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On appeal to this court, the petitioner claims that the Appellate Court incorrectly affirmed the judgment of the habeas court denying his petition. Specifically, the petitioner asserts that the Appellate Court incorrectly required him to demonstrate prejudice from Simon's handling of the jury note during trial.

We begin by setting forth the legal principles and standard of review applicable to the petitioner's appeal. "The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 448, 936 A.2d 611 (2007). The application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), however, is a mixed question of law and fact subject to our plenary review. See, e.g., *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 152–53, 662 A.2d 718 (1995).

"As enunciated in *Strickland* . . . [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of compe-

failed to meet that burden?" *Taylor* v. *Commissioner of Correction*, 316 Conn. 905, 906, 111 A.3d 881 (2015). In accordance with our long-standing policy of reframing certified questions to more accurately reflect the issues presented on appeal, we now reframe the certified questions in the present case as follows: (1) If Simon's performance was deficient, as held by the Appellate Court, did the Appellate Court properly determine that it was the petitioner's burden to prove that the deficient performance in responding to the treatment of the jury note prejudiced him?; and (2) Did the Appellate Court correctly determine that the petitioner had failed to demonstrate prejudice? See *State* v. *Ouellette*, 295 Conn. 173, 184, 989 A.2d 1048 (2010); *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191, 884 A.2d 981 (2005).

tence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Fernandez* v. *Commissioner of Correction*, 291 Conn. 830, 838, 970 A.2d 721 (2009). A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel on either the performance prong or the prejudice prong, whichever is easier. *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 852–53, 950 A.2d 1220 (2008).

The following additional facts, as found by the habeas court, are relevant to the present appeal. "On the third day of deliberations, the trial court received a jury note signed by the foreperson.[2] The note read:

" 'Judge Barry—I have polled the jury [four] times after various deliberations and discussions. Votes were as follows on the charge of murder:

" '10-8-97	4G	5NG	3 undecided
" '10-9-97	6G	5NG	1 [abstention]
" '10-9-97	7G	5NG	
" '10-10-97	7G	5NG	

" 'I started discussion this [morning] with a proposal to compromise—that is, that we would find [the peti-

[2] "According to the habeas court, the jury did not commence deliberations on its first day of deliberations until late in the day, after hearing closing arguments and jury instructions. The jury spent the majority of its second day of deliberations discussing various prior jury notes with the court and hearing playbacks of testimony and instructions. After hearing the playbacks, the jury deliberated for approximately four hours before submitting the note at issue on appeal, which the foreperson signed at 11:50 a.m. on the morning of the third day of deliberations." *Taylor* v. *Commissioner of Correction*, supra, 154 Conn. App. 712 n.17.

the termination of parental rights proceeding against Melissa E. did not affect the outcome of Maria G.'s action in the habeas court for custody or guardianship of Santiago. This is because the only rights at issue in the termination of parental rights action underlying the present appeal are the parental rights of Melissa E., not those of Maria G.[10] Put differently, Maria G.'s potential adoption rights to Santiago are not impacted by the termination proceeding underlying the present appeal, but rather, were addressed during her action in the habeas court.

Lastly, the Guatemalan judgment upon which Maria G. relies[11] does not affect the disposition of this case. Even if we were to assume, without deciding, that the Guatemalan judgment did give some sort of guardian-

[10] To this end, this court expressed concerns at oral argument about whether the department would proceed immediately with adoption proceedings upon termination of Melissa E.'s parental rights, because to do so would effectively extinguish any potential rights of Maria G. At oral argument, Assistant Attorney General Benjamin Zivyon, counsel for the commissioner, assured this court that the department would not proceed with the adoption of Santiago until after the final disposition of Maria G.'s habeas proceeding. Zivyon represented to this court that Judge Quinn had not yet scheduled a trial for the termination of parental rights of Melissa E., and would not do so until after Maria G.'s habeas action was resolved, a proceeding over which Judge Quinn also presided. Moreover, we note that prior to any adoption proceeding, an affidavit must be filed stating that there is no proceeding pending in any other court affecting the custody of the child free for adoption. See General Statutes § 52-231a.

Additionally, we note that Maria G. had an opportunity to litigate the merits of her claims to guardianship in the proper venue, namely, the habeas court. After the filing of cross motions for summary judgment, the habeas court ultimately dismissed Maria G.'s habeas petition.

[11] In Guatemala, Melissa E. filed a voluntary petition for confirmation with the Family Trial Court, San Benito, Peten, on June 17, 2015. In this petition, she granted custody to Maria G., "since [Maria G.] is the woman who has cared for the minor child since his birth, as if he were her son, and has provided his sustenance and education." On June 18, 2015, the Judge of the Family Trial Court, Department of Peten, Guatemala, entered judgment, granting Maria G. parental rights, custody, and representation of Santiago.

ship interest of Santiago to Maria G., the proceeding that underlies the present appeal is the termination of Melissa E.'s parental rights, the disposition of which, as previously noted in this opinion, in no way affected Maria G.'s ability to pursue her guardianship rights or interests in the habeas court.[12] Stated another way, the present case represents a situation akin to the commissioner seeking the termination of parental rights of just one of two biological parents—the termination of one parent's rights has no impact on the other parent's rights. See, e.g., General Statutes § 45a-717 (j) ("if the parental rights of only one parent are terminated, the remaining parent shall be sole parent and, unless otherwise provided by law, guardian of the person").

Thus, we conclude that Maria G. has failed to plead a colorable claim to intervene as of right. Accordingly, we conclude that the trial court's denial of her motion to intervene as of right is not a final judgment for purposes of this appeal.

The appeal is dismissed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* CHIHAN ERIC CHYUNG (SC 19375)

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

Syllabus

The defendant was charged with murder and manslaughter in the first degree with a firearm in connection with the shooting death of his wife. The

[12] This is further evidenced by the habeas court's complete adjudication of Maria G.'s interests, despite the fact that the termination of parental rights action against Melissa E. remains pending.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* FRANK SCHOVANEC (SC 19851)

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

Syllabus

Convicted of, inter alia, the crimes of identity theft in the third degree, credit card theft, illegal use of a credit card, and larceny in the sixth degree, the defendant appealed. The victim, who had volunteered to help host a party at her child's school, noticed shortly after returning home that her wallet was missing from her purse. After searching unsuccessfully, the victim discovered certain unauthorized purchases had been made on one of her credit cards. These charges included two purchases at a gas station near the school shortly after the party and various purchases in a nearby city the following day, including a transaction at B Co. The victim subsequently reported that, during the party, the defendant and his wife had lingered around a table where the victim had placed her unzipped purse. U and K, two employees from the gas station who knew the defendant personally, testified at trial that the defendant had purchased gasoline and cigarettes shortly after the party had ended. U testified, in particular, that the defendant had requested a carton of cigarettes and that such a request was unusual because the gas station did not stock cartons. H, a police officer assigned to investigate the victim's complaint, testified that, although a loss prevention officer employed by B Co. had informed him of a video recording showing three unidentified Hispanic males using the victim's credit card the day after the party, H did not conduct any further investigation regarding that purchase. At trial, the defendant requested an instruction on third-party culpability and permission to make a corresponding argument to the jury. The trial court declined to issue that instruction and excluded references to third-party culpability from argument, but permitted defense counsel to refer to H's testimony regarding the video recording and the three unidentified Hispanic males. Following his conviction, the defendant appealed, claiming that the trial court had incorrectly denied his request for a third-party culpability instruction and argument and that, because the charge of larceny in the sixth degree arose out of the same acts as the charges of identity theft in the third degree and illegal

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

use of a credit card, his convictions on these charges violated the constitutional prohibition against double jeopardy. *Held*:

1. The trial court did not abuse its discretion in declining to charge the jury on, or permit arguments regarding, the issue of third-party culpability: in the absence of evidence that the three unidentified Hispanic males were involved in the theft of the victim's wallet or the unauthorized purchases at the gas station, the defendant had failed to establish a direct connection between those individuals and the charged offenses; moreover, in the absence of such a direct connection, the fact that the trial court exercised its discretion in allowing defense counsel to reference H's testimony regarding the video recording did not require the conclusion that the evidence reasonably supported argument or a charge on the issue of third-party culpability.
2. The defendant could not prevail on his unpreserved claim that his convictions of identity theft in the third degree, illegal use of a credit card, and larceny in the sixth degree violated the constitutional prohibition against double jeopardy, the defendant having failed to establish that the charged offenses arose out of the same act or transaction; in light of the theft of the victim's wallet, the various items contained therein, gasoline, and cigarettes, the jury reasonably could have found a separate factual basis for each offense.

Argued April 4—officially released July 18, 2017

Procedural History

Substitute, two part information charging the defendant, in the first part, with the crimes of identity theft in the third degree, credit card theft, illegal use of a credit card, and larceny in the sixth degree and, in the second part, with being a persistent larceny offender, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the first part of the information was tried to the jury before *Hon. William J. Lavery*, judge trial referee; verdict of guilty; thereafter, the defendant was presented to the court on a plea of guilty, with respect to the second part of the information; judgment in accordance with the verdict and plea, from which the defendant appealed. *Affirmed*.

David V. DeRosa, for the appellant (defendant).

Marcia A. Pillsbury, assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's

attorney, and *Sharmese L. Hodge*, assistant state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Frank Schovanec, appeals from the judgment of conviction, rendered following a jury trial, of identity theft in the third degree in violation of General Statutes § 53a-129d, credit card theft in violation of General Statutes § 53a-128c (a), illegal use of a credit card in violation of General Statutes § 53a-128d (2), and larceny in the sixth degree in violation of General Statutes § 53a-125b.[1] On appeal, the defendant claims that the trial court incorrectly (1) precluded him from arguing third-party culpability and denied his corresponding request for a jury instruction, and (2) sentenced the defendant on the charges of identity theft, illegal use of a credit card, and the lesser included offense of larceny in the sixth degree because these convictions violated the prohibition against double jeopardy contained within the fifth amendment to the United States Constitution.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, are relevant to this appeal. On October 31, 2013, the victim was the room parent for her child's class at Middle Gate Elementary School (school) in the

[1] We note that the defendant was also convicted of being a persistent larceny offender in violation of General Statutes (Rev. to 2013) § 53a-40. See also footnote 6 of this opinion.

[2] "The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . This constitutional provision is applicable to the states through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 172 n.39, 869 A.2d 192 (2005).

town of Newtown.[3] That morning, she put her child on the bus and went to work in the city of New Haven, where she worked as an accountant. The victim unlocked the door to her office and worked there until 2:30 p.m. There were no other security measures, such as key cards or badges, required for entrance to her office. After the victim left work, she traveled to the school in order to attend a Halloween party for her child's class. The victim brought bags of supplies for the party and, due to traffic, was running a few minutes late. She entered the classroom, placed her unzipped purse on a table located to the right of the door, and immediately began helping with the children and the party.

The defendant and his wife, Lori Schovanec, were also at the Halloween party because they had a child in the same classroom. The victim saw the defendant and his wife in the classroom, but was not formally introduced to them. Prior to the party, the victim had never seen the defendant and his wife. At the end of the party, the victim noticed that the defendant and his wife were lingering around the table by the door where she had placed her purse.

Later that evening, as the victim and her husband were leaving to take their children out trick or treating, the victim discovered that her wallet was not in her purse. She contacted a manager at her place of employment to see if the wallet was either in her office or an adjacent parking lot. The manager did not find the wallet. When she arrived back home after trick or treating, the victim searched her house for the wallet, but did not find it. The victim then checked her accounts online

[3] At trial, the victim described her duties as a room parent as follows: "A room parent, basically, just helps the teacher out with anything she needs as far as parent volunteers in the classroom . . . they're at the holiday parties . . . or any other events that maybe the teacher might need help with . . . ."

and discovered that someone was making charges on a credit card that had been in her wallet. She called the bank, cancelled the card, and informed the bank that someone was using the card without her permission. The victim then called and cancelled all of the other bank and credit cards that she had in her wallet. The victim's driver's license, a heath savings account credit card, and insurance cards were also in her wallet at the time. The driver's license contained the victim's name and address.

The victim last remembered having her wallet when she used a credit card at a restaurant in the town of Bethel on October 30, 2013, the night before the Halloween party. She checked at the restaurant, but her wallet was not there.

The victim then reported her wallet stolen to the Newtown Police Department. Because the victim believed that she had either lost her wallet or that it had been stolen at the restaurant, the Newtown Police Department instructed the victim to contact the Bethel Police Department. The victim then shared documents with the Bethel Police Department showing that the first unauthorized use of her credit cards had taken place at a gas station on South Main Street in Newtown. All of the subsequent unauthorized charges took place at locations in the city of Waterbury.

The victim was familiar with that particular gas station because it is located near the school. The victim subsequently went to the gas station and spoke to the owner. She requested, and obtained, a copy of the receipt for the transactions in which her credit card had been used. The receipts indicated that her credit card was used on October 31, 2013, at 3:39 p.m. Upon seeing that the time on the receipt was minutes after school had been released that day, the victim began to think that her wallet must have been taken when she

was at the school. Thereafter, the victim reported the theft of her wallet and the unauthorized use of her credit card to the Newtown Police Department because the first unauthorized use of the card had been at the gas station in Newtown.

Robert Haas, a police officer employed at the Newtown Police Department, investigated the victim's complaint regarding the theft of her wallet and the unauthorized use of her credit card. At trial, Haas testified that the gas station is located a short distance from the school, and that it would take about two minutes to drive from the school to the gas station. He obtained the original receipt for an unauthorized charge of $76 from the owner of the gas station. He confirmed that the time on the receipt was 3:39 p.m. He obtained the school's visitor log for October 31 and confirmed that the defendant and his wife were listed as being at the school that day. The evidence contained within the record shows that many parents were listed on the visitor log for that day because of the multiple Halloween parties at the school.

Haas interviewed two employees of the gas station who were working on October 31, Kenneth Urban and Hakan Kundraci. At trial, Urban testified that he knew the defendant because the defendant used to work at the gas station. Urban further testified that had seen the defendant pull into the gas station in the late afternoon of October 31, 2013, and that the defendant had swiped a credit card at the pump to pay for gasoline. Urban testified that the defendant and a female companion entered the store and asked for a carton of cigarettes, which was unusual because the defendant usually only bought one or two packs at a time. Urban then asked Kundraci to assist the defendant because he was helping a customer outside. According to Urban's testimony, because cartons of cigarettes were not typi-

cally stocked at the store, customers could only purchase individual packs.

Kundraci had worked at the gas station for about ten years. He gave a statement to police about the incident that occurred at the gas station on October 31, involving the defendant. Kundraci testified that that the defendant purchased packs of cigarettes, but that he could not recall how many packs. After reviewing his statement to police, Kundraci testified that the defendant had purchased eight packs of cigarettes. Kundraci testified that the defendant and the woman were in a green minivan. Kundraci also testified that the defendant would sometimes pay with cash, sometimes with a credit card, and sometimes with a store charge, meaning he was permitted to pay the gas station back later.

There were other charges made on the victim's credit cards in Waterbury. Officer Haas, however, did not investigate these transactions. Those charges amounted to approximately $800. Haas testified that, because those transactions involved the same card, he contacted the loss prevention department in one of the stores where the card had been used, the Burlington Coat Factory at the Waterbury Mall. The loss prevention officer told Haas that the videotape from the store's security camera system showed that the victim's credit card was used by three Hispanic males on November 1, 2013. There was no investigation by the Waterbury Police Department into the charges on the victim's credit card. Haas did not view the videotape himself. The loss prevention officer did not testify at the trial. Neither party attempted to enter the videotape into evidence.

The defendant requested that the court include a jury instruction as to third-party culpability and that he be allowed to argue third-party culpability. The state objected to these requests. The court declined to give the requested charge. The court also excluded any refer-

ence to third-party culpability during argument. The court, however, indicated that counsel could "make remarks about anything that's in testimony," including Haas' testimony regarding his conversation with the loss prevention officer about the three unidentified Hispanic males that had used the victim's credit card in Waterbury.

