on a motion to withdraw a guilty plea the court may disregard any allegations of fact, whether contained in the motion or made in an offer of proof, which are either conclusory, vague or oblique" [internal quotation marks omitted]).[9] Contrary to the majority's position that this practice would have interrupted the orderly administration of justice, in the absence of a legitimate basis for making such a claim,

[8] Due to the very nature of an ineffectiveness claim and depending on the nature of the specific allegations underlying such a claim, it may be necessary for the court to allow or appoint different counsel to assess and present the claim objectively and effectively. See, e.g., *State* v. *Sutton*, supra, 95 Conn. App. 141 (court appointed special public defender to represent defendant in hearing on motion to withdraw plea); *State* v. *Salas*, supra, 92 Conn. App. 543, 545–46 (defendant retained new counsel to withdraw his plea, submitted own detailed affidavit, and that of another party); *State* v. *Brown*, 82 Conn. App. 678, 680–81, 846 A.2d 943 (court appointed new attorney for defendant who filed new formal motion to withdraw plea and represented defendant at hearing), cert. denied, 270 Conn. 906, 853 A.2d 522 (2004); *State* v. *Gray*, supra, 63 Conn. App. 154 (defendant retained new counsel); *State* v. *Perez*, supra, 57 Conn. App. 387 (defendant's new counsel sought plea withdrawal). The decision to allow or appoint different counsel remains within the trial court's sound discretion. Additionally, it can also employ other methods in dealing with this particular motion. See, e.g., *State* v. *Barnwell*, supra, 102 Conn. App. 262 (defendant allowed to read statement into record about dissatisfaction with his attorney's performance).

[9] In distinguishing this case from *Morant*, the Appellate Court stated that "there was a *vague allegation* that the defendant had concerns about his attorney's representation but no specific facts"; (emphasis added) *State* v. *Anthony D.*, supra, 151 Conn. 118; and in the same paragraph that court stated that "[t]he trial court need not consider *allegations* that merely are conclusory, vague or oblique . . . ." (Emphasis added; internal quotation marks omitted.) Id., 119. It is clear from the colloquy, however, that defense counsel's statement regarding his client's concerns merely described the basis for the defendant's motion—ineffective assistance of counsel. As I have explained, the trial court then foreclosed the defendant from providing any specific *allegations of fact* to support the claim. I am mindful that it is a defendant's burden to present those allegations of fact but in the present case the defendant was prevented from doing so by the court.

the entire colloquy would probably have only taken several minutes. In this case, however, *no* allegations of fact for the court to evaluate were ascertained because the trial court denied the oral motion to withdraw without ever allowing the defendant the opportunity to explain the underlying reasons for it.

For the foregoing reasons, I respectfully dissent. I believe that the appropriate remedy is to remand the case for further inquiry into the defendant's claim of ineffective assistance of counsel. Further inquiry will give the defendant an opportunity to meet his burden and if the allegations of fact furnish a basis for the defendant's claim that cannot be resolved from the record, then an evidentiary hearing should be held. See *State* v. *Torres*, 182 Conn. 176, 185–86, 438 A.2d 46 (1980) ("[i]f such allegations furnish a basis for withdrawal of the plea under [Practice Book § 39-27] and are not conclusively refuted by the record of the plea proceedings and other information contained in the court file, then *an evidentiary hearing is required*" [emphasis added]); *State* v. *Salas*, supra, 92 Conn. App. 544 (same).

Note

Supreme Court Orders begin at page 901. Page numbers 872 to 900 are intentionally omitted.

Reporter of Judicial Decisions

ORDERS

ANN MARIE BENEDETTO ET AL. *v.* DIETZE AND ASSOCIATES, LLC, ET AL.

The plaintiffs' petition for certification for appeal from the Appellate Court, 159 Conn. App. 874 (AC 36778), is denied.

Eddi Z. Zyko, in support of the petition.

Thomas P. O'Connor, in opposition.

Decided November 30, 2015

STATE OF CONNECTICUT *v.* EDWARD VICTOR DAVIS

The defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 251 (AC 36476), is denied.