The jury returned a verdict of guilty on the charges of identity theft in the third degree in violation of § 53a-129d, credit card theft in violation of § 53a-128c (a), illegal use of a credit card in violation of § 53a-128d (2), and larceny in the sixth degree in violation of § 53a-125b.[4] The court subsequently rendered a judgment of conviction in accordance with the jury's verdict, from which the defendant appealed.[5] Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court incorrectly precluded him from arguing third-party culpability and refusing to charge on that issue. Specifically, he asserts that, at trial, defense counsel demonstrated a direct connection between a third party and the crimes for which the defendant was convicted. We disagree.

The following additional facts are necessary for the resolution of the defendant's claim. During closing argument, defense counsel asserted that there had been a misidentification of the defendant. Specifically, defense counsel asserted that the defendant did not commit the crime and that the three Hispanic men who were in

[4] We note that, following trial, the defendant pleaded guilty to a separate charge of being a persistent larceny offender in violation of General Statutes (Rev. to 2013) § 53a-40. See also footnote 6 of this opinion.

[5] 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.

the videotape from the Burlington Coat Factory had committed the crime.

The defendant filed a formal request to charge. The fifth requested charge contained the following lanugage: "There has been evidence that . . . third parties . . . not the defendant, committed the crimes with which the defendant is charged. This evidence is not intended to prove the guilt of the third parties, but is part of the total evidence for you to consider. The burden remains on the state to prove each and every element of the offense beyond a reasonable doubt. It is up to you, and to you alone, to determine whether any of this evidence, if believed, tends to directly connect third parties to the crimes with which the defendant is charged. If after a full and fair consideration and comparison of all the evidence, you have left in your minds a reasonable doubt indicating that the alleged third parties, in this case, three unidentified Hispanic males, may be responsible for the crimes the defendant is charged with committing, then it would be your duty to render a verdict of not guilty as to the [defendant]." The prosecutor objected to the proposed third-party culpability instruction on the ground that there was no evidence presented regarding any third-party culpability. The court then denied the defendant's requested third-party culpability instruction.

We begin with the standard of review applicable to the defendant's claim that the trial court incorrectly refused to charge on third-party culpability. "In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a

duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence." (Internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 607–608, 935 A.2d 975 (2007). "[T]he very standards governing the admissibility of [third-party] culpability evidence also should serve as the standards governing a trial court's decision of whether to submit a requested [third-party] culpability charge to the jury." Id., 608–609.

"The admissibility of evidence of [third-party] culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated [that such] evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of [third-party] culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that [third-party] culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt. . . . Finally,

[t]he trial court's ruling on the relevancy of [third-party] inculpatory evidence will be reversed on appeal only if the court has abused its discretion or an injustice appears to have been done. . . .

"Whether a defendant has sufficiently established a direct connection between a third party and the crime with which the defendant has been charged is necessarily a fact intensive inquiry. In other cases, this court has found that proof of a third party's physical presence at a crime scene, combined with evidence indicating that the third party would have had the opportunity to commit the crime with which the defendant has been charged, can be a sufficiently direct connection for purposes of [third-party] culpability. . . . Similarly, this court has found the direct connection threshold satisfied for purposes of [third-party] culpability when physical evidence links a third party to a crime scene and there is a lack of similar physical evidence linking the charged defendant to the scene. . . . Finally, this court has found that statements by a victim that implicate the purported third party, combined with a lack of physical evidence linking the defendant to the crime with which he or she has been charged, can sufficiently establish a direct connection for [third-party] culpability purposes." (Citations omitted; internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 810–12, 91 A.3d 384 (2014).

A trial court is in the best position to view the evidence in the context of the entire case and has wide discretion in making its evidentiary rulings. *State* v. *Walsh*, 67 Conn. App. 776, 790, 789 A.2d 1031, cert. denied, 269 Conn. 906, 795 A.2d 546 (2002). A trial court's decision as to the relevancy of third-party culpability evidence will be reversed on appeal only if it has abused its discretion or an injustice appears to have been done. *State* v. *West*, 274 Conn. 605, 626, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L.

Ed. 2d 601 (2005). "Whether a defendant has sufficiently established a direct connection between a third party and the crime with which the defendant has been charged is necessarily a fact intensive inquiry." *State* v. *Baltas*, supra, 311 Conn. 811.

The defendant asserts that, because there was evidence adduced at trial that purchases using the victim's credit card took place in Waterbury by individuals who did not match his description, he had established a direct connection between a third party and the crime for which he was charged. The defendant further claims that, because the trial court allowed defense counsel to comment on the use of the credit card in Waterbury by individuals other than the defendant, the trial court should have provided corresponding instructions to the jury as guidance. We are not persuaded.

The defendant failed to establish a direct connection between the charged offenses, which occurred on October 31, 2013, in Newtown, and the use of the victim's stolen credit card in Waterbury the following day. There was no evidence that the three unidentified Hispanic males were involved in the theft of the victim's wallet or the unauthorized use of her credit card in Newtown. Even if the evidence adduced at trial showed conclusively that the stolen credit card had been used by three unidentified Hispanic males in Waterbury, there was no evidence directly connecting these individuals to the crimes with which the defendant was charged, which were committed on the previous day in Newtown. Eyewitnesses who knew the defendant personally identified him as using a credit card for two purchases at the gas station in Newtown. Those transactions, which appeared on the victim's credit card account, were made minutes after the school Halloween party that both the victim and the defendant attended and the gas station was a two minute drive from the school. The statements attributed to the Burlington Coat Factory

loss prevention officer do not even raise a bare suspicion that the stolen credit card was used by anyone other than the defendant at the gas station in Newtown. There is no evidence that the three unidentified Hispanic males ever used the victim's credit card to charge anything at the gas station. Indeed, there was no evidence those individuals were ever at the gas station. What may have happened to the card after the defendant used it at the gas station is, at most, the subject of sheer speculation. There is clearly not a direct connection.

The defendant relies on *State* v. *Hedge*, 297 Conn. 621, 1 A.3d 1051 (2010), in support of his claim that he had established a direct connection between the third party and the crimes for which he was charged. In *Hedge*, we reversed in part the judgment of the trial court, which had precluded certain third-party culpability evidence from being admitted. Id., 629–30. Specifically, in *Hedge*, the defendant sought to introduce evidence that, shortly before his arrest, he had borrowed a vehicle in which drugs were subsequently found and that the same vehicle had been driven by a convicted drug dealer less than twenty-four hours earlier. Id., 629. In *Hedge*, this court concluded that the third-party culpability evidence should have been admitted, reasoning as follows: "[The defendant] claimed that he did not know anything about the drugs that were found secreted in the vehicle and proffered evidence that a convicted drug dealer, who previously had left drugs and money in the vehicle, had driven the vehicle shortly before him. That evidence was highly relevant to the defendant's theory of defense. We conclude, therefore, that when . . . a person is arrested for the possession of drugs that are concealed in a vehicle that does not belong to him, and he adduces evidence that another person had both the motive and the opportunity to commit the crime and actually operated the vehicle within a twenty-four hour period, it is

improper for the trial court to exclude that evidence." Id., 646.

In the present case, there is neither evidence of the presence of a third party at the school or the gas station, nor evidence of the opportunity for a third party to have committed the crime at either location. Because the defendant did not establish even a minimal direct connection between the charged crimes and the alleged use of the stolen credit card in Waterbury the following day, we conclude that the trial court did not abuse its discretion in denying the defendant's request to charge on third-party culpability or the defendant's request to make corresponding arguments.

The trial court ruled that defense counsel could make remarks about anything that was "in testimony." Therefore, during his closing argument defense counsel commented on the fact that the victim's credit cards were used on November 1, 2013, in Waterbury and that the investigating officer failed to follow up on the information. The defendant claims that, because counsel was allowed to comment on the use of the charge card in Waterbury, it was clearly relevant. If the testimony was relevant, he contends, it merited a charge to the jury and further arguments from defense counsel that a third party was responsible for the credit card charges at the gas station in Newtown. The fact that the trial court exercised its discretion in allowing counsel to comment on the use of the credit cards in Waterbury, a ruling which clearly benefited the defendant, however, does not mean that the evidence reasonably supported either further argument or a charge on the issue of third-party culpability. The sufficiency of the proof, in the context of the present case, is measured in terms of the evidence related to both the theft of the wallet at the school and the charges at the gas station in Newtown. The proof of any third-party direct connection relation to those two events was nonexistent. Therefore, we conclude

that the trial court did not abuse its discretion in refusing to charge the jury on, or permit arguments regarding, the issue of third-party culpability.

II

The defendant next claims that his convictions of identity theft, illegal use of a credit card and the lesser included offense of larceny in the sixth degree violated the constitutional prohibition against double jeopardy. We conclude that, under *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and in the context of the charging document in the present case, the defendant is unable to establish that larceny in the sixth degree is the same offense, for purposes of double jeopardy, as either identity theft in the third degree or illegal use of a credit card.[6] Accordingly, we conclude that the trial court correctly sentenced the defendant for his convictions of identity theft, illegal use of a credit card and the lesser included offense of larceny in the sixth degree.

The defendant failed to preserve his double jeopardy claims at trial and seeks to prevail on appeal pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Under *Golding*, a defendant may prevail on an unpreserved claim only if the following conditions are met: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if

[6] The defendant also asserts that, because the conviction for larceny in the sixth degree was the basis for his enhanced sentence as a persistent larceny offender and his conviction for larceny in the sixth degree violates the prohibition against double jeopardy, there is no basis for his plea as a persistent larceny offender and it must be vacated. Because we conclude that the defendant's conviction for larceny in the sixth degree does not violate the prohibition against double jeopardy, we need not address this claim.

subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) Id.; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). Because the record is adequate for review, and the defendant's claim that the multiple convictions violated his right against being placed in double jeopardy is of constitutional magnitude, our inquiry focuses on whether the violation alleged by the defendant exists and deprived him of a fair trial.

"A defendant's double jeopardy challenge presents a question of law over which we have plenary review. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . .

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met. . . .

"Traditionally we have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other

does not. . . . This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial. . . .

"Our analysis of [the defendant's] double jeopardy [claim] does not end, however, with a comparison of the offenses. The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling when a contrary intent is manifest. . . . When the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 319 Conn. 684, 689–90, 127 A.3d 147 (2015).

In count one of its long form information dated June 17, 2015, the state accused the defendant of identity theft in the third degree and charged that, on October 31, 2013, in Newtown, the defendant "knowingly used personal identifying information of another person to obtain goods without the consent of such other person, in violation of . . . § 53a-129d."

In count three of the same information, the state accused the defendant of illegal use of a credit card and charged that, on October 31, 2013, in Newtown, the defendant "obtained goods and anything of value by representing without the consent of the cardholder that he [was] the holder of a specified card, in violation of . . . § 53a-128d (2)."

In count four of the same information, the state accused the defendant of larceny in the sixth degree

and charged that, on October 31, 2013, in Newtown, the defendant, "with intent to deprive another of property and to appropriate the same [to] himself or a third party . . . wrongfully [took], obtain[ed], [and withheld] such property from an owner and the value of the property is [$500] or less, in violation of . . . § 53a-125b."

As indicated previously, the *Blockburger* test involves a two step analysis. *State* v. *Wright*, supra, 319 Conn. 689. First, we must determine if the charges arose out of the same transaction. Id. If that fact is established we then look to whether the charges cover one offense. Id. In conducting the second inquiry, we only look to the statutes, charging documents, and any bill of particulars, not evidence at trial. Id., 690. When conducting the first inquiry, however, it is not uncommon that we look to the evidence at trial and to the state's theory of the case. For example, in *State* v. *Snook*, 210 Conn. 244, 265, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989), this court explained as follows: "The defendant does not even address the first issue whether the second and third degree sexual assault charges arose out of the same transaction. [T]he state introduced evidence of a number of episodes in which the defendant engaged in sexual intercourse with the victim. Both counts . . . alleged that the defendant committed the prohibited act or acts on 'diverse days between June, 1979, and January, 1984.' The state points out that the jury could have relied on evidence of one act to convict the defendant of [one crime], and evidence of a different act to convict him of [the other]. Thus, the defendant has failed to meet his initial burden of demonstrating that his conviction on the second and third degree sexual assault charges arose out of the same act." Thus, in *Snook*, we analyzed the first step using both the charging document and the evidence upon

which the jury could have relied.[7] Accordingly, if we conclude that the charges may not have occurred from the same transaction, it is unnecessary for us to proceed to step two of the analysis.

With respect to the charge of larceny in the sixth degree in count four of the long form information, in his closing argument, the prosecutor asserted the following: "[I]ntent to deprive another person of property or to appropriate the . . . same to himself or a third party who wrongfully takes, obtains or withholds such property from the owner. Okay. What does that mean? Intent to deprive another of property . . . what property was [the victim] deprived of? She's deprived of her wallet. She's deprived of her credit cards. She's deprived of her driver's license . . . . Her personal property, her personal belongings . . . included that wallet and everything inside . . . that was taken from her. And so whether it was taken from her directly by [the defendant] or he obtained it or withheld that property from her, that's a larceny, and when we talk about different degrees of larceny, we're talking about what is the value of that property . . . . [T]he value of the property [here] is $500 or less . . . . That could be the credit card, it could be [the gasoline] . . . the cigarettes . . . [or] the value of the wallet itself. . . . That's larceny in the [sixth] degree." The defendant claims that, because the judge referred to the gasoline and cigarettes

[7] We note that the defendant in the present case did not request a bill of particulars regarding count four, which contained the charge of larceny in the sixth degree. Thus, the jury could have found separate acts of larceny that occurred on the same day. Furthermore, if the defendant had raised his claim before the trial court that a conviction of identity theft, illegal use of a credit card and the lesser included offense of larceny in the sixth degree would violate the constitutional prohibition against double jeopardy, the state or the court could have made clear that theft of the same property could not form the factual basis for the larceny charge and the other charges. By failing to raise the claim of double jeopardy before the trial court, the defendant contributed to the ambiguity that is now present in the record.

in the charge, it was all part of the same transaction. However, because the jury, and not the judge, was the fact finder in the present case, because the information was broad enough to encompass the theft of the wallet and its contents and the separate unauthorized charges on the credit cards, and because the prosecutor both argued the case and presented evidence in that manner relating to both incidents, we reject the defendant's arguments in that regard.

On the basis of the testimony of the witnesses and the evidence introduced at trial, the jury reasonably could have found a factual basis for the charge of larceny in the sixth degree arose out of the theft of the victim's wallet and all of the items contained therein, including her driver's license, her insurance cards, and her bank and credit cards, as well as the separate theft of the gasoline and the cigarettes from the gas station. Any of those separate actions could have formed the basis for finding the defendant guilty of larceny in the sixth degree.

Similarly, the jury reasonably could have found a factual basis for the charges of identity theft and illegal use of a credit card arose out of the specific use of one particular credit card in the stolen wallet. Thus, there was a separate factual basis for the charge of larceny in the sixth degree that did not arise out of the same act as the charges of identity theft in the third degree and illegal use of a credit card. We therefore conclude that the defendant has failed to establish the first prong of *Blockburger* and, therefore, we need not proceed to the second prong. See *State* v. *Wright*, supra, 319 Conn. 689. Accordingly, we conclude that the defendant has failed to establish that his convictions of identity theft, illegal use of a credit card and the lesser included offense of larceny in the sixth degree violated the constitutional prohibition against double jeopardy.

The judgment is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 326

ANDREA MICEK-HOLT, EXECUTRIX (ESTATE OF EDWARD W. MICEK) *v.* MARY PAPAGEORGE ET AL.
(SC 19896)

The motion of the defendant in error, filed April 11, 2017, for dismissal, having been presented to the court, it is hereby ordered granted. The motion of the defendant in error, filed April 12, 2017, for determination of appellate stay, having been presented to the court, it is hereby ordered denied.