Peter G. Billings, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided November 30, 2015

STATE OF CONNECTICUT *v.* LAURENCE V. PARNOFF

The petition by the state of Connecticut for certification for appeal from the Appellate Court, 160 Conn. App. 270 (AC 36567), is granted, limited to the following issue:

"Did the Appellate Court correctly determine in its de novo review of the record, that there was insufficient evidence to support the defendant's conviction of disorderly conduct pursuant to General Statutes § 53a-182 (a) (1) because the state's proof of that offense's threat

element did not satisfy the first amendment's 'fighting words' doctrine?"

The Supreme Court docket number is SC 19588.

Mitchell S. Brody, senior assistant state's attorney, in support of the petition.

Norman A. Pattis, in opposition.

Decided November 30, 2015

GREGORY GREENE *v.* COMMISSIONER OF CORRECTION

The petitioner Gregory Greene's petition for certification for appeal from the Appellate Court, 160 Conn. App. 903 (AC 36805), is denied.

Cheryl A. Juniewic, assigned counsel, in support of the petition.

Brett R. Aiello, special deputy assistant state's attorney, in opposition.

Decided November 30, 2015

ENTERTAINMENT FINANCIAL, LLC *v.* TIFFANY BLACKSTONE ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 903 (AC 37089), is denied.

ROBINSON, J., did not participate in the consideration of or decision on this petition.

Brenden P. Leydon, in support of the petition.

Sean R. Plumb, in opposition.

Decided November 30, 2015

STATE OF CONNECTICUT *v.* TIMOTHY PHILLIPS

The defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 358 (AC 37183), is denied.

John L. Cordani, Jr., assigned counsel, in support of the petition.

Kathryn W. Bare, assistant state's attorney, in opposition.

Decided November 30, 2015

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* HEATHER M. BLISS ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 159 Conn. App. 483 (AC 36219), is denied.

ROBINSON, J., did not participate in the consideration of or decision on this petition.

John R. Hall, in support of the petition.

Laura Pascale Zaino, *Brian D. Rich* and *Logan A. Forsey*, in opposition.

Decided December 9, 2015

STATE OF CONNECTICUT *v.* SARA E. VANDEUSEN

The defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 815 (AC 35504), is denied.

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

Pamela S. Nagy, assistant public defender, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided December 9, 2015

PETER GONDA *v.* COMMISSIONER OF CORRECTION

The petitioner Peter Gonda's petition for certification for appeal from the Appellate Court, 160 Conn. App. 908 (AC 36216), is denied.

Michael D. Day, in support of the petition.

Adam E. Mattei, assistant state's attorney, in opposition.

Decided December 9, 2015

STATE OF CONNECTICUT *v.* CHERYL J. MARTONE

The defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 315 (AC 36350), is denied.

Laila Haswell, senior assistant public defender, in support of the petition.

Brett R. Aiello, special deputy assistant state's attorney, in opposition.

Decided December 9, 2015

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* LOUISE WORKS

The plaintiff's petition for certification for appeal from the Appellate Court, 160 Conn. App. 49 (AC 36707), is denied.

Christopher J. Picard, in support of the petition.

Janine M. Becker, in opposition.

Decided December 9, 2015

ERNEST DAVIS *v.* COMMISSIONER OF CORRECTION

The petitioner Ernest Davis' petition for certification for appeal from the Appellate Court, 160 Conn. App. 906 (AC 36710), is denied.

Justine F. Miller, assigned counsel, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided December 9, 2015

JAMES B. *v.* COMMISSIONER OF CORRECTION

The petitioner James B.'s petition for certification for appeal from the Appellate Court, 160 Conn. App. 905 (AC 36787), is denied.

Albert J. Oneto IV, assigned counsel, in support of the petition.

Decided December 9, 2015

TAVORUS FLUKER *v.* COMMISSIONER OF CORRECTION

The petitioner Tavorus Fluker's petition for certification for appeal from the Appellate Court, 160 Conn. App. 908 (AC 37085), is denied.

Robert J. McKay, assigned counsel, in support of the petition.

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided December 9, 2015

STATE OF CONNECTICUT *v.* KENNY HOLLEY

The petition by the state of Connecticut for certification for appeal from the Appellate Court, 160 Conn. App. 578 (AC 37166), is granted, limited to the following issues:

"1. Did the Appellate Court correctly determine that the defendant's convictions should be reversed on the basis of his claim that the trial court violated his right to present a defense by preventing him from presenting evidence regarding a bite mark on his cohort's hand?