July 18, 2017

PER CURIAM. We are asked to decide whether this court has jurisdiction over a writ of error challenging an order of the trial court, which was issued while the direct appeal of the plaintiffs-in-error, Mary Papageorge and George Papageorge (collectively, the Papageorges), was pending before the Appellate Court and whether the filing of such a writ gave rise to an automatic stay of the order that the writ challenged. We conclude that we lack jurisdiction, and, as a result, we do not reach the issue of whether an automatic stay exists. Accordingly, we grant the motion to dismiss the writ of error filed by the defendant in error, Andrea Micek-Holt, executrix of the estate of Edward W. Micek, and deny her motion for determination of the status of the automatic appellate stay.

The record reveals the following relevant facts. In 2010, Edward W. Micek and Kalami Corporation (Kalami), an entity represented by Mary Papageorge as its officer, executed a one year lease agreement whereby Micek would lease certain real property to Kalami and the Papageorges and their two daughters would occupy the property. Micek and Mary Papageorge concurrently executed a purchase and sale agreement (sale agreement) for the property, whereby

Mary Papageorge would pay Micek a deposit during the period of the lease and then purchase the property for $250,000 at the end of the lease. Mary Papageorge, on behalf of Kalami, made all rent payments due under the lease and paid the agreed upon sales deposit prior to the expiration of the lease, but Micek failed to take steps to complete the purchase under the sale agreement.

Micek thereafter brought a summary process action against the Papageorges and Kalami seeking to evict them for nonpayment of rent after the end of the lease period. The trial court found in favor of Kalami and the Papageorges, concluding that no further obligations existed under the lease agreement and that Mary Papageorge had an equitable right to the property under the sale agreement, including continued possession of the property until the real estate closing took place pursuant to the sale agreement.

Subsequently, Micek and, after his death, Micek-Holt, as executrix of Micek's estate, made two attempts to close under the sale agreement with Mary Papageorge. Both times Mary Papageorge refused to perform under the terms of the sale agreement, claiming she was due additional consideration beyond what was memorialized in that agreement.

Micek-Holt, in her capacity as executrix, then commenced an action against the Papageorges, their daughter Angelina Papageorge, and Kalami (collectively, the defendants), claiming, inter alia, breach of the sale agreement and unjust enrichment and seeking to quiet title to the property. She sought, in the alternative, monetary damages, specific performance, foreclosure of Mary Papageorge's equitable interest in the property, a declaratory judgment that the defendants had no interest in the property, and the defendants' eviction from the property. Mary Papageorge filed a separate action

against Micek-Holt and others seeking legal title to the property and $5.5 million in damages as a result of Micek's alleged breach of the sale agreement. The trial court, after the two actions had been consolidated for trial, rejected all of Mary Papageorge's claims. The trial court then found in favor of Micek-Holt on her breach of contract and unjust enrichment claims. As to relief, it ordered either that Mary Papageorge pay monetary damages and perform under the terms of the sale agreement by October 26, 2016, or, in the event that she failed to perform, that her equitable right to the property be "extinguished" and a judgment of quiet title be issued in favor of Micek-Holt, as executrix, and Micek-Holt could request an execution of ejectment[1] against the defendants.

The Papageorges timely appealed from the judgment in favor of Micek-Holt to the Appellate Court. The automatic stay that arose upon the filing of the appeal; see Practice Book § 61-11 (a); was terminated in November, 2016, upon Micek-Holt's motion, after the deadline for performance of the sale agreement had passed. That appeal is currently pending before the Appellate Court.

In March, 2017, the trial court granted Micek-Holt's request for an execution of ejectment. The Papageorges

[1] The trial court memorandum of decision stated that Micek-Holt could request an "execution of eviction," but did not specify the statutory authority under which such execution would be issued. Micek-Holt subsequently filed, and the trial court ordered, an execution of summary process using a standard Judicial Branch form. The proper statutory mechanism for eviction of a party following a trial that determines the equitable interests in a property is an execution of ejection. See General Statutes § 49-22 ("[a] In any action . . . for any equitable relief in relation to land, the plaintiff may, in his complaint, demand possession of the land, and the court may, if it renders judgment in his favor and finds that he is entitled to the possession of the land, issue execution of ejectment . . . ."). Accordingly, we refer to the actions as seeking executions of ejectment, and look to cases challenging executions of ejectment for guidance in determining whether a party may bring such a challenge by way of a writ of error.

filed an emergency motion for review of that order with the Appellate Court. The Appellate Court granted review, ordered a stay of the execution of ejectment, and ordered briefing from the parties on whether Mary Papageorge's equitable right to the property implicated a right of possession. Thereafter, the Appellate Court issued an order terminating the stay of the execution of ejectment, which effectively denied the relief requested by the Papageorges.

Subsequently, the Papageorges filed the writ of error presently before this court, claiming that the issuance of the execution of ejectment by the trial court was improper because it violated the initial automatic appellate stay in that the deadline for performance of the sale agreement occurred while the stay was in effect. Micek-Holt filed a motion to dismiss, asserting that this court lacks jurisdiction because (1) the Papageorges, as parties to the underlying trial court case, may not bring a writ of error pursuant to Practice Book § 72-1 (a), and (2) the writ of error is improper pursuant to Practice Book § 72-1 (b) because the Papageorges could raise claims concerning the execution of ejectment in the appeal pending before the Appellate Court. Micek-Holt concurrently filed a motion for clarification as to whether the filing of the writ of error resulted in an automatic stay of the execution of ejectment.

Practice Book § 72-1 provides in relevant part: "(a) Writs of error for errors in matters of law may be brought from a final judgment of the superior court to the supreme court in the following cases . . . a decision binding on an aggrieved nonparty . . . and . . . as otherwise necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law.

"(b) No writ of error may be brought in any civil . . . proceeding for the correction of any error where . . .

the error might have been reviewed by process of appeal . . . .”

Although it is undisputed that the Papageorges are parties to the underlying case, they contend that a writ of error is the proper mechanism to challenge the execution of ejectment because the execution occurred after the final judgment from which they have appealed and, therefore, they cannot challenge the propriety of the execution in the pending appeal. They further note that without action by this court through the writ of error, they will be divested of possession of the property prior to the resolution of their appeal.

The Papageorges have cited no authority, nor has our research revealed any, supporting the proposition that a party to an underlying case may use a writ of error to challenge an execution of ejectment following a foreclosure or other final judgment settling the equitable property rights of the parties. To the contrary, authority holds that a writ of error is the proper mechanism for a tenant to challenge an ejectment following a foreclosure when the tenant has *not* been made a party to the foreclosure action. See *Tappin* v. *Homecomings Financial Network, Inc.*, 265 Conn. 741, 745–46, 830 A.2d 711 (2003). When a tenant *is* a party to a foreclosure and seeks to challenge the execution of ejectment that resulted from the subject foreclosure, the tenant must seek review through a direct appeal. See *First Federal Bank, FSB* v. *Whitney Development Corp.*, 237 Conn. 679, 682–84, 677 A.2d 1363 (1996) (elderly, disabled tenant challenging right of mortgagee to evict her through execution of eviction following vesting of title in mortgagee through strict foreclosure); see also *Wells Fargo Bank of Minnesota, N.A.* v. *Morgan*, 98 Conn. App. 72, 73–74, 909 A.2d 526 (2006) (issuance of execution of ejectment raised by party through appeal of denial of motion to open and set aside orders of trial court approving foreclosure sale and deed).

Although we are not unsympathetic to the fact that the Papageorges will be required to vacate the property to which they claim a right of possession prior to the resolution of their appeal, we are unpersuaded that this circumstance alone negates their status as parties to the underlying case for purposes of standing to bring a writ of error. To hold otherwise would allow any party to a case pending on appeal in which the automatic appellate stay has been lifted, resulting in a negative consequence to the party, to bring a writ of error. The Papageorges also have not demonstrated that they lacked any mechanism to challenge the trial court's order authorizing the issuance of an execution of ejectment—either due to form or substance—in their direct appeal or by way of an amended appeal. Therefore, we conclude that this court lacks jurisdiction over the Papageorges' writ of error.[2] Because we dismiss the Papageorges' writ of error, we do not reach the issue of whether the filing of the writ resulted in an automatic stay of the execution of ejectment.

The motion to dismiss the writ of error is granted, and the motion for determination of appellate stay is denied.

STATE OF CONNECTICUT *v.* TAUREN WILLIAMS-BEY

The defendant's petitions for certification for appeal from the Appellate Court, 167 Conn. App. 744, and 173 Conn App. 64 (AC 37430), is granted, limited to the following questions:

[2] In light of the grounds on which we rest our decision, we need not consider whether the writ of error is an improper attempt to circumvent the general rule that a party aggrieved by an Appellate Court decision may only obtain review (1) when that decision constitutes "a final determination of [an] appeal"; *Ingersoll* v. *Planning & Zoning Commission*, 194 Conn. 277, 279, 479 A.2d 1207 (1984); (2) by way of a petition for certification. See General Statutes § 51-197f; Practice Book § 84-1; see also Practice Book § 66-6 (providing for motion for review of "any action by the appellate clerk under [Practice Book §] 66-1" and various trial court orders).

"1. Under the Connecticut constitution, article first, §§ 8 and 9, are all juveniles entitled to a sentencing proceeding at which the court expressly considers the youth related factors required by the United States constitution for cases involving juveniles who have been sentenced to life imprisonment without the possibility of release? See *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)?

"2. If the answer to the first question is in the affirmative and a sentencing court does not comply with the sentencing requirements under the Connecticut constitution, does parole eligibility under General Statutes § 54-125a (f) adequately remedy any state constitutional violation?"

Heather Clark, assigned counsel, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided July 10, 2017

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CONNECTICUT APPELLATE REPORTS

Vol. 174

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DEUTSCHE BANK AG *v.* SEBASTIAN HOLDINGS, INC., ET AL.

(AC 38515)

(AC 38516)

Alvord, Bentivegna and Pellegrino, Js.

Syllabus

The plaintiff bank sought to pierce the corporate veil of the defendant corporation, S Co., and to enforce an English court's judgment against

the individual defendant, V, the sole shareholder and director of S Co. The plaintiff had commenced an action in England against S Co., seeking damages for moneys owed to it in connection with various trading losses incurred by S Co. in relation to accounts that it had opened and operated through the plaintiff. In response, S Co. filed a counterclaim, alleging, inter alia, that the plaintiff had breached certain contractual duties that it had owed to S Co., which resulted in the depletion of funds that S Co. could have used to mitigate its losses. The English court denied S Co.'s counterclaim, finding that the plaintiff had not breached its duties to S Co. and that V had control over S Co. such that any alleged breach of duty should not have interfered with V's ability to transfer funds to or from S Co. The English court rendered judgment for the plaintiff, awarding it damages plus interest. Thereafter, the plaintiff filed a non-party costs application with the English court, seeking to hold V personally liable for certain of the plaintiff's court costs in its action against S Co. The English court granted the costs application, concluding that V was liable for the costs incurred by the plaintiff due to his extensive involvement in the action against S Co. In response to S Co.'s failure to make payments in accordance with the judgment, the plaintiff commenced the present action. Thereafter, the defendants filed a motion for summary judgment, claiming that the doctrine of res judicata barred the plaintiff's corporate veil piercing claim because it should have been raised in the action in the English court. The plaintiff filed a separate motion for summary judgment, arguing that all questions of material fact with respect to its corporate veil piercing claim previously had been decided by the English court and that V was collaterally estopped from denying that he was the alter ego of S Co. and personally liable for the judgment in the English action. The trial court denied the parties' motions, concluding that the plaintiff's corporate veil piercing claim was not barred by res judicata because that claim was sufficiently different in nature from the breach of contract claims in the English action, and that V was not collaterally estopped from denying liability for S Co.'s debt because the issue was not actually or necessarily decided in the English action. From the trial court's judgment, the parties filed separate appeals with this court. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly denied their motion for summary judgment because the plaintiff's corporate veil piercing claim arose out of the same series of transactions as the English action and should have been raised in the English action, and, therefore, was barred by the doctrine of res judicata: the plaintiff's corporate veil piercing claim was not barred by the doctrine of res judicata, the claims litigated in the English action and the claims alleged in the present action having been distinct, as the plaintiff in the present action was not seeking to relitigate a claim of contractual liability that previously had been decided in the English action but, rather, was

seeking to enforce the unsatisfied English judgment against V under a corporate veil piercing theory.

2. There was no merit to the plaintiff's claim that the trial court improperly denied its motion for summary judgment on the ground that the issue of whether V was the alter ego of S Co. previously had been decided by the English court and, thus, the doctrine of collateral estoppel precluded the defendants from relitigating that issue: the facts relevant to the issues in the English action and those in the present action were not identical for purposes of issue preclusion, and the issues pertaining to V's control of S Co., as found by the English court, were not essential to the English action because the English court's finding that the plaintiff did not breach any duties it owed to S Co. was essential only to the English court's resolution of S Co.'s counterclaim; moreover, although the English court made factual findings relating to V's dominion and control of S Co. when it awarded costs against V, the sole purpose of the costs judgment was to determine whether V, as a nonparty, could be held liable for costs and attorney's fees incurred during the litigation of the English action, and the costs proceeding was a summary process proceeding that did not afford the parties basic procedural safeguards, including the presentation and cross-examination of witnesses, and the English court explicitly noted that the issues in determining a nonparty costs order were not the same as a corporate veil piercing claim.

Argued February 2—officially released July 18, 2017

Procedural History

Action to pierce the corporate veil of the named defendant and to hold the defendant Alexander Vik liable for an unsatisfied foreign judgment, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, Complex Litigation Docket, where the court, *Genuario*, *J.*, denied the defendants' motion to dismiss; thereafter, the court denied the defendants' motion to strike; subsequently, the court denied the plaintiff's motion for summary judgment and denied the defendants' motion for summary judgment, and the plaintiff and the defendants filed separate appeals in this court; thereafter, this court granted in part the defendants' motion to dismiss the plaintiff's appeal. *Affirmed*.

Richard M. Zaroff, with whom were *Thomas P. O'Connor*, *Wyatt R. Jansen*, and, on the brief, *Charles W. Pieterse* and *Ira S. Zaroff*, for the appellants in AC 38515 and appellees in AC 38516 (defendants).

David G. Januszewski, with whom were *Thomas D. Goldberg*, and, on the brief, *Bryan J. Orticelli*, *Sheila C. Ramesh*, and *Erin R. McAlister*, for the appellee in AC 38515 and appellant in AC 38516 (plaintiff).

Opinion

PELLEGRINO, J. These appeals arise from an action to recover an approximately $243 million judgment (English judgment) rendered by the Queen's Bench Division of the High Court of Justice of England and Wales (English court) in an action captioned *Deutsche Bank AG* v. *Sebastian Holdings, Inc.* (English action) in which the trial court rendered judgment in favor of the plaintiff, Deutsche Bank AG, against the corporate defendant, Sebastian Holdings, Inc. (Sebastian). In the present action, the plaintiff sought to pierce Sebastian's corporate veil and to enforce the English judgment against the individual defendant, Alexander Vik. The defendants and the plaintiff moved for summary judgment based on the doctrines of res judicata and collateral estoppel, respectively. On appeal, the parties claim that the trial court improperly denied their respective motions for summary judgment.[1] We affirm the judgment of the trial court.

The trial court found the following facts. On January 1, 2009, the plaintiff commenced the English action against Sebastian, a corporation organized under the laws of the Turks and Caicos Islands, seeking damages for moneys that it was allegedly owed in connection with various trading losses incurred by Sebastian

[1] The defendants filed the present appeal on October 26, 2015, and on October 28, 2015, the plaintiff filed its appeal.

through accounts that it had opened and operated through the plaintiff. Sebastian incurred various debts owed to the plaintiff through unpaid margin calls and closeouts of its accounts with the plaintiff. Following a forty-five day trial, the English court rendered judgment in favor of the plaintiff in the amount of $243,023,089 plus interest.

Subsequent to the English judgment, the plaintiff filed a nonparty costs application with the English court, seeking to hold Vik, the sole shareholder and director of Sebastian, personally liable for portions of the plaintiff's court costs. On June 24, 2014, the English court issued its decision (English costs judgment) in which it concluded that Vik was personally liable for the costs incurred by the plaintiff due to his extensive involvement with the English action.[2] It therefore granted the costs application.

On December 13, 2013, the plaintiff commenced the present action to enforce the English judgment against Vik following Sebastian's failure to make payments on the English judgment. Specifically, the plaintiff sought (1) a declaratory judgment seeking to pierce Sebastian's corporate veil and to hold Vik personally liable for the amounts due under the English judgment, and (2) to enforce the English judgment against Vik under the

[2] Under § 51 of the United Kingdom's Senior Courts Act, a nonparty to an action may be summarily held liable for a judgment of attorney's fees and costs made against a party. See Senior Courts Act 1981, c. 54, § 51. The English court explained in the English costs judgment that, in assessing costs under § 51, the "critical factor" is "the nature and degree of the nonparty's connection with the proceedings." *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, [2004] EWHC 2073 (Q.B.) The English court emphasized that "[a]n application under [§] 51 does not involve the assertion of a cause of action but is a request for the exercise by the English court of a statutory discretion in relation to proceedings in which the court already has jurisdiction and, as here, has usually already given judgment against a party subject to that jurisdiction." Id.

Uniform Foreign Money Judgments Recognition Act, as adopted in Connecticut.[3]

Following a period of discovery, on August 21, 2015, the defendants and the plaintiff both moved for summary judgment. In their motion, the defendants argued that res judicata barred the present action because the plaintiff's claim seeking to pierce the corporate veil should have been raised in the English action. The plaintiff, by contrast, argued in its motion that all questions of material fact with respect to its veil piercing claim previously had been decided by the English court and that Vik was collaterally estopped from denying that he is the "alter ego" of Sebastian and personally liable for the English judgment. On October 22, 2015, by way of written memorandum of decision, the trial court denied both parties' motions for summary judgment.

With respect to the defendants' motion for summary judgment, the court concluded that the plaintiff's veil piercing claim was not barred by the doctrine of res judicata because that claim was sufficiently different in nature from the breach of contract claims in the English action. With respect to the plaintiff's motion for summary judgment, the court concluded that Vik was not collaterally estopped from denying liability for Sebastian's debt because the issue was not actually or necessarily decided in the English action. From the court's judgment, the parties now appeal.[4]

We begin by setting forth our standard of review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is

[3] See General Statutes § 52-604 et seq.

[4] As a threshold matter, we note that "[o]rdinarily, the denial of a motion for summary judgment is not an appealable final judgment. . . . When the decision on a motion for summary judgment, however, is based on the doctrine of collateral estoppel, the denial of that motion does constitute a final judgment for purposes of appeal. . . . That precept applies to the doctrine of res judicata with equal force." (Citations omitted; internal quota-

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Savvidis* v. *Norwalk*, 129 Conn. App. 406, 409–410, 21 A.3d 842, cert. denied, 302 Conn. 913, 27 A.3d 372 (2011). Thus, our review of the trial court's judgment denying the parties' motions for summary judgment is plenary. See id., 410.

I

AC 38515

We turn first to the defendants' appeal in which they claim that the trial court improperly denied their motion for summary judgment because the plaintiff's veil piercing claim was barred by the doctrine of res judicata. Specifically, the defendants argue that the plaintiff's veil piercing claim arises out of the same series of transactions as the English action and should have been raised in the English action. We disagree.

In denying the defendants' motion for summary judgment, the trial court stated: "The fact that certain evidence will need to be presented in the case at bar which was previously presented in the English action is insufficient to invoke the doctrine of res judicata. A

tion marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3, 15 A.3d 601 (2011).

piercing the corporate veil claim is different in nature and involves a different type of claim than the original contract claim asserted in the English action. The court also observes that Vik was not a party in the English action until the [nonparty costs] proceedings[5] . . . . The court also observes that the facts and evidence which the defendants claim should bar the plaintiff's subsequent action were matters that were probative of the defendants' counterclaim and not the plaintiff's original contractual assertions. The plaintiff brought the English action against [Sebastian] only asserting a contractual claim against [Sebastian]. [Sebastian's] assertion of claims that broadened the evidence (claims that the English court did not find meritorious) should not serve to bar the plaintiff's subsequent action to enforce its judgment against one who allegedly depleted the assets of [Sebastian] rendering it unable to pay its debts. Accordingly the court holds that the plaintiff's claim is not barred by the doctrine of res judicata." (Footnote added.)

In so doing, the court concluded that "the action brought by the plaintiff herein is different in nature than the English action. Thus, although the facts at issue in the [English] action overlap with the facts at issue in this case, the differences are more significant than mere shadings of fact. Instead the cases lack a common nucleus of operative facts." (Internal quotation marks omitted.)

[5] The English court's decision in granting the nonparty costs application reflects that it found jurisdiction over Vik solely for the purpose of awarding a judgment for costs incurred in the English action. The English court's jurisdiction over Vik was derived from chapter 54, § 51 of the Senior Courts Act 1981, which confers upon the English court "full power to determine by whom and to what extent the costs are to be paid." In granting the costs application, the English court explained that Vik was responsible for legal costs as a nonparty based on, inter alia, his status as the sole shareholder and sole director of Sebastian and because Vik controlled the conduct of the litigation on Sebastian's behalf.

The following legal principles guide our discussion. "In deciding whether the doctrine of res judicata is determinative, we begin with the question of whether the second action stems from the same transaction as the first. [Our Supreme Court has] adopted a transactional test as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata. [T]he claim [that is] extinguished [by the judgment in the first action] includes 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. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations 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. . . . *Orselet* v. *DeMatteo*, [206 Conn. 542, 545–46, 539 A.2d 95 (1988)]; see *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 364–65, 511 A.2d 333 (1986); see also *Nevada* v. *United States*, 463 U.S. 110, 130–31 n.12, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983); 1 Restatement (Second), [Judgments, § 24 (1982)]. In applying the transactional test, we compare the complaint in the second action with the pleadings and the judgment in the earlier action." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 604, 922 A.2d 1073 (2007).

With regard to that test, it appears that neither party disputes that the first two requirements are satisfied: (1) the English action resulted in a valid, final judgment rendered on the merits; and (2) the English action and the present action were between the same parties. See *Coyle Crate LLC* v. *Nevins*, 137 Conn. App. 540, 548,

558 (2012). Thus, we need only address the third requirement, that is, whether the plaintiff's veil piercing claims arose from the same transaction and should have been raised in the English action.

The substance of the plaintiff's claim in the present action is that Vik is Sebastian's "alter ego," and, as a result, he is personally liable for the unsatisfied English judgment. In the English action, the plaintiff alleged various claims against Sebastian arising from their contractual relationship. Although this precise issue has been scarcely discussed by the courts of this state, we agree with the trial court that *Wells Fargo Bank, N.A.* v. *Konover*, United States District Court, Docket No. 3:05CV1924 (CFD) (D. Conn. March 20, 2008) (2008 U.S. Dist. Lexis 21506), provides guidance.

In *Wells Fargo Bank, N.A.*, the plaintiff bank obtained a judgment rendered by a Maryland court against several corporate defendants, including Konover Management Company, for a breach of a mortgage agreement. Id., *2. Following the defendants' failure to satisfy the judgment, the plaintiff brought an action before the federal court to enforce the Maryland judgment against an individual, Michael Konover, and his various other entities, under a corporate veil piercing theory. Id.

In the action to enforce the Maryland judgment, the plaintiff alleged that the individual Connecticut defendant used his control over the entities named in the Maryland judgment to drain funds from those entities. Id. The court analyzed the complaint in the judgment enforcement action and stated: "Counts 1 and 2 are clearly addressed at recovering for a loss distinct from those at issue in Maryland. The claims here are based on the Judgment Debtor's inability to satisfy the Maryland judgment, rather than the mortgage default underlying that judgment." Id., *4. The court concluded that

although "the facts at issue in the Maryland action overlap with the facts at issue in this case, the differences are more significant than mere shadings of facts. Instead, the cases lack a common nucleus of operative facts." (Internal quotation marks omitted.) Id.

The circumstances in the present case are nearly identical to those in *Wells Fargo Bank, N.A.* In essence, the respective plaintiffs in both cases had secured a prior judgment in their favor and sought to enforce that judgment through a corporate veil piercing claim in a subsequent action. The actual claim advanced in the present case is that the plaintiff suffered a loss based upon nonpayment of the judgment rendered by the English court. In our view, the present action is not seeking to relitigate the various claims that gave rise to Sebastian's liability in the English action, but seeking to enforce that judgment. This becomes even more evident when examining the governing law pertaining to the plaintiff's veil piercing claims.

Prior to the parties' respective motions for summary judgment, the defendants moved to strike the complaint "arguing that the substantive law of [the] Turks and Caicos [Islands] must apply to the claims made that the corporate veil between Vik and [Sebastian] should be pierced since [Sebastian] is a corporation organized and existing under the laws of [the] Turks and Caicos [Islands]. The defendants further argue[d] that under that applicable Turks and Caicos [Islands'] law the allegations of the complaint are insufficient to state a cause of action pursuant to which the corporate veil between Vik and [Sebastian] may be pierced." The court concluded that the applicable law to be applied to the plaintiff's veil piercing claim was the law of the Turks and Caicos Islands and that the plaintiff sufficiently pleaded a cause of action.

In its memorandum of decision denying the defendants' motion to strike, the court stated: "In determining

the elements and parameters of [the Turks and Caicos Islands] law with regard to piercing the corporate veil the affidavit relies on decisions of English courts. The court has reviewed the affidavit submitted by the defendants as well as an affidavit submitted by the plaintiff, signed by an individual who is a solicitor admitted to practice in England and Wales. Both affidavits purport to set forth the law as developed in England and therefore applicable to [the Turks and Caicos Islands] with regard to attempts to pierce a corporate veil. Having reviewed those affidavits, as well as other authorities, the court concludes that the plaintiff has adequately alleged a cause of action under [the Turks and Caicos Islands'] law. The affidavits submitted by the defendants indicate that a corporate veil can be pierced only if there is some 'impropriety and that such impropriety must be linked to the use of the companies' structure to avoid or conceal liability.' The affidavits suggest that in order to pierce a veil it is necessary that the plaintiff show both control of the company by wrongdoers and an impropriety that constitutes a misuse of the company by them as a device or façade to conceal their wrongdoing. The defendants' affidavit additionally states that a company can be a façade even though it was not originally incorporated with any deceptive intent. Rather, the question is whether it is being used as a façade at the time of a relevant transaction. If so, the court may pierce the veil only so far as it is necessary to provide a remedy for the particular wrong which those controlling the company have done."

The trial court's discussion is helpful in resolving the present appeal because it delineates the elements that the plaintiff must prove in its claim in the present case and the stark differences from the claims in the English action. It is clear to this court that the claims litigated in the English action and those claims alleged in the present case are distinct. For example, in prevailing on

its claims in the English action, the plaintiff was not required to prove that Vik demonstrated control over Sebastian and impermissibly drained its assets. Simply put, the plaintiff in present action is not seeking to relitigate a claim of contractual liability that previously was decided in the English judgment. Instead, the plaintiff's claims here are seeking to enforce the unsatisfied English judgment against Vik under a corporate veil piercing theory.

In sum, the claims alleged in the English action and those alleged in the present action arise from a distinct nucleus of operative facts. It is also worth noting that Sebastian's refusal to satisfy the judgment left the plaintiff in the precarious position of pursuing alternative methods of enforcing the judgment, that being an enforcement action seeking to pierce Sebastian's corporate veil. Requiring the plaintiff to have pursued such a claim in the English action would produce an unjust result, as the plaintiff would have been required to have anticipated that Sebastian would refuse to satisfy the English judgment. See *Gladysz* v. *Planning & Zoning Commission*, 256 Conn. 249, 261, 773 A.2d 300 (2001) (courts must ensure "that the effect of the doctrine does not work an injustice"). We thus conclude that the plaintiff's veil piercing claim is not barred by the doctrine of res judicata. Accordingly, the trial court properly denied the defendants' motion for summary judgment.

II

AC 38516

We next consider the plaintiff's appeal in which it claims that the trial court improperly denied its motion for summary judgment. The plaintiff argues that the court's denial of its motion was improper because the issue of whether Vik is the "alter ego" of Sebastian previously was decided by the English court and that the

doctrine of collateral estoppel precluded the defendants from litigating that issue. We disagree.

In its memorandum of decision denying the plaintiff's motion for summary judgment, the court stated: "While it is clear that [the English court] in issuing [its] decision rendering the English judgment did conclude that Vik was in control of the funds and caused them to be transferred out of [Sebastian] to make them harder to reach, [it] did so as a component of [its] decision denying [Sebastian's] counterclaim against the plaintiff. In the English action, [Sebastian] counterclaimed against the plaintiff claiming that the plaintiff had breached duties and contractual obligations to [Sebastian] which resulted in funds not being available to [Sebastian] from which it could have minimized its losses. [the English court] concluded that the plaintiff had not breached its contract or any other duties to [Sebastian], and, therefore, the plaintiff was not liable to [Sebastian] for those breach of contractual or other duties. [The English court] additionally found that because Vik was in control of the funds that had been transferred out of [Sebastian], Vik could have transferred those funds back to [Sebastian] at anytime thereby undercutting [Sebastian's] claim that the failure of [Sebastian] to have access to funds caused it significant damages. But this was unnecessary to the court's conclusion since the court had already determined that the plaintiff had not breached any duties to [Sebastian]. Moreover the issue decided by [the English court] was not whether or not Vik was the alter ego of [Sebastian] and liable for [Sebastian's] debts but only that he was still able to control the transfer of funds that had been transferred out of [Sebastian] and, therefore, could have avoided damage. To be sure in [its] lengthy and thorough decision, [the English court] took a dim view of Vik's conduct and integrity but that is insufficient to establish the collateral estoppel necessary to grant summary judgment for the plaintiff."

Our resolution of the plaintiff's appeal is governed by the following legal principles. "Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . . To assert successfully the doctrine of issue preclusion, therefore, a party must establish that the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case. . . . An issue is *actually litigated* if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . Therefore, a party may assert the doctrine of collateral estoppel successfully when three requirements are met: [1] [t]he issue must have been fully and fairly litigated in the first action, [2] it must have been actually decided, and [3] the decision must have been necessary to the judgment. . . .

"Before collateral estoppel applies there must be an identity of issues between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding. [T]he court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding. Simply put, collateral estoppel has no application in the absence of an identical issue. Further, [t]he [party seeking estoppel] has the burden of showing that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.)

Wiacek Farms, LLC v. *Shelton*, supra, 132 Conn. App. 168–70, 30 A.3d 27 (2011).

We begin with a review of the issues presented to each court. In the English action, the plaintiff claimed that Sebastian suffered trading losses through the use of accounts opened and operated through the plaintiff. Those losses led to Sebastian incurring debts owed to the plaintiff as a result of unpaid margin calls and closeouts of Sebastian's accounts with the plaintiff. In the present case, the plaintiff claimed that Vik was personally liable for Sebastian's debts because he was Sebastian's "alter ego" due to, inter alia, his domination and control of Sebastian.

It is apparent to this court that the facts relevant to the issues in the English judgment and those in the present case are not "identical" for purposes of issue preclusion. See *Corcoran* v. *Dept. of Social Services*, 271 Conn. 679, 689–90, 859 A.2d 533 (2004). Our resolution of the plaintiff's appeal, however, is complicated by the English court's disposition of Sebastian's counterclaims and the postjudgment award of costs rendered against Vik.