"2. Did the Appellate Court correctly determine that testimony regarding a witness' observation of a bite mark on the defendant's cohort's hand violated the limitation on lay opinion testimony in Connecticut Code of Evidence § 7-1?

"3. Did the Appellate Court correctly determine that an item visible in the defendant's backpack in a surveillance video was a shoe box violated the limitation on lay opinion testimony in Connecticut Code of Evidence § 7-1?

"4. If the answer to questions two and/or three is in the affirmative, was any error harmless?"

The Supreme Court docket number is SC 19598.

Timothy F. Costello, assistant state's attorney, in support of the petition.

Raymond L. Durelli, assigned counsel, in opposition.

Decided December 9, 2015

MICHAEL OUELLETTE *v.* COMMISSIONER OF CORRECTION

The petitioner Michael Ouellette's petition for certification for appeal from the Appellate Court, 159 Conn. App. 854 (AC 35548), is denied.

David B. Rozwaski, assigned counsel, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided December 16, 2015

STATE OF CONNECTICUT *v.* JODY GRISWOLD

The defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 528 (AC 35743), is denied.

Alice Osedach, assistant public defender, in support of the petition.

Kathryn W. Bare, assistant state's attorney, in opposition.

Decided December 16, 2015

ATHENA HOLDINGS, LLC *v.* JAN MARCUS

The defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 470 (AC 35979), is denied.

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

Jan A. Marcus, in support of the petition.

Edward M. Rosenthal, in opposition.

Decided December 16, 2015

ELISSA PRAMUKA *v.* TOWN OF CROMWELL ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 160 Conn. App. 863 (AC 36688), is denied.

Joseph M. Busher, Jr., in support of the petition.

Kelly S. Therrien and *Jason J. Lewellyn*, in opposition.

Decided December 16, 2015

WILLIAM KUMAH ET AL. *v.* LEO G. BROWN ET AL.

The plaintiffs' petition for certification for appeal from the Appellate Court, 160 Conn. App. 798 (AC 36716), is denied.

Nathaniel E. Baber, in support of the petition.

Brendon P. Levesque, in opposition.

Decided December 16, 2015

ELLEN SCHAEPPI ET AL. *v.* UNIFUND CCR PARTNERS ET AL.

The plaintiffs' petition for certification for appeal from the Appellate Court, 161 Conn. App. 33 (AC 36524), is denied.

Kirk D. Tavtigian, Jr., in support of the petition.

Cristin E. Sheehan, in opposition.

Decided December 16, 2015

JULIE M. SOWELL *v.* DEIRDRE H. DICARA ET AL.

The petition by the plaintiff in error, George E. Mendillo, for certification for appeal from the Appellate Court, 161 Conn. App. 102 (AC 36921), is denied.

George E. Mendillo, self-represented, in support of the petition.

Decided December 16, 2015

SCOTT PALMENTA *v.* COMMISSIONER OF CORRECTION

The petitioner Scott Palmenta's petition for certification for appeal from the Appellate Court, 161 Conn. App. 901 (AC 36981), is denied.

David B. Bachman, in support of the petition.

Brett R. Aiello, special deputy assistant state's attorney, in opposition.

Decided December 16, 2015

ANTHONY OLIPHANT *v.* COMMISSIONER OF CORRECTION

The petitioner Anthony Oliphant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 253 (AC 37028), is denied.

Albert J. Oneto IV, assigned counsel, in support of the petition.

Leon F. Dalbec, Jr., senior assistant state's attorney, in opposition.

Decided December 16, 2015

OREMA TAFT *v.* COMMISSIONER OF CORRECTION

The petitioner Orema Taft's petition for certification for appeal from the Appellate Court, 159 Conn. App. 537 (AC 36118), is denied.

Mark M. Rembish, assigned counsel, in support of the petition.

Linda Currie-Zeffiro, assistant state's attorney, in opposition.

Decided December 23, 2015

CHANDRA BOZELKO *v.* WEBSTER BANK, N.A.

The plaintiff's petition for certification for appeal from the Appellate Court, 159 Conn. App. 821 (AC 37078), is denied.

Chandra Bozelko, self-represented, in support of the petition.

John C. Pitblado, in opposition.

Decided December 23, 2015

STATE OF CONNECTICUT *v.* JUSTIN SKIPWITH

The petition by the plaintiff in error, Tabatha Cornell, for certification for appeal from the Appellate Court, 159 Conn. App. 502 (AC 37501), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the trial court properly dismissed the plaintiff in error's motion to vacate the defendant's sentence because it was not an illegal sentence?"