First, Sebastian made several counterclaims in the English action. Sebastian counterclaimed that the plaintiff breached its contractual duties and other duties that it owed to Sebastian that, in turn, resulted in the depletion of Sebastian's funds that it could have used to mitigate its losses. In denying Sebastian's counterclaim, the English court found both that (1) the plaintiff did not breach its duties to Sebastian, contractual or otherwise, and (2) Vik had control over Sebastian such that any alleged breach of duty on behalf of the plaintiff should not have interfered with Vik's ability to transfer funds to or from Sebastian.

In its memorandum of decision, the trial court noted that the English court's findings relating to Vik's control

of Sebastian and that Vik could have transferred funds back to Sebastian were "unnecessary to the court's conclusion since the court had already determined that the plaintiff had not breached any duties to [Sebastian]." We agree with this assessment. Because only those issues that were necessarily determined by the English court could invoke the doctrine of collateral estoppel, the English court's finding that the plaintiff did not breach any duties it owed to Sebastian was the only essential issue determined by the English court pertaining to the counterclaim. See *Gladysz* v. *Planning & Zoning Commission*, supra, 256 Conn. 260. Thus, we decline to afford any preclusive effect to the issues pertaining to Vik's control of Sebastian and related issues because those issues found by the English court were nonessential. See *Farmington Valley Recreational Park, Inc.* v. *Farmington Show Grounds, LLC*, 146 Conn. App. 580, 589, 79 A.3d 95 (2013).

Second, the English court also made factual findings relating to Vik's dominion and control of Sebastian when it awarded postjudgment costs against Vik. In our view, the factual findings underlying the English costs judgment cannot serve as the grounds for invoking the doctrine of collateral estoppel for two reasons: (1) the sole purpose of the English costs judgment was to determine whether a nonparty, Vik, could be held liable for costs and attorney's fees incurred during the litigation of the English action; and (2) the English costs proceeding did not afford the parties basic procedural safeguards, including presentation and cross-examination of witnesses.

In its memorandum of decision as to the costs judgment, the English court noted that under the applicable provision that gives rise to the costs proceeding, § 51,[6]

[6] See footnote 2 of this opinion.

the critical factor is the nature and degree of the nonparty's connection with the proceedings. See *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, [2004] EWHC 2073 (Q.B.). The English court further stated, "[a]s is plain from a number of authorities, an application under [§] 51 does not involve the assertion of a cause of action but is a request for the exercise by the English court of a statutory discretion in relation to the proceedings in which the court already has jurisdiction and, as here, has usually already given judgment against a party subject to that jurisdiction." Id.

It is apparent to this court that § 51 proceedings do not afford the parties the same procedural safeguards as the parties were afforded when they litigated the underlying merits in the English action or that the parties are afforded in the present case. Specifically, "[t]he procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action." Id. The English court observed that "[§] 51 proceedings are intended to be a 'speedy process' where disclosure and cross-examination are not ordinarily part of the procedure." Id. Although the court could have exercised its discretion to allow disclosure and cross-examination, the English court instead relied solely on its findings from the English judgment.

In light of the lack of procedural safeguards afforded to a § 51 proceeding, we decline to apply preclusive effect to the issues in the present case. Our courts have declined to apply the doctrine of collateral estoppel to findings made in proceedings where "the panoply of procedural and discovery devices available in civil proceedings [were] not equally available . . . ." *Connecticut Natural Gas Corp.* v. *Miller*, 239 Conn. 313, 321–22, 684 A.2d 1173 (1996); see also *Gateway* v. *Kelso & Co.*, 126 Conn. App. 578, 587, 15 A.3d 635 (2011) (declining to invoke collateral estoppel where court permitted

only plaintiff's witness to testify, defendant was not allowed to call any witnesses, and defendant was not permitted to complete cross-examination of plaintiff's witness). As best we can tell from the record before us, the English costs judgment was the result of a summary proceeding that did not afford the parties the ability to present new evidence, to call witnesses, or to cross-examine witnesses. Moreover, the English court explicitly noted that the issues in determining a nonparty costs order were not the same as a corporate veil piercing claim.[7] Thus, we decline to apply the doctrine of collateral estoppel to the factual findings made by the English court in the costs judgment.

Although we acknowledge that there is some overlap in the facts relevant to the issues in the present case and those in the English action, "[o]ur Supreme Court has held . . . that an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel." *Wiacek Farms, LLC* v. *Shelton*, supra, 132 Conn. App. 172. Our Supreme Court has also "recognized that applying the doctrine of collateral estoppel has harsh consequences, namely, cutting off a party's right to future litigation on a given issue, [and our Supreme Court has] been reluctant to uphold the invocation of the doctrine unless the issues are completely identical." *Corcoran* v. *Dept. of Social Services*, supra, 271 Conn. 695. On the facts of the present case, we decline to foreclose the issue that Vik is Sebastian's alter ego because that issue is not identical to those issues that were before the English court. Moreover, we decline to give preclusive effect to the English court's

[7] Specifically, the English court stated, "if a non-party costs order is made against a company director or shareholder, it is wrong to characterize this as piercing or lifting the corporate veil or to say that the company and the director or shareholder are one in the same. The separate personality of a corporation, even a single member corporation, is deeply imbedded in our law for the purpose of dealing with legal rights and obligations." *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, [2004] EWHC 2073 (Q.B.).

postjudgment costs award based on the lack of procedural safeguards. Thus, the court properly concluded that genuine issues of material fact exist as to the issues.

The judgment is affirmed.

In this opinion the other judges concurred.

CATHERINE LEDERLE *v.* STEVAN SPIVEY
(AC 37755)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for attorney's fees. Following the dissolution of the parties' marriage, the defendant had filed a motion to open the dissolution judgment, which the trial court denied, and the defendant appealed from that judgment to this court, which upheld the denial of that motion. The plaintiff thereafter filed a motion for attorney's fees incurred in defending that appeal. In granting the plaintiff's motion for attorney's fees, the trial court concluded that the appeal concerning the motion to open lacked any indicia of a colorable claim and was brought in bad faith, and, therefore, it awarded attorney's fees pursuant to the bad faith exception to the general rule that attorney's fees are not allowed to the successful party in the absence of a contractual or statutory exception. Pursuant to the bad faith exception, in order to impose sanctions pursuant to its inherent authority, the trial court must find both that the litigant's claims were entirely without color and that the litigant acted in bad faith, and the court must make those findings with a high degree of specificity. *Held* that the trial court abused its discretion in awarding attorney's fees to the plaintiff pursuant to the bad faith exception: although that court found that the defendant had acted in bad faith and supported that finding with a high degree of specificity, it failed to delineate its finding that the defendant's appeal concerning the motion to open lacked any indicia of a colorable claim with clear evidence and a high degree of specificity; moreover, there was no indication in the trial court's memorandum of decision that it applied the correct standard for colorability applicable to a party, as opposed to an attorney, and that it therefore considered whether the defendant's principal claim in his previous appeal was so lacking in factual and legal

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

support that a reasonable person could not have concluded that the basis of the claim might be established; accordingly, a new hearing is required at which the trial court must apply the proper standard for colorability determinations applicable to a party, and its factual findings thereon have to be made with a high degree of specificity.

Argued January 9—officially released July 18, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Abery-Wetstone, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Emons, J.*, denied the defendant's motion to open, and the defendant appealed to this court, which affirmed the judgment; subsequently, the court, *Emons, J.*, granted the plaintiff's motion for attorney's fees, and the defendant appealed to this court. *Reversed; further proceedings.*

David DeRosa, with whom was *Paul Greenan*, for the appellant (defendant).

Tara C. Dugo, with whom, on the brief, was *Norman A. Roberts II*, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant, Stevan Spivey, appeals from the judgment of the trial court awarding $30,000 in attorney's fees to the plaintiff, Catherine Lederle. On appeal, the defendant claims that the court abused its discretion in (1) awarding attorney's fees based on its conclusion that his claims in a prior appeal were entirely without color and that he acted in bad faith, and (2) finding that an award of $30,000 in attorney's fees was reasonable under the circumstances of this case. We agree with the defendant's first claim that the court abused its discretion in awarding attorney's fees. Accordingly, we reverse the judgment awarding the plaintiff $30,000 in attorney's fees and remand the

matter for a determination of whether the defendant's claims in his previous appeal were entirely without color.

The following facts and procedural posture, as outlined in *Lederle* v. *Spivey*, 151 Conn. App. 813, 814–16, 96 A.3d 1259, cert. denied, 314 Conn. 932, 102 A.3d 84 (2014), are relevant to our resolution of this appeal. "The parties were married in Darien on December 31, 1998. One child was born of the marriage in 2000. Thereafter, the marriage broke down irretrievably, and, in March, 2005, the plaintiff commenced an action seeking to dissolve the marriage. On May 2, 2007, the court, *Abery-Wetstone*, *J.*, rendered a judgment of dissolution. As part of this decision, the court acknowledged the plaintiff's claim that she needed to move to Virginia in order to remain competitive in her employment with Lexmark, and found that it was in the best interest of the child to relocate with her to Virginia. The defendant appealed from the judgment, arguing, inter alia, that the court improperly permitted the plaintiff to relocate with their minor child to Virginia. We affirmed the judgment of the court, and our Supreme Court denied certification to appeal. *Lederle* v. *Spivey*, 113 Conn. App. 177, 965 A.2d 621, cert. denied, 291 Conn. 916, 970 A.2d 728 (2009).

"The defendant subsequently filed an amended motion to open the judgment, in which he claimed that [t]he plaintiff, in her trial testimony committed fraud with respect to the issue of her Lexmark employment and specifically whether or not [her Lexmark employment position] was available in Virginia on the dates testified to." (Internal quotation marks omitted.) *Lederle* v. *Spivey*, supra, 151 Conn. App. 814–15. According to the defendant, "[t]he plaintiff had a continuing duty to disclose the status of her job situation with Lexmark after [the May 2, 2007] judgment [of the trial court], and before the Appellate Court issued a memorandum

of decision in [March] 2009." (Internal quotation marks omitted.) Id., 815. The defendant further argued that the plaintiff's failure to disclose the status of her job situation with Lexmark constituted fraud "with respect to a material fact or facts which ultimately led to [the trial] court's conclusion that [the] plaintiff and the minor child should be permitted to relocate from the state of Connecticut to the state of Virginia for primarily employment purposes." (Internal quotation marks omitted.) Id.

"The court, *Emons*, *J.*, heard oral argument on the motion and, after receiving a memorandum of law from counsel for each party in support of their position, issued a memorandum of decision denying the motion to open on January 28, 2013. In reaching its decision, the court found that [a]fter the May 2, 2007 judgment, on June 5, the plaintiff lost her employment at Lexmark. . . . On or about August 20, 2007, the plaintiff relocated to Virginia and at or about the same time, began a new job at Xerox, also located in Virginia. The court noted that Judge Abery-Wetstone found numerous reasons why relocation was in the best interest of the minor child and that no single factor controlled the decision of the court. On the basis of the foregoing, the court held that while the plaintiff did have a duty to disclose that she lost her Lexmark job and procured a new one at Xerox, prior to the Appellate [Court's] decision, her failure to disclose does not constitute fraud." (Internal quotation marks omitted.) Id., 815–16. The defendant appealed from that decision.

In his appeal, the defendant claimed "that the [trial] court: (1) improperly held a portion of the hearing on the motion to open in chambers and off the record; and (2) abused its discretion by deciding the motion to open, which was based on a claim of fraud and therefore involved a question of material fact, without the benefit of sworn testimony or other evidence." Id., 814. This

court determined that it could not review the first issue because the record was inadequate for review on appeal. Id., 816. With respect to the second issue, this court determined that "the defendant's motion to open based on fraud, which was exclusively predicated upon the plaintiff's alleged failure 'to disclose the status of her job situation with Lexmark *after* [the trial court's] judgment [of dissolution] . . . and *before* the Appellate Court [rendered judgment],' fail[ed] as a matter of law." (Emphasis in original.) Id., 819. We then explained that the cases that both parties relied on, i.e., *Weinstein* v. *Weinstein*, 275 Conn. 671, 882 A.2d 53 (2005), and *Billington* v. *Billington*, 220 Conn. 212, 595 A.2d 1377 (1991), merely establish a continuing duty to disclose pertinent financial information until the judgment of dissolution is final *and not during the appeal. Lederle* v. *Spivey*, supra, 151 Conn. App. 819. In determining that the defendant's claim failed as a matter of law, this court did not address whether Judge Emons abused her discretion in deciding the motion to open based on fraud without the benefit of sworn testimony or other evidence. See id. Therefore, we affirmed the judgment of the trial court on July 29, 2014, and our Supreme Court denied certification to appeal. *Lederle* v. *Spivey*, 314 Conn. 932, 102 A.3d 84 (2014).

On March 11, 2013, during the pendency of the appeal in *Lederle* v. *Spivey*, supra, 151 Conn. App. 813, the plaintiff filed a motion for attorney's fees incurred in defending the defendant's "appeal of the trial court's January 28, 2013 judgment denying his motion to open." The plaintiff also filed a motion for termination of stay of proceedings on January 20, 2015. Judge Emons held a hearing on the motion for attorney's fees on October 30, 2013, and continued the matter until after the appeal was resolved. Additional hearings were held on February 10, 11 and 20, 2015. On March 4, 2015, the trial court issued a memorandum of decision in which it granted

the plaintiff's motion for attorney's fees and her motion for termination of stay of proceedings. In granting the plaintiff's motion, the trial court found "that the appeal filed by the defendant lacked any indicia of a colorable claim (wholly without color) and was brought in bad faith. After an evidentiary hearing on the reasonableness of the plaintiff's fees, the court GRANTS [the] plaintiff's motion and awards attorney fees in the amount of thirty thousand dollars ($30,000)." On March 11, 2015, the defendant filed this appeal. Additional facts will be set forth as necessary.

In the present appeal, the defendant claims that the trial court abused its discretion in awarding attorney's fees on the basis of its conclusion that his prior appellate claims were entirely without color and that he had acted in bad faith. Specifically, the defendant argues that there was no foundation in the trial court and appellate court records for the trial court to find that his appeal from the denial of his motion to open lacked any indicia of a colorable claim or that it was brought in bad faith,[1] nor did the court's memorandum of decision set forth its factual findings with a high degree of

[1] We note that the defendant further argued that the trial court's conclusion was based on its clearly erroneous finding that the parties entered into a factual stipulation as to their respective positions on the motion to open, on which it relied in denying that motion. This court reviews the trial court's findings of facts under the clearly erroneous standard of review. See *McKeon* v. *Lennon*, 131 Conn. App. 585, 612, 27 A.3d 436, cert. denied, 303 Conn. 901, 31 A.3d 1178 (2011). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id. Our review of the record reveals that at the October 24, 2012 hearing on the motion to open, the defendant's trial counsel asserted that the issue of fraud was fundamentally a legal issue and the facts were not in dispute. Further, there was evidence that at the October 24, 2012 hearing the parties orally agreed to proceed with a stipulation of facts, which was memorialized subsequently in both parties' memoranda of law on the issue of fraud. Consequently, the defendant's argument fails.

specificity.[2] The plaintiff counters that the trial court had ample evidence on which to base its findings and order in granting her motion for attorney's fees. We agree with the defendant that the court abused its discretion in awarding attorney's fees because its decision lacked the "high degree of specificity" as to its finding that the defendant's appeal was entirely without color, which is required under *Maris* v. *McGrath*, 269 Conn. 834, 848, 850 A.2d 133 (2004).[3]

The following additional facts and procedural history are relevant to our resolution of this claim. The court

[2] Pursuant to our case law, the trial court is obligated to "find *both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith"; (emphasis in original) *Berzins* v. *Berzins*, 306 Conn. 651, 663, 51 A.3d 941 (2012); and the court must set forth its factual findings with "a high degree of specificity" before awarding attorney's fees. *Maris* v. *McGrath*, 269 Conn. 834, 848, 850 A.2d 133 (2004).