The Supreme Court docket number is SC 19608.

Jeffrey D. Brownstein, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided December 23, 2015

DERMOTH H. BROWN *v.* CITY OF HARTFORD

The plaintiff's petition for certification for appeal from the Appellate Court, 160 Conn. App. 677 (AC 36360), is denied.

S. Zaid Hassan, in support of the petition.

Decided December 23, 2015

DONALD COUTURE *v.* COMMISSIONER OF CORRECTION

The petitioner Donald Couture's petition for certification for appeal from the Appellate Court, 160 Conn. App. 757 (AC 36629), is denied.

Michael D. Day, assigned counsel, and *James E. Mortimer*, assigned counsel, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided December 23, 2015

STATE OF CONNECTICUT *v.* ROBERT LEANDRY

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 379 (AC 36741), is denied.

Kirstin B. Coffin, assigned counsel, in support of the petition.

Matthew Kalthoff, special deputy assistant state's attorney, in opposition.

Decided December 23, 2015

IN RE NIOSHKA A. N.

The petition by the respondent mother for certification for appeal from the Appellate Court, 161 Conn. App. 627 (AC 37955), is denied.

Michael D. Day, in support of the petition.

Jessica C. Torres, assistant attorney general, in opposition.

Decided December 23, 2015

STATE OF CONNECTICUT *v.* BASIL C. WASHINGTON

The defendant's petition for certification for appeal from the Appellate Court (AC 37950) is denied.

Basil C. Washington, self-represented, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided December 23, 2015

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
v. CHRISTOS SIMOULIDIS ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 133 (AC 36681), is denied.

Richard M. Breen, in support of the petition.

Laura Pascale Zaino, in opposition.

Decided January 7, 2016

NATIONWIDE MUTUAL INSURANCE COMPANY
ET AL. *v.* JEFFREY S. PASIAK ET AL.

The petition by the defendants Jeffrey S. Pasiak and Pasiak Construction Services, LLC, for certification for appeal from the Appellate Court, 161 Conn. App. 86 (AC 36922), is granted, limited to the following issue:

"Did the Appellate Court properly determine, in this declaratory judgment action, that there was no duty to indemnify under the policy of insurance because the claims fell within the 'business pursuits' exclusion of the policy?"

The Supreme Court docket number is SC 19618.

David J. Robertson, in support of the petition.

Heather L. McCoy, in opposition.

Decided January 7, 2016

CALVIN KING *v.* COMMISSIONER OF CORRECTION

The petitioner Calvin King's petition for certification for appeal from the Appellate Court, 161 Conn. App. 269 (AC 36952), is denied.

Vishal K. Garg, in support of the petition.

Leon F. Dalbec, Jr., senior assistant state's attorney, in opposition.

Decided January 7, 2016

LIRIJE DAUTI ET AL. *v.* LIGHTING SERVICES, INC., ET AL.

The plaintiffs' petition for certification for appeal from the Appellate Court, 160 Conn. App. 904 (AC 37186), is denied.

Eddi Z. Zyko, in support of the petition.

David A. Kelly and *Ryan D. Ellard*, in opposition.

Decided January 13, 2016

STATE OF CONNECTICUT *v.* NATHANIEL FAUST

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 149 (AC 37164), is denied.

Mary A. Beattie, assigned counsel, in support of the petition.

Jennifer F. Miller, deputy assistant state's attorney, in opposition.

Decided January 13, 2016

STATE OF CONNECTICUT *v.* FREDERICK ACKER

The defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 734 (AC 36578), is denied.

Frederick Acker, self-represented, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided January 20, 2016

PETER LEE *v.* RICHARD H. STANZIALE

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 525 (AC 36519), is denied.

Robert Shluger, in support of the petition.

Decided January 20, 2016

NEWALLIANCE BANK *v.* ERNEST A. SCHAEPPI ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 161 Conn. App. 902 (AC 37173), is denied.

Kirk D. Tavtigian, in support of the petition.

Joseph J. Sensale, in opposition.

Decided January 20, 2016

STATE OF CONNECTICUT *v.* REGINALD TERRY

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 797 (AC 35768), is denied.