[3] We disagree, however, with the defendant that the trial court erred in finding that his conduct in maintaining the previous appeal was in bad faith. The trial court summarized its finding that the defendant's conduct of maintaining the previous appeal was in bad faith by stating: "At the very least, the defendant and his appellate counsel perpetuated an appeal knowing that counsel, the court, and the clients had agreed to proceed in a particular way. Nevertheless, in a bad faith and disingenuous way, the defendant and appellate counsel . . . proceeded with an appeal that was wholly lacking a factual and legal basis." In reviewing this finding of bad faith under the clearly erroneous standard of review, we are convinced that the trial court's finding is sufficiently supported with a high degree of specificity in its memorandum of decision. See *Munro* v. *Munoz*, 146 Conn. App. 853, 861–62, 81 A.3d 252 (2013) ("Whether a party has acted in bad faith is a question of fact, subject to review only for clear error. . . . 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." [Citation omitted; internal quotation marks omitted.]). Therefore, contrary to the defendant's assertion, we conclude that the trial court's finding of bad faith was not clearly erroneous under the circumstances of this case. See *McKeon* v. *Lennon*, 131 Conn. App. 585, 612, 27 A.3d 436, cert. denied, 303 Conn. 901, 31 A.3d 1178 (2011). Because the trial court was obligated to "find *both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith"; (emphasis in original) *Berzins* v. *Berzins*, 306 Conn. 651, 663, 51 A.3d 941 (2012); before awarding attorney's fees, the primary focus of our analysis will therefore be on the

issued a memorandum of decision on March 4, 2015, in which it granted the plaintiff's motion for attorney's fees, finding, inter alia, that the defendant's claim that the court denied his motion to open without the benefit of sworn testimony or other evidence lacked any indicia of a colorable claim and was brought in bad faith.[4] In that decision, the court found that "the transcripts of an October 24, 2012 hearing . . . demonstrate that the court inquired of both counsel whether evidence was a necessary part of the 'but for' legal question as to whether the failure to disclose a new job could have arisen to a finding of 'fraud.' " The court's decision continues by stating: "Even more telling, was the colloquy that the court had with both clients, explaining to them that the court would entertain a legal issue with facts as stipulated in simultaneous briefs by counsel. As the court explained, depending upon the decision, further evidentiary hearing and/or appeals might be necessary. . . . As is clear from the October 24, 2012 transcripts, the attorneys, in the presence of their clients

court's finding that the defendant's previous appeal lacked any indicia of a colorable claim.

[4] Although the defendant claimed in the prior appeal "that the [trial] court: (1) improperly held a portion of the hearing on the motion to open in chambers and off the record; and (2) abused its discretion by deciding the motion to open, which was based on a claim of fraud and therefore involved a question of material fact, without the benefit of sworn testimony or other evidence"; *Lederle* v. *Spivey*, supra, 151 Conn. App. 814; our focus in the present appeal is on the latter of the defendant's claims, which we refer to as the principal claim in this appeal. As we discuss at greater length in this opinion, we are not convinced that the trial court set forth its findings with a high degree of specificity pertaining to its conclusion that the defendant's principal claim in the foregoing appeal was entirely without color. Therefore, because we conclude that the court failed to apply the correct standard to find that the defendant's principal claim was entirely without color, we need not address whether the other claim in his previous appeal was also entirely without color for purposes of the applicability of the bad faith exception to the American rule in the present appeal. *Munro* v. *Munoz*, 146 Conn. App. 853, 861, 81 A.3d 252 (2013) (before awarding attorney's fees "the court had to find *both* that the defendant's *claims* were entirely without color, and that he acted in bad faith" [emphasis added]).

and on the record, agreed to file simultaneous briefs with factual stipulations . . . copies of [the] defendant's and [the] plaintiff's simultaneous briefs together with copies of pages 8 [through] 15 of [the] plaintiff's appellee's brief analyzing all factual stipulations are attached as appendix C. There is no conceivable way that either [the] defendant or his appellate counsel did not have this information or evidence available to them prior to bringing the appeal." The court's decision further noted that "the defendant and his appellate counsel perpetuated an appeal knowing that counsel, the court, and the clients had agreed to proceed in a particular way. Nevertheless, in a bad faith and disingenuous way, the defendant and appellate counsel . . . proceeded with an appeal that was wholly lacking a factual or legal basis." Accordingly, the trial court granted the motion for attorney's fees pursuant to the bad faith exception set forth in *Maris* v. *McGrath*, supra, 269 Conn. 844–46. On March 11, 2015, the defendant filed this appeal, claiming that the court abused its discretion in awarding attorney's fees.

We begin by setting forth our well established standard of review and applicable legal principles that govern our resolution of this claim. "The abuse of discretion standard of review applies when reviewing a trial court's decision to [grant or] deny an award of attorney's fees. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Munro* v. *Munoz*, 146 Conn. App. 853, 858, 81 A.3d 252 (2013).

"[T]he common law rule in Connecticut, also known as the American Rule, is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Internal quotation marks omitted.) *Berzins* v. *Berzins*, 306 Conn. 651, 661, 51 A.3d 941 (2012). "Th[is] rule does not apply, however, where the opposing party has acted in bad faith." (Internal quotation marks omitted.) *Munro* v. *Munoz*, supra, 146 Conn. App. 858. This exception to the American rule often is referred to as the bad faith exception. See *Rinfret* v. *Porter*, 173 Conn. App. 498, 509 n.14, A.3d (2017).

Pursuant to the bad faith exception, "[i]t is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation." (Internal quotation marks omitted.) *Munro* v. *Munoz*, supra, 146 Conn. App. 858. "It applies both to the party and his counsel. . . . Moreover, the trial court must make a specific finding as to whether counsel's [or a party's] conduct . . . constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers to impose attorney's fees for engaging in bad faith litigation practices." (Internal quotation marks omitted.) *Kupersmith* v. *Kupersmith*, 146 Conn. App. 79, 97, 78 A.3d 860 (2013).

"[A] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle." *Berzins* v. *Berzins*, supra, 306 Conn. 662. "To ensure . . . that fear of an award of attorney's fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are

entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . and a high degree of specificity in the factual findings of [the] lower courts." (Internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 845; see also *Kupersmith* v. *Kupersmith*, supra, 146 Conn. App. 97. Thus, our Supreme Court held that "*Maris* makes clear that in order to impose sanctions pursuant to its inherent authority, the trial court must find *both* [1] that the litigant's claims were entirely without color *and* [2] that the litigant acted in bad faith." (Emphasis in original.) *Berzins* v. *Berzins*, supra, 663.

Accordingly, to determine whether the litigant's claims were entirely without color, the court must apply "[t]he standard for colorability [which] varies depending on whether the claimant is an attorney or a party to the litigation. . . . If the claimant is an attorney, a claim is colorable if a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts had been established. . . . If the claimant is a party to the litigation, a claim is colorable, for purposes of the bad faith exception to the American rule, if a reasonable person, given his or her first hand knowledge of the underlying matter, could have concluded that the facts supporting the claim might have been established." (Citations omitted; internal quotation marks omitted.) *McKeon* v. *Lennon*, 131 Conn. App. 585, 612–13, 27 A.3d 436, cert. denied, 303 Conn. 901, 31 A.3d 1178 (2011). Significantly, the sanctions in the present case were imposed against the defendant and not his attorney, and, thus, the latter standard for colorability guides our analysis.

On the other hand, in determining whether the litigant acted in bad faith, the court need only apply one standard. According to the bad faith standard, "the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's use of

oppressive tactics or its wilful violations of court orders; [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation." (Internal quotation marks omitted.) *Berzins* v. *Berzins*, supra, 306 Conn. 662.

"Moreover, our Supreme Court's holding in *Berzins* makes clear that the two required findings, i.e., colorability and bad faith, must be *separate* from each other"; *Rinfret* v. *Porter*, supra, 173 Conn. App. 509–10 (referring to *Berzins* v. *Berzins*, supra, 306 Conn. 663); and the court must set forth its factual findings with "a high degree of specificity." *Maris* v. *McGrath*, supra, 269 Conn. 848.

Mindful of the high degree of specificity standard, we conclude that the findings of the trial court in the present case do not satisfy the requirement in *Berzins* that the court find "*both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith." (Emphasis in original.) *Berzins* v. *Berzins*, supra, 306 Conn. 663; see *Perry* v. *Perry*, 312 Conn. 600, 630, 95 A.3d 500 (2014) (Supreme Court concluded that trial court, guided by *Maris*, was required to find both that movant's claims challenging attorney's fees were entirely without color and that he acted in bad faith, but "the trial court never mentioned *Maris* in its memorandum of decision. Therefore, the trial court did not make the required findings under *Maris* and, consequently, the [moving party] is entitled to a new hearing at which the trial court applies the proper standard."); see also *Light* v. *Grimes*, 156 Conn. App. 53, 68, 111 A.3d 551 (2015) (this court reversed award for attorney's fees when "although the [trial] court did find that the defendant's motion . . . was wasteful and bordering on frivolous, the court did not find that the defendant's claims were entirely without color and that he acted in bad faith"). Specifically, although the trial court here found that the defendant acted in bad faith and

supported that finding with a high degree of specificity in its memorandum of decision, it did not make similarly specified findings as to colorability. Cf. *Berzins* v. *Berzins*, supra, 306 Conn. 663 (reversing trial court's award of attorney's fees based on conclusion that "the court did not make a separate finding that the administrator acted in bad faith"); see generally *Kupersmith* v. *Kupersmith*, supra, 146 Conn. App. 98 ("[t]he court found generally both that the defendant's motion was entirely without color and that he acted in bad faith, yet the court did not support that finding with factual specificity").

Specifically, the trial court incorrectly set forth the applicable standard to determine whether a claim is colorable for purposes of the bad faith exception to the American rule. Because this case involved sanctions in the form of attorney's fees for the bad faith conduct by the defendant, the court should have applied the standard for colorability applicable to a party and not an attorney. To reiterate, that standard provides that if the claimant is a party, rather than an attorney, "a claim is colorable, for purposes of the bad faith exception to the American rule, if a reasonable person, given his or her first hand knowledge of the underlying matter, could have concluded that the facts supporting the claim might have been established." (Internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 847. Our Supreme Court has previously concluded that "[t]his is an appropriate reformulation of the standard, cast in terms applicable to a party, because it focuses on the party's firsthand knowledge of the facts and whether, given that knowledge, the party reasonably could have concluded that his or her claim might be established. This standard, moreover, takes into account the capacity of the party for truthfully or untruthfully recounting those facts, as well as the capacity for honest mistakes, recollections and disagreements over those facts." Id.

In the present case, the trial court's decision did not apply the aforementioned standard to determine whether the defendant's appeal was entirely without color. Rather, the trial court's decision noted: "*Maris* makes clear that in order to impose sanctions pursuant to its inherent authority, the trial court must find both that the litigant's claims were entirely without color and that the litigant acted in bad faith." In applying the foregoing authority to determine the issue of colorability, the trial court merely stated: "After reviewing the evidence that the defendant and/or his attorney had at the time that the appeal was taken and during the time that it was presented, the court would be hard-pressed to find that there was an existing colorable claim on appeal." Because the trial court did not apply the correct standard for colorability in its memorandum of decision, it is not clear whether it assessed the issue of colorability focusing on the defendant's firsthand knowledge of the facts and whether, given that knowledge, the defendant reasonably could have concluded that his claim might be established. See *Maris* v. *McGrath*, supra, 269 Conn. 847.

For example, in *Maris*, our Supreme Court applied the standard for colorability applicable to a party as opposed to his attorney. Id., 848. The Supreme Court concluded "that the trial court was justified in making the award of attorney's fees" based on the specific findings it identified in its memorandum of decision. Id. In particular, in discussing the trial court's finding that the plaintiff's claim was entirely without color, our Supreme Court stated: "First, the court specifically found that the plaintiff repeatedly had testified untruthfully . . . . The court specifically identified all of the numerous instances in which the plaintiff had testified untruthfully, and it specifically found that the plaintiff's claims were wholly without merit . . . . Second, the

matters about which the plaintiff repeatedly had testified untruthfully . . . were matters particularly within his firsthand knowledge . . . .'' (Internal quotation marks omitted.) Id. The court then concluded that the trial court's finding that the plaintiff's claim was entirely without color was ''based on ample and clear evidence, which the trial court specifically identified in its memorandum of decision.'' Id.

In *Keller* v. *Keller*, 167 Conn. App. 138, 150, 142 A.3d 1197 (2016), this court applied the foregoing standard for colorability applicable to a party and concluded: ''The [trial] court clearly stated that even if the plaintiff's claims were true, no reasonable person would find that her actions were justified.'' We continued by noting that the trial court's finding that the plaintiff proceeded without colorable claims was sufficiently detailed in its decision. Id., 151.

In the present case, there is no indication in the trial court's memorandum of decision that it applied the appropriate standard for colorability and considered whether the defendant's principal claim in his previous appeal was so lacking in factual and legal support that a reasonable person could not have concluded that the basis of the claim might be established. Although the trial court's memorandum of decision did discuss the defendant's knowledge of a factual stipulation pertaining to the ''but for'' legal issue of fraud in the underlying motion to open, this finding appears to relate to its determination on bad faith and not its determination on colorability. Specifically, the trial court's memorandum of decision states: ''At the very least, the defendant and his appellate counsel perpetuated an appeal knowing that counsel, the court, and the clients had agreed to proceed in a particular way. Nevertheless, in a bad faith and disingenuous way, the defendant and appellate counsel . . . proceeded with an appeal that was wholly lacking a factual and legal basis.'' There is no

similar finding as to whether the defendant's claims were not colorable.

There are no further indications in the record that the court made other findings of fact to support its conclusion that the defendant's principal claim in his previous appeal was entirely without color. For these reasons, we conclude that the present case is distinguishable from *Maris* and *Keller*, in which each court applied the appropriate standard for colorability and determined that the trial court's finding that the party acted without colorable claims was sufficiently detailed with a high degree of specificity. By contrast, the court in the present case did not delineate its finding of colorability with clear evidence and a high degree of specificity as required under our case law. *Berzins* v. *Berzins*, supra, 306 Conn. 663; *Maris* v. *McGrath*, supra, 269 Conn. 848. Therefore, the trial court failed to make the necessary finding pertaining to the colorability requirement of the bad faith exception set forth in *Maris*.

Accordingly, although the trial court found that the defendant acted in bad faith and supported that finding with a high degree of specificity in its factual findings, we conclude that it erred in applying *Maris* and subsequently awarding attorney's fees, as it failed to set forth its factual findings with "a high degree of specificity" concerning whether the defendant's previous appeal was entirely without color. *Maris* v. *McGrath*, supra, 269 Conn. 848; see also *Berzins* v. *Berzins*, supra, 306 Conn. 663. Moreover, there was no indication in the trial court's memorandum of decision that it applied the correct standard for colorability applicable to a party and considered whether the defendant's principal claim in his previous appeal was so lacking in factual and legal support that a reasonable person could not have concluded that the basis of the claim might be established. For the foregoing reasons, we conclude that the trial court abused its discretion in awarding

attorney's fees pursuant to the bad faith exception of the American rule because the court did not apply the standard set forth in *Maris*. See *Maris* v. *McGrath*, supra, 269 Conn. 847–48. Therefore, a new hearing is required at which the trial court must apply the proper standard applicable to a party as set forth in *Maris*, and its factual findings thereon must be made with a high degree of specificity.

The judgment is reversed and the case is remanded for further proceedings on the plaintiff's motion for attorney's fees in accordance with the preceding paragraph.

In this opinion the other judges concurred.