Kirstin B. Coffin, assigned counsel, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided January 27, 2016

MICHAEL J. O'BRIEN *v.* KATHLEEN E. O'BRIEN

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 575 (AC 36694), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that the trial court abused its discretion when it considered the plaintiff's purported violations of the automatic orders in its decision dividing marital assets?"

The Supreme Court docket number is SC 19635.

Daniel J. Krisch and *Aidan R. Welsh*, in support of the petition.

Daniel J. Klau, in opposition.

Decided January 27, 2016

RANDALL BROWN *v.* COMMISSIONER OF CORRECTION

The petitioner Randall Brown's petition for certification for appeal from the Appellate Court, 161 Conn. App. 770 (AC 37056), is denied.

ESPINOSA, J., did not participate in the consideration of or decision on this petition.

Patrick Paoletti, in support of the petition.

Rita M. Shair, senior assistant state's attorney, in opposition.

Decided January 27, 2016

STATE OF CONNECTICUT *v.* TINA FLOWERS

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 747 (AC 37235), is denied.

Cameron R. Dorman, assigned counsel, in support of the petition.

Matthew R. Kalthoff, special deputy assistant state's attorney, in opposition.

Decided January 27, 2016

TIMOTHY CONROY *v.* CITY OF STAMFORD ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 161 Conn. App. 691 (AC 37474), is denied.

Brenda C. D. Lewis, in support of the petition.

David J. Morrissey, in opposition.

Decided January 27, 2016

PAUL GRAZIANI *v.* COMMISSIONER OF CORRECTION

The petitioner Paul Graziani's petition for certification for appeal from the Appellate Court, 162 Conn. App. 901 (AC 35590), is denied.

Laljeebhai R. Patel, assigned counsel, in support of the petition.

Emily Graner Sexton, special deputy assistant state's attorney, in opposition.

Decided January 27, 2016

SUNTRUST MORTGAGE, INC. *v.* GREGORY HUTCHINS ET AL.

The named defendant's petition for certification for appeal from the Appellate Court (AC 38296) is denied.

Gregory Hutchins, self-represented, in support of the petition.

Decided January 27, 2016

STATE OF CONNECTICUT *v.* STEVEN K. STANLEY

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 10 (AC 35600), is denied.

Deborah G. Stevenson, assigned counsel, in support of the petition.

Bruce R. Lockwood, senior assistant state's attorney, in opposition.

Decided February 10, 2016

STATE OF CONNECTICUT *v.* PATRICK S. REDMOND

The movant Patrick C. Redmond's petition for certification for appeal from the Appellate Court, 161 Conn. App. 622 (AC 36831), is denied.

Mitchell Lake, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided February 10, 2016

NICKETA WRIGHT *v.* COMMISSIONER OF CORRECTION

The petitioner Nicketa Wright's petition for certification for appeal from the Appellate Court, 161 Conn. App. 904 (AC 37372), is denied.

Justine Miller, assigned counsel, in support of the petition.

Matthew R. Kalthoff, deputy assistant state's attorney, in opposition.

Decided February 10, 2016

STATE OF CONNECTICUT *v.* MARLANDO DALEY

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 861 (AC 37580), is denied.

Pamela S. Nagy, assistant public defender, in support of the petition.

Adam E. Mattei, assistant state's attorney, in opposition.

Decided February 10, 2016

STATE OF CONNECTICUT *v.* JERZY G.

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 156 (AC 36586), is granted, limited to the following issues:

"1. Did the Appellate Court properly dismiss the defendant's appeal as moot under *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006)?

"2. If the answer to the first question is yes, should this court overrule *State* v. *Aquino*, supra, 279 Conn. 293?"

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 19641.

James B. Streeto, senior assistant public defender, and *Kelly Billings*, assistant public defender, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided February 10, 2016

MARK BOVA *v.* COMMISSIONER OF CORRECTION

The petitioner Mark Bova's petition for certification for appeal from the Appellate Court, 162 Conn. App. 348 (AC 36915), is denied.

Peter Tsimbidaros, in support of the petition.

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided February 10, 2016

BEATRICE FORGIONE *v.* MENNATO FORGIONE

The plaintiff's petition for certification for appeal from the Appellate Court, 162 Conn. App. 1 (AC 36991), is denied.

Norman A. Roberts II, in support of the petition.

Thomas C. C. Sargent, in opposition.

Decided February 10, 2016*

* The order is rescinded. See *Forgione* v. *Forgione*, 328 Conn. 922, 181 A.3d 92 (2018).

STEVEN SAUNDERS *v.* COMMISSIONER OF CORRECTION

The petitioner Steven Saunders' petition for certification for appeal from the Appellate Court, 162 Conn. App. 902 (AC 37122), is denied.

Michael D. Day, in support of the petition.

Jacob L. McChesney, special deputy assistant state's attorney, in opposition.

Decided February 10, 2016

IN RE GLERISBETH C. ET AL.

The petition by the respondent mother for certification for appeal from the Appellate Court, 162 Conn. App. 273 (AC 37846), is denied.

Benjamin M. Wattenmaker, in support of the petition.

Tammy Nguyen-O'Dowd, assistant attorney general, in opposition.

Decided February 10, 2016

JAMES HILTON *v.* COMMISSIONER OF CORRECTION

The petitioner James Hilton's petition for certification for appeal from the Appellate Court, 161 Conn. App. 58 (AC 36382/AC 36387), is denied.

David B. Rozwaski, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided February 17, 2016

MADELINE G. FAZIO *v.* MICHAEL A. FAZIO

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 236 (AC 37241), is denied.

Kevin F. Collins, in support of the petition.

Thomas C. C. Sargent, in opposition.

Decided February 17, 2016

SEMINOLE REALTY, LLC *v.* SERGEY SEKRETAEV

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 167 (AC 37340), is denied.

Sergey Sekretaev, self-represented, in support of the petition.

Decided February 24, 2016

STATE OF CONNECTICUT *v.* ROBERTO ACOSTA

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 774 (AC 38003), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that the trial court, in a case alleging sexual assault, did not abuse its discretion in concluding that evidence of uncharged misconduct by the defendant twelve years previously was not 'too remote' for admissibility purposes under *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008)?"

The Supreme Court docket number is SC 19645.

Daniel J. Foster, assigned counsel, in support of the petition.

Brett R. Aiello, special deputy assistant state's attorney, in opposition.

Decided February 24, 2016

STATE OF CONNECTICUT *v.* DIRREN T. CONYERS

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 467 (AC 35411), is denied.

Neal Cone, senior assistant public defender, in support of the petition.

Leon F. Dalbec, Jr., senior assistant state's attorney, in opposition.

Decided March 2, 2016

TOWN OF TRUMBULL *v.* LINDA A. PALMER, EXECUTRIX (ESTATE OF MICHAEL A. KNOPICK), ET AL.

The petition by the defendant Helene B. Knopick for certification for appeal from the Appellate Court, 161 Conn. App. 594 (AC 36718), is denied.

Stein M. Helmrich, in support of the petition.

Matthew Hausman, in opposition.

Decided March 2, 2016

STATE OF CONNECTICUT *v.* KENYON JOSEPH

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 850 (AC 36908), is denied.

W. Theodore Koch III, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided March 2, 2016

JAMES GOODWIN *v.* COLCHESTER
PROBATE COURT ET AL.

The petition by the intervening defendant John F. Fedus for certification for appeal from the Appellate Court, 162 Conn. App. 412 (AC 36214), is denied.

Eric H. Rothauser, in support of the petition.

Kerin M. Woods, in opposition.

Decided March 2, 2016

STATE OF CONNECTICUT *v.* PAWEL SIENKIEWICZ

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 407 (AC 36536), is denied.

Jodi Zils Gagne, assigned counsel, in support of the petition.

Jacob L. McChesney, special deputy assistant state's attorney, in opposition.

Decided March 2, 2016

GEORGE BONGIORNO ET AL. *v.* J & G
REALTY, LLC, ET AL.

The plaintiff Marie Bongiorno's petition for certification for appeal from the Appellate Court, 162 Conn. App. 430 (AC 36953), is denied.

EVELEIGH and ROBINSON, Js., did not participate in the consideration of or decision on this petition.

Peter V. Lathouris, in support of the petition.

Mark F. Katz, in opposition.

Decided March 2, 2016

ALBERTO VASQUEZ *v.* COMMISSIONER OF CORRECTION

The petitioner Alberto Vasquez' petition for certification for appeal from the Appellate Court, 162 Conn. App. 906 (AC 37458), is denied.