CATHEDRAL GREEN, INC. *v.* DOROTHY HUGHES ET AL.
(AC 38469)

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

Syllabus

The plaintiff landlord sought, by way of a summary process action, to obtain possession of an apartment that it had rented to the defendant tenant. The plaintiff and the defendant entered into a stipulated judgment pursuant to which the court rendered a judgment of possession in favor of the plaintiff and a stay of execution. In accordance with the stipulated judgment, the plaintiff agreed to allow the defendant and her minor child to remain in the apartment during the stay provided that, inter alia, the defendant no longer allow the child's father, M, a nonparty to the lease who previously had resided in the apartment and allegedly sold drugs there, to enter the premises, and that the defendant call the police should M enter the premises in the defendant's presence. Subsequently, the plaintiff sought an order of execution on the ground that M was seen on the premises with the defendant's knowledge and acquiescence. The evidence demonstrated that M was in the defendant's apartment and that he was recorded by a security camera following the defendant into the apartment. The trial court granted the plaintiff's request for an order of execution, finding that the defendant wilfully violated the stipulated judgment. On appeal to this court, the defendant claimed that the trial court improperly had relied on facts that were

not in evidence or that were not supported by the record, and failed to properly adjudicate the defendant's equitable nonforfeiture defense. *Held*:

1. The defendant failed to demonstrate that the trial court's material factual findings were clearly erroneous: this court could not conclude, in light of its review of the record, that the trial court impermissibly inferred that the plaintiff had encountered problems involving M's presence on the premises or that the stipulation was not entered into in light of those problems; moreover, allowing for all reasonable inferences, the court's description of the events depicted in the photographs from the security camera was not clearly erroneous, and, to the extent that there was any misstatement by the court regarding those events, it was harmless in light of the other undisputed evidence establishing that M was observed in the defendant's apartment with her knowledge and consent and that she never called the police to report his presence.
2. The trial court having applied the three part test established in *Fellows* v. *Martin* (217 Conn. 57) for determining whether a defendant is entitled to equitable relief from forfeiture of a tenancy, it recognized and applied the correct legal standard in considering the defendant's equitable nonforfeiture defense.
3. The trial court properly found that the defendant's breach of the stipulated judgment was wilful, the evidence having demonstrated that the defendant knowingly, voluntarily, and deliberately allowed M to be on the premises; the defendant never disputed that she invited M to her apartment, that she initially tried to hide his presence from other residents, and that she knew his presence was in violation of the stipulated judgment, and photographs from the security camera showed the defendant permitting M to enter the premises.

Argued March 28—officially released July 18, 2017

Procedural History

Summary process action brought to the Superior Court in the judicial district of Hartford, Housing Session, where the defendant William Moore was defaulted for failure to appear; thereafter, the court, *Woods*, *J.*, rendered judgment of possession for the plaintiff and stayed execution in accordance with the parties' stipulated agreement; subsequently, the court, *Hon. Joseph H. Pellegrino*, judge trial referee, granted the plaintiff's request for execution of the judgment and granted an equitable stay of execution to the named defendant,

and the named defendant appealed to this court; thereafter, the court, *Rubinow*, *J.*, granted the named defendant's motion for use and occupancy. *Affirmed.*

Sally R. Zanger, with whom was *Katrina R. Cessna*, for the appellant (named defendant).

James P. Sexton, with whom were *Matthew C. Eagan* and, on the brief, *Michael H. Clinton*, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The present appeal arises from a summary process action that initially was settled in November, 2014, by way of a stipulated judgment. In accordance with that stipulation, the court rendered a judgment of possession in favor of the plaintiff, Cathedral Green, Inc., execution of which it stayed through the end of January, 2017. During the stay, the plaintiff agreed to allow the defendant, Dorothy Hughes, and her minor child to remain in the defendant's apartment provided that, inter alia, the defendant no longer allow William Moore, her child's father and a nonparty to the lease, to have access to the premises, which included both the apartment and the common areas of the property.[1] The defendant now appeals from the trial court's postjudgment ruling of October 5, 2015, in which the court found that the defendant wilfully had violated the terms of the stipulated judgment. As a result, the court ordered execution of the judgment of possession.[2] The

[1] Moore also was named as a defendant in the underlying summary process complaint, but he never filed an appearance with the trial court, which rendered a default judgment against him indicating that he never had any right or privilege to occupy the premises. Moore never filed an appeal from the summary process judgment, nor has he participated in the present appeal. Accordingly, we refer to Hughes as the defendant throughout this opinion and to Moore by name.

[2] Although ordinarily an appeal will not lie from an execution issued in a summary process action because the execution merely effectuates the judgment of possession and, thus, is not itself an appealable order or judgment; see *Iannotti* v. *Turner*, 32 Conn. Supp. 573, 575, 346 A.2d 114, cert. denied, 169 Conn. 709, 344 A.2d 357 (1975); we construe the present appeal

defendant claims on appeal that the court improperly (1) relied upon facts that were not in evidence or that were not supported by the record, and (2) failed to adjudicate properly the defendant's equitable nonforfeiture defense.[3] We disagree and affirm the judgment of the trial court.

The following facts, which the court either set forth in its decision or are undisputed, and procedural history are relevant to our resolution of the defendant's claims. The defendant is a single mother who resides with her minor daughter in a subsidized apartment that is part of a housing complex, Cathedral Green, owned and operated by the plaintiff. In June, 2014, the plaintiff commenced the underlying action seeking to evict the defendant on the ground that she violated the terms of her lease. In particular, the plaintiff alleged that the defendant had allowed Moore to reside in the apartment despite the fact that he was not an authorized occupant under the lease. Further, the plaintiff alleged that Moore had "been coming and going on several occasions using the defendant's keys to enter the premises and has a lot of visitors meeting him briefly at the premises on several occasions during the day and night to transact illegal drug sales." According to the plaintiff, the defendant failed to cure the lease violations after she was notified of them by the plaintiff.

On November 25, 2014, the date set for the summary process trial, the parties, each of whom was represented by counsel, filed a joint motion for a stipulated judgment, which was accepted by the court, *Woods*, *J.* According to the parties' stipulation, the defendant

as more analogous to a challenge to the summary enforcement of a judgment, which, even in the case of a stipulated judgment, we have found constitutes an appealable final judgment. See *Bernet* v. *Bernet*, 56 Conn. App. 661, 664, 745 A.2d 827, cert. denied, 252 Conn. 953, 749 A.2d 1202 (2000).

[3] For clarity and ease of discussion, we have combined and reordered the claims as they are set forth in the defendant's brief.

agreed to pay reasonable use and occupancy payments going forward, and to repay $890 in unpaid rent in accordance with a repayment plan the parties agreed to "work out" by the end of the following month and to present to the court as a modification of the parties' stipulated agreement. The stipulation also provided that the defendant agreed to abide by all of the terms, rules, and conditions contained in the original lease with the plaintiff except as specifically modified by the terms of the stipulation.

Of particular relevance to the present appeal, the defendant agreed in the stipulated judgment to the following: "[S]he shall not allow or permit [Moore] to enter her unit or accompany her in the common areas of the property, including all outside areas and the parking lot. The defendant agrees that [Moore] is a trespasser and both Catholic Family Charities and [the Department of Children and Families] agree that [Moore] should not be allowed on the plaintiff's premises. As such, [the] defendant shall have an affirmative obligation to call the police should he enter the premises or the common areas in her presence. Further, the defendant agrees that if [Moore] is to visit the defendant's minor daughter, the visit or transfer shall occur off of the plaintiff's premises, including the common areas, driveway and parking lots. [The defendant] agrees that [the] plaintiff may treat [Moore] as a trespasser and call the police to keep him off of the premises." If the defendant was able to make all payments, as agreed, and to comply with all the other conditions of the stipulation, the plaintiff agreed to reinstate her as a tenant in good standing "on the earlier of the first day of the second month following full payment or February 1, 2017, but in no event sooner than December 31, 2015."

On July 27, 2015, however, the plaintiff filed an affidavit with the court noting the defendant's noncompliance with the terms of the stipulated judgment and seeking

an order of execution. The affidavit, signed by the plaintiff's property manager, Crystal Wise, stated that, despite the defendant's promise not to allow Moore on the premises, Moore had been observed "coming and going into the defendant's apartment and on the premises with the [defendant's] knowledge and acquiesce[nce]."

The court scheduled a hearing on the plaintiff's request for execution, which took place on September 8, 2015. At that hearing, the court heard testimony from the defendant; Wise; Kimberly May-Bailey, the director of community services at Catholic Charities, which oversees program services provided to some of Cathedral Green's tenants;[4] and Michelle Simon, a senior family specialist at Catholic Charities assigned to Cathedral Green.

May-Bailey testified that she and Simon observed Moore on the premises on July 9, 2015, after the stipulated judgment was in effect. She recounted that they were in the office at Cathedral Green when they received a phone call from a tenant regarding an issue at the playground. The women found the defendant's daughter at the playground unattended and escorted her back to the defendant's apartment because children were not supposed to play at the playground unattended. At that time, May-Bailey and Simon observed Moore inside the defendant's apartment with the defendant. When they confronted the defendant with the fact that his presence violated the stipulation, the defendant indicated that she was preparing Moore a birthday dinner. The women alerted the property manager of Moore's presence.

[4] According to May-Bailey's uncontested testimony, Cathedral Green is a twenty-eight unit facility composed of fourteen "service enriched" units funded by the state to provide special services to families in need, and fourteen other units that are designated as affordable housing. The defendant lived in one of the affordable housing units.

Wise testified regarding photographs that were taken from security camera video footage which showed Moore following the defendant into the premises on July 3, 2015. Wise was familiar with Moore and could identify him in the photographs because of an encounter she had with him in early June, 2015, when he attempted to enter the premises allegedly to deliver a birthday present and she was alerted by a maintenance worker and asked him to leave. The court admitted three of the five photographs into evidence.

In her own testimony, the defendant acknowledged that she had signed the stipulated agreement in this matter with the assistance of an attorney, who had advised her regarding the terms of the agreement. She never informed her attorney that she did not understand the agreement. She admitted that the defendant was in her apartment with her on July 9, 2015. She never disputed that she had been preparing Moore a dinner for his birthday or suggested that he had shown up at the apartment uninvited. She also admitted that he was on the premises on other dates, including on July 3, 2015, when he followed her into the building, and that she had never, at any time, called the police to have him removed from the premises.

The court granted the defendant's request to file a posthearing brief, with a reply from the plaintiff to follow. The defendant filed her brief on September 15, 2015, and the plaintiff filed its reply on September 23, 2015.

In her posttrial memorandum, the defendant argued that the doctrine of equitable nonforfeiture should bar dispossession in this case because, even if the defendant violated the stipulated judgment, the harm to the defendant and her child in losing their rent-subsidized housing and the attendant stability it afforded far outweighed any harm to the plaintiff, which harm she characterized as being limited to the inconvenience of

having to make phone calls to the police to keep Moore off of the premises.

The plaintiff took the position that the court was bound to enforce a validly rendered stipulated judgment and that, because the evidence demonstrated that the defendant had violated the agreement, the plaintiff was entitled to execution as a matter of law. With respect to the equitable nonforfeiture defense, the plaintiff argued that a balancing of all the equities actually favored the plaintiff. Further, it argued that the harm caused by the defendant's wilful violations of the stipulated agreement went beyond simply the harm and inconvenience to the plaintiff, and included potential harm to other tenants in allowing a trespasser and alleged drug dealer onto the premises.

On October 5, 2015, the court, *Hon. Joseph H. Pellegrino*, judge trial referee, issued a memorandum of decision granting the plaintiff's request for an order of execution, finding that the defendant wilfully had violated the stipulation by continuing to allow Moore on the premises and by failing to call the police as she had agreed to do. The court considered and rejected the defendant's equitable defense, finding, on balance, that the various factors did not weigh in favor of the defendant. Although it overruled the defendant's objection to an order of execution, it granted an equitable stay until January 1, 2016, in order to give the defendant time to secure new living arrangements for herself and her child. This appeal followed.

I

The defendant first claims that the court's decision improperly relied upon facts that were not in evidence or that were not supported by the record. The plaintiff counters that the facts challenged by the defendant were not dispositive of the issue before the court and, thus, even if there was some error with regard to the

disputed findings, it was harmless. We conclude that the defendant has failed to demonstrate that any of the court's material factual findings were clearly erroneous.

We begin by setting forth our standard of review, which is well settled. "If the factual basis of the court's decision is challenged, our review includes determining whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Juliano* v. *Juliano*, 96 Conn. App. 381, 385, 900 A.2d 557, cert. denied, 280 Conn. 921, 908 A.2d 544 (2006).

The defendant first takes issue with the court's statement that the parties agreed to the stipulation "[i]n light of the problems that the plaintiff has encountered with [Moore] . . . ." The defendant contends that the record is silent as to why the parties decided to agree on the stipulation and that there was no evidence of any actual problems involving Moore, only the unsubstantiated allegations in the plaintiff's summary process complaint. The defendant argues that the court simply assumed that the allegations in the complaint, particularly the allegations of drug dealing on the premises, were true, "despite the execution of a stipulated agreement that means that the parties decided not to test the allegations of the complaint."

The court, however, never stated at the hearing or in its written decision that it was treating the allegations in the summary process complaint as true. The court never references any particular allegation from the complaint. The court's reference in its memorandum to "problems" is more properly understood in the context of the preceding finding that those managing the housing complex did not want Moore on the premises. The defendant does not challenge that finding, which is

clearly supported by the record. Moreover, the defendant seems to ignore that, in the stipulation, the defendant acknowledges that Moore was a trespasser on the premises, which status alone would have provided a sufficient basis for the court to describe his presence as a "problem" for the plaintiff. The court, however, never elaborated regarding the reasons for the plaintiff not wanting Moore on the property. In fact, when the plaintiff's attorney referenced Moore's alleged drug dealing during his argument, the court clearly indicated that that was an issue that was not before the court and that there was no evidence before the court regarding those allegations.

Certainly, in its role as the trier of fact, the court was permitted to draw any reasonable factual inference from the evidence, whether direct or circumstantial. In light of our review of the record as a whole, we cannot conclude that the court impermissibly inferred that the plaintiff had encountered problems involving Moore's presence on the premises or that the stipulation was not entered into "in light of" those problems. The defendant's suggestion that the court's statement was somehow clearly erroneous and also so relevant that it tainted the court's consideration of the issues before it simply lacks any merit.

The defendant also takes issue with the court's finding that "[t]here were pictures from security videos, introduced by [Wise], that show [Moore] entering the building and *the defendant holding the door for him to enter*." (Emphasis added.) The defendant argues that none of the photographs entered into evidence actually shows the defendant "holding the door" for Moore. We conclude that, allowing for all reasonable inferences, the court's description of the events depicted in the photographs was not clearly erroneous, and, to the extent that there was any misstatement, it was harmless in light of the other undisputed evidence establishing

that, on a separate date, Moore was observed in the defendant's apartment with her knowledge and consent and that she never called the police seeking Moore's removal from the premises at any time. Furthermore, whether she held the door open for Moore on that particular date or simply let him enter behind her was only marginally relevant to the material issue before the court.

The two photographs at issue were marked as plaintiff's exhibits four and five. They each contained date and time stamps. It is undisputed that exhibit four shows the defendant at the front door of the building with Moore following close behind. The next photo, taken less than three seconds later, shows Moore nearly at the door, which is now swung wide open. Given the short period of time that elapsed between the two photos, and the fact that no one else is shown between the defendant and Moore, it is not unreasonable to infer that the defendant was either holding the door open or was aware that Moore was close behind and entering the premises. The defendant herself testified that Moore was on the premises with her knowledge on July 3, 2015, the date the photographs were taken.

Even if we agreed with the defendant that the court's finding was clearly erroneous, which we do not, the defendant cannot demonstrate that the court's specific finding that she held the door open played a significant role in the court's decision that the defendant had violated the terms of the stipulated judgment, and, thus, any error was harmless. After all, the testimony of Simon and May-Bailey, each of whom testified regarding Moore's presence in the defendant's apartment for a birthday dinner, is far more damaging.