Michael D. Day, in support of the petition.

Lisa Herskowitz, senior assistant state's attorney, in opposition.

Decided March 2, 2016

PAUL FINE *v.* COMMISSIONER OF CORRECTION

The petitioner Paul Fine's petition for certification for appeal from the Appellate Court, 163 Conn. App. 77 (AC 37457), is denied.

Robert T. Rimmer, assigned counsel, in support of the petition.

Lawrence J. Tytla, supervisory assistant state's attorney, in opposition.

Decided March 2, 2016

NANCY BURTON *v.* CONNECTICUT SITING COUNCIL ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 161 Conn. App. 329 (AC 36799), is denied.

ROGERS, C. J., did not participate in the consideration of or decision on this petition.

Nancy Burton, self-represented, in support of the petition.

Robert L. Marconi, assistant attorney general, *George Jepsen*, attorney general, and *Bradford S. Babbit*, in opposition.

Decided March 9, 2016

CHANDRA BOZELKO *v.* COMMISSIONER OF CORRECTION

The petitioner Chandra Bozelko's petition for certification for appeal from the Appellate Court, 162 Conn. App. 716 (AC 35990), is denied.

Chandra Bozelko, self-represented, in support of the petition.

Kathryn W. Bare, senior assistant state's attorney, in opposition.

Decided March 9, 2016

ALEX RODRIGUEZ ET AL. *v.* DOUGLAS CLARK

The plaintiffs' petition for certification for appeal from the Appellate Court, 162 Conn. App. 785 (AC 37083), is denied.

John Del Buono, in support of the petition.

Michael F. O'Connor, in opposition.

Decided March 9, 2016

CONNECTICUT NATIONAL MORTGAGE COMPANY *v.* LISE-LOTTE KNUDSEN ET AL.

The named defendant's petition for certification for appeal from the Appellate Court (AC 38091) is granted, limited to the following issue:

"Did the Appellate Court properly dismiss the appeal in this matter as moot?"

PALMER, J., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 19672.

Lise-Lotte Knudsen, self-represented, in support of the petition.

Decided March 9, 2016

CONNECTICUT NATIONAL MORTGAGE COMPANY *v.* LISE-LOTTE KNUDSEN ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court (AC 38091) is dismissed.

PALMER, J., did not participate in the consideration of or decision on this petition.

Benjamin T. Staskiewicz, in support of the petition.

Decided March 9, 2016

STATE OF CONNECTICUT *v.* JORGE CARRILLO PALENCIA

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 569 (AC 36612), is denied.

McDONALD, J., did not participate in the consideration of or decision on this petition.

Richard H. G. Cunningham, in support of the petition.

Jacob L. McChesney, special deputy assistant state's attorney, in opposition.

Decided March 23, 2016

NATHANIEL BOYKIN *v.* COMMISSIONER OF CORRECTION

The petitioner Nathaniel Boykin's petition for certification for appeal from the Appellate Court, 162 Conn. App. 902 (AC 36648), is denied.

Edward G. McAnaney, in support of the petition.

Linda Currie-Zeffiro, assistant state's attorney, in opposition.

Decided March 23, 2016

BRENMOR PROPERTIES, LLC *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF LISBON

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 678 (AC 37293), is granted, limited to the following issues:

"1. Did the Appellate Court properly conclude that the trial court correctly determined that the plaintiff's noncompliance with the road ordinance did not constitute a valid ground on which to deny its modified affordable housing application?

"2. Did the Appellate Court correctly determine that the trial court properly ordered the commission to approve the plaintiff's subdivision application 'as is' rather than allowing the commission, on remand, to consider appropriate conditions of approval?"

The Supreme Court docket number is SC 19665.

Michael A. Zizka, in support of the petition.

Timothy S. Hollister, in opposition.

Decided March 23, 2016

MARK ANIGBO *v.* B AND W PAVING COMPANY

The plaintiff's petition for certification for appeal from the Appellate Court, 162 Conn. App. 905 (AC 37665), is denied.

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

Mark Anigbo, self-represented, in support of the petition.

Maureen E. Burns, in opposition.

Decided March 23, 2016

R.S. SILVER ENTERPRISES, INC.
v. HENRY PASCARELLA ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 163 Conn. App. 1 (AC 34601), is denied.

Wesley W. Horton and *Kenneth J. Bartschi*, in support of the petition.

Hugh D. Hughes, in opposition.

Decided March 23, 2016

STATE OF CONNECTICUT *v.* JACQUES LOUIS

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 55 (AC 35703), is denied.

ROBINSON, J., did not participate in the consideration of or decision on this petition.

Alan Jay Black, assigned counsel, in support of the petition.

Adam E. Mattei, assistant state's attorney, in opposition.

Decided March 23, 2016

STATE OF CONNECTICUT *v.* GILBERT ORLANDO

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 155 (AC 36402), is denied.

Alan Jay Black, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided March 23, 2016

LAUREN SCHULL *v.* NEAL SCHULL

The plaintiff's petition for certification for appeal from the Appellate Court, 163 Conn. App. 83 (AC 36726), is denied.

Daniel Shepro, in support of the petition.

Decided March 23, 2016

DAMIAN REYNOLDS *v.* COMMISSIONER OF CORRECTION

The petitioner Damian Reynolds' petition for certification for appeal from the Appellate Court, 163 Conn. App. 901 (AC 36972), is denied.

William A. Adsit, assigned counsel, in support of the petition.

Matthew A. Weiner, assistant state's attorney, in opposition.

Decided March 23, 2016

SALISBURY BANK AND TRUST COMPANY *v.* ERLING C. CHRISTOPHERSEN ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 429 (AC 37269), is denied.

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

Andrew M. McPherson, in support of the petition.

Patrick M. Fahey, in opposition.

Decided March 23, 2016

STATE OF CONNECTICUT *v.* KARON GODBOLT

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 367 (AC 36857), is denied.

Elizabeth Knight Adams, in support of the petition.

Robert J. Scheinblum, senior assistant state's attorney, in opposition.

Decided March 30, 2016

STATE OF CONNECTICUT *v.* GAZMEN GJINI

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 117 (AC 36029), is denied.

Zoltan Simon and *Bradley L. Henry*, in support of the petition.

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided March 30, 2016

LETICIA CLOUGHERTY *v.* KEVIN CLOUGHERTY

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 857 (AC 36886), is denied.

William H. Cashman, in support of the petition.

Kenneth J. McDonnell, in opposition.

Decided March 30, 2016

LETICIA CLOUGHERTY *v.* KEVIN CLOUGHERTY

The plaintiff's petition for certification for appeal from the Appellate Court, 162 Conn. App. 857 (AC 36887), is denied.

Kenneth J. McDonnell, in support of the petition.

Decided March 30, 2016

PELLETIER MECHANICAL SERVICES, LLC *v.* G & W MANAGEMENT, INC.

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 294 (AC 36993), is denied.

Alexander G. Snyder, in support of the petition.

Brian D. Danforth, in opposition.

Decided March 30, 2016

MARY MARGARET FARREN *v.* J. MICHAEL FARREN

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 51 (AC 37079), is denied.

McDONALD, J., did not participate in the consideration of or decision on this petition.

Allison M. McKeen and *Ryan C. McKeen*, in support of the petition.

Ernest F. Teitell, *Paul A. Slager* and *Marco A. Allocca*, in opposition.

Decided March 30, 2016

MARY MARGARET FARREN *v.* J. MICHAEL FARREN

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 51 (AC 37080), is denied.

McDONALD, J., did not participate in the consideration of or decision on this petition.

Allison M. McKeen and *Ryan C. McKeen*, in support of the petition.

Ernest F. Teitell, *Paul A. Slager* and *Marco A. Allocca*, in opposition.

Decided March 30, 2016

STATE OF CONNECTICUT *v.* CARMELITO RODRIGUEZ

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 262 (AC 37023), is denied.

G. Douglas Nash, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided March 30, 2016

KATHRYN G. O'TOOLE *v.* ORLANDO HERNANDEZ

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 565 (AC 37317), is denied.

McDONALD, J., did not participate in the consideration of or decision on this petition.

Christopher Kylin, in support of the petition.

Decided March 30, 2016

PAUL IPPOLITO ET AL. *v.* OLYMPIC CONSTRUCTION, LLC

The plaintiffs' petition for certification for appeal from the Appellate Court, 163 Conn. App. 440 (AC 37437), is denied.

Joseph DaSilva, Jr., in support of the petition.

Thomas M. Cassone, in opposition.

Decided March 30, 2016