The remainder of the defendant's arguments in support of this claim are equally unavailing and warrant

no further discussion. In sum, we are utterly unconvinced that the court's decision was rendered on the basis of clearly erroneous factual findings, and, if any misstatements exist, they were immaterial to the court's analysis of the issues before it and, thus, harmless.

II

The defendant also claims that the court failed to adjudicate properly her defense of equitable nonforfeiture. Although there are several aspects to the defendant's claim, we need address only two.[5] First, we consider whether the court failed to apply the correct legal standard. Second, we address whether the court improperly determined that the defendant's breach of the stipulation was wilful. We conclude that the court both applied the correct legal framework and properly exercised its discretion by rejecting the defendant's equitable defense.

We begin by setting forth the applicable standards of review and legal principles relevant to the defendant's equitable nonforfeiture defense. To the extent that the defendant challenges whether the court chose and applied the correct legal standard in addressing her equitable defense, this raises a question of law over which our review is plenary. See *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 183, 74 A.3d 1278 (2013) ("[i]t is well established that [t]he . . . determination of the proper legal standard in any given case is a question of law subject to our plenary review" [internal quotation marks omitted]). Any challenge to how the court exercised its equitable authority, however, is entitled to

[5] Because we conclude that the court properly found that the defendant wilfully breached the stipulated judgment, and because that finding is dispositive of whether the defendant established her entitlement to equitable relief, we need not address the defendant's other arguments, namely, whether the court improperly balanced the relative harm of the parties or whether it improperly determined that the breach of the stipulated judgment was not reparable.

considerable deference. "We employ the abuse of discretion standard when reviewing a trial court's decision to exercise [or not exercise] its equitable powers. . . . Although we ordinarily are reluctant to interfere with a trial court's equitable discretion . . . we will reverse [if] we find that a trial court acting as a court of equity could not reasonably have concluded as it did . . . or to prevent abuse or injustice. In reviewing claims of error in the trial court's exercise of discretion in matters of equity, we give great weight to the trial court's decision. . . . [E]very reasonable presumption should be given in favor of its correctness. . . . The ultimate issue is whether the court could reasonably conclude as it did." (Citations omitted; internal quotation marks omitted.) *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 407, 158 A.3d 772 (2017).

In determining whether a defendant is entitled to equitable relief from forfeiture of a tenancy, our Supreme Court has reiterated that courts should look to the test arising from its decision in *Fellows* v. *Martin*, 217 Conn. 57, 66–67, 584 A.2d 458 (1991). See *Presidential Village, LLC* v. *Phillips*, supra, 325 Conn. 406–407. In *Fellows*, the court clarified that, under Connecticut law, "equitable defenses and counterclaims implicating the right to possession are available in a summary process proceeding."[6] *Fellows* v. *Martin*, supra, 62. The court in *Fellows* also made clear, however, that "[a] court of equity will apply the doctrine of clean hands to a tenant seeking such equitable relief; thus, a tenant whose breach was 'wilful' or 'grossly negligent' will not be entitled to relief." Id., 67.

Accordingly, *Fellows* established that an equitable nonforfeiture defense can succeed only if "(1) the tenant's breach was not [wilful] or grossly negligent; (2)

[6] "Although originally articulated in the context of the nonpayment of rent, the doctrine of equitable nonforfeiture may be applicable in evictions arising from violations of other lease terms." *Presidential Village, LLC* v. *Phillips*, supra, 325 Conn. 407.

upon eviction the tenant will suffer a loss wholly disproportionate to the injury to the landlord; *and* (3) the landlord's injury is reparable." (Emphasis added.) *Cumberland Farms*, *Inc.* v. *Dairy Mart*, *Inc.*, 225 Conn. 771, 778, 627 A.2d 386 (1993), citing *Fellows* v. *Martin*, supra, 217 Conn. 66–67. This enumerated test, formulated from the holding in *Fellows*, is stated in the conjunctive, and, therefore, the failure of any prong of that test means that equitable relief is unavailable. See *Presidential Village*, *LLC* v. *Phillips*, supra, 325 Conn. 410–11 (reversing trial court's granting of equitable relief to tenant because court engaged in improper balancing of harm under prong two); see also *BNY Western Trust* v. *Roman*, 295 Conn. 194, 207 n.11, 990 A.2d 853 (2010) (limiting appellate review to one element of conjunctive test); *Berzins* v. *Berzins*, 105 Conn. App. 648, 654, 938 A.2d 1281 (same), cert. denied, 289 Conn. 932, 958 A.2d 156 (2008). The burden of establishing an equitable defense in a summary process action falls on the party asserting that defense. See, e.g., *Lynwood Place*, *LLC* v. *Sandy Hook Hydro*, *LLC*, 150 Conn. App. 682, 690, 92 A.3d 996 (2014) (holding summary process defendant had burden of proving its equitable defense of laches.)

A

Turning to the defendant's arguments, to the extent that she suggests that the trial court failed to apply the correct legal standard in considering her equitable defense, we reject that aspect of her claim. As the defendant correctly sets forth in her brief, the standard that applies is well settled. As set forth previously, the legal framework discussed in *Fellows* and the aforementioned three part test are the applicable legal standards that a court must apply in considering a properly raised claim of equitable nonforfeiture in a summary process action. The court did so in this case.

In its memorandum of decision, the court clearly identifies that the defendant sought to have it exercise

its equitable powers to prevent a forfeiture by the defendant under the facts of this case. The court cites to *Fellows* and indicates that it must consider the wilfulness of the defendant's breach, whether an eviction would cause disproportionate injury to the defendant when compared to the plaintiff's injury, and whether any injury to the plaintiff is reparable. Although the court discusses in limited detail only the first and last elements, it clearly states that, in reaching its decision, it considered all of the equitable factors argued by the defendant. The defendant has not shown otherwise. See *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 132, 74 A.3d 1225 (2013) (noting presumption that court of general jurisdiction acts "only after due consideration, in conformity with the law and in accordance with duty" [internal quotation marks omitted]). Accordingly, on the basis of the record before us, we conclude that the court both recognized and applied the proper legal standard in this case.

B

Finally, the defendant argues that the court improperly found that her breach of the stipulated judgment was wilful. We are not persuaded, and, as previously stated, our resolution of this issue is dispositive of the remainder of the defendant's claim regarding her equitable nonforfeiture defense.

"Whether a party's conduct is wilful is a question of fact. . . . The term has many and varied definitions, with the applicable definition often turn[ing] on the specific facts of the case and the context in which it is used." (Citation omitted; internal quotation marks omitted.) *Saunders* v. *Firtel*, 293 Conn. 515, 530, 978 A.2d 487 (2009). "As we previously have observed . . . wilful has been defined ranging from 'voluntary; knowingly; deliberate . . . [i]ntending the result which actually comes to pass; designed; intentional; purposeful;

not accidental or involuntary' to '[p]remeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences.' " Id., 530–31. Wilful misconduct has also been defined as intentional conduct that is "deemed highly unreasonable or indicative of bad faith." Id., 531.

With respect to whether the defendant's breach of the stipulation was wilful, the court stated as follows: "[T]he court finds that the evidence is clear that the defendant wilfully violated the stipulation. She invited [Moore] to her apartment for a birthday party . . . . Furthermore, the video evidence presented at trial is further evidence that [the defendant] allowed [Moore] to be on the premises without calling the police, in violation of the written stipulation." Those findings, along with our review of the record as a whole, fully support the court's determination that the defendant wilfully violated her agreement under the stipulation to "not allow or permit [Moore] to enter her unit or accompany her in the common areas of the property, including all outside areas and the parking lot."

The defendant was represented and assisted by counsel when she signed the stipulation. She testified that her counsel went over the terms of the stipulation with her and that she never told her attorney that she did not understand what was in the agreement. Although she also testified that she did not fully understand her duties under the stipulation, the trial court was not required to credit that testimony. Furthermore, her alleged lack of understanding was belied by her testimony that she had instructed Moore that he was not allowed on the premises and that she was in the process of obtaining a restraining order against Moore. The defendant never disputed that she invited Moore to her apartment on his birthday to cook him dinner, and it can be reasonably inferred from the fact that she and Moore initially tried to hide his presence from Simon

and May-Bailey that she knew his presence was in violation of the stipulation and that she sought to avoid being caught. Nor was the birthday dinner an isolated incident as evidenced by the photographs showing the defendant permitting Moore to enter the premises on a prior occasion. The defendant thus knowingly, voluntarily, and deliberately allowed Moore to be on the premises despite her promise not to allow him in her apartment or the common areas. The defendant has failed to demonstrate that the court improperly determined that her violation of the stipulation was wilful, which finding alone was a sufficient basis for denying her equitable relief.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TYRAN SAMPSON
(AC 37925)

Lavine, Beach and Flynn, Js.

Syllabus

Convicted of the crime of interfering with an officer, as a lesser offense included within the crime of assault of public safety personnel, the defendant appealed to this court. The defendant was a passenger in a vehicle driven by his brother that nearly collided with a police officer who was responding to a report of a robbery in East Hartford, and they were later involved in a police pursuit involving officers from the Hartford and East Hartford Police Departments. After the vehicle stopped, the driver fled, and two police officers, O and P, approached the passenger side of the vehicle and ordered the defendant to exit the vehicle. The defendant did not obey the order and, instead, engaged in a struggle with police during which he kicked P in the right forearm. The defendant was eventually removed from his vehicle and secured in handcuffs. *Held*:

1. The defendant could not prevail on his claim that the trial court violated his constitutional right to confrontation by granting the state's motion in limine to exclude certain evidence relating to counseling received by O in connection with an arrest report she had written previously in an unrelated case, which the defendant claimed could have been used to

impeach O's testimony; that court's ruling that the evidence was not relevant was not an abuse of discretion, as the excluded evidence concerned verbal counseling and training received by O regarding how to write more detailed police reports and, thus, had no relation to the ability or propensity of O to tell the truth, nor did it relate to the issue of whether the defendant had kicked P.

2. The trial court did not abuse its discretion or violate the defendant's right to present a defense by finding inadmissible certain testimony of three police officers concerning the details of the police investigation into the robbery in East Hartford, police radio dispatches during the pursuit, and information about the charges brought against the defendant's brother arising out of his conduct in driving the vehicle involved in the pursuit, which the defendant claimed would have demonstrated that the police officers had acted unreasonably and in excess of their authority, and therefore was relevant to the issue of the reasonableness of the force used by P in arresting the defendant: the excluded testimony related to a collateral issue that was not directly relevant to the elements of the crime charged against the defendant or the lesser included offense, did not tend to prove or to disprove any element of the offense, and was not relevant to the issue of the reasonableness of P's use of force; moreover, because the essence of the defendant's defense, which was the reasonableness of P's use of force, was before the jury, the court did not improperly limit the defendant's ability to present the defense.

Argued January 10—officially released July 18, 2017

Procedural History

Substitute information charging the defendant with the crimes of assault of public safety personnel and failure to appear in the first degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the court, *D'Addabbo*, *J.*, granted the defendant's motion to sever the charge of failure to appear; thereafter, the court granted the state's motion in limine to preclude certain evidence; subsequently, the charge of assault of public safety personnel was tried to the jury before the court; verdict and judgment of guilty of the lesser included offense of interfering with an officer, from which the defendant appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Duby*, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, was *Brian Preleski*, state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Tyran Sampson, appeals from the judgment of conviction, rendered after a jury trial, of interfering with an officer in violation of General Statutes § 53a-167a. The defendant claims that the trial court violated (1) his right to confrontation by excluding certain impeachment evidence as to a state's witness and (2) his right to present a defense by prohibiting the introduction of certain testimony. We disagree and affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On June 10, 2012, at approximately 9:52 p.m., Daniel Caruso, a sergeant with the East Hartford Police Department, responded to a report of an armed robbery at the Family Dollar store in East Hartford. While en route to the scene, a Toyota Camry crossed into his lane of travel and Caruso swerved to avoid a collision. Caruso's attempt to stop the Camry was unsuccessful. He was able to provide the department with a description of the vehicle and its license plate number. The police were able to determine the address of the person who had rented the Camry. When Caruso arrived at that address, he saw the Camry drive by and pursued the vehicle again. Paul Neves, a sergeant with the East Hartford Police Department, and other East Hartford police officers also responded to the address after being notified by dispatch that the address belonged to the renter of the Camry. Caruso followed the Camry, but stopped the pursuit when the Camry entered Interstate 84 traveling in the wrong direction.

At approximately 10:27 p.m., officers with the Hartford Police Department picked up the pursuit of the Camry. The pursuit concluded when police officers

deployed stop sticks that disabled the vehicle. The defendant was in the front passenger seat of the Camry, and D'Amico Sampson, the defendant's brother, had been driving the car. The defendant and his brother were suspected by the police to have engaged in the armed robbery in East Hartford earlier that evening.[1]

Once the vehicle stopped, the driver exited the vehicle and fled on foot, while the defendant remained in the passenger seat. Tonya Ortiz and Anthony Pia, officers with the Harford Police Department, approached the passenger side of the vehicle and ordered the defendant to exit the vehicle. The defendant did not comply with the order.

Pia opened the passenger door and noticed the defendant leaning toward the driver's side of the car "as if he was trying to get over to the driver's side either to get away or get into the driver's seat of the car." In response, Pia pulled on the defendant's shirt. As the defendant continued to reach toward the driver's side, Ortiz gave him "a couple foot strikes" in order to get him to release his hand from the steering wheel and center shift. The defendant broke away, and kicked Pia in the right forearm. The defendant continued to struggle with Pia and tried to take Pia's gun. Pia struck the defendant in the forehead; he then was able to remove the defendant from the vehicle. The defendant began "violently thrashing, twisting his body on the ground, resisting arrest." The officers tried to place the defendant in handcuffs and, after a struggle, the defendant was finally secured in handcuffs. The defendant began shouting that he was "going to beat the case" and that he had been drinking.

Following a jury trial, the defendant was convicted of interfering with an officer.[2] He was sentenced to one

[1] The defendant and his brother later were determined by police not to have had any involvement with the East Hartford robbery.

[2] The jury found the defendant not guilty of the greater offense of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (1).

year incarceration, consecutive to a sentence he was then serving.[3] This appeal followed.

I

The defendant first claims that the court violated his right to confrontation[4] in granting the state's motion in limine to exclude certain evidence that he claimed would have impeached Ortiz' testimony. We disagree.

Prior to the presentation of evidence, the state filed a motion in limine seeking to limit the scope of the cross-examination of its witness, Ortiz, regarding internal affairs materials of the Hartford Police Department that the state had disclosed to the defense. The state argued that the materials could not properly be used for impeachment purposes because the materials did not relate to Ortiz' veracity. At issue was a letter from a sergeant of the Hartford Police Department to the prosecutor indicating that the department's computer system revealed counseling that Ortiz had received in 2009 concerning an arrest report that she had written. Although probable cause had existed for the arrest, Ortiz was counseled to include more details in her reports. Defense counsel reported receiving an additional memorandum about the counseling as well. Defense counsel maintained that the defendant did not kick Pia, and that testimony of Ortiz to the contrary could more properly be evaluated by the jury if it had the benefit of the arguably impeaching information. The court allowed voir dire of Ortiz prior to ruling.

[3] The defendant was sentenced to five years incarceration and four years of special parole for violation of probation as a further consequence of his conviction.

[4] The defendant makes this claim pursuant to both the federal and state constitutions. Because the defendant did not provide a separate analysis of the state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we will review the defendant's claim only under the federal constitution. See, e.g., *Barros* v. *Barros*, 309 Conn. 499, 507 n.9, 72 A.3d 367 (2013).

Outside the presence of the jury, Ortiz testified that in April, 2009, she received verbal counseling regarding an arrest report that did not contain enough information. She testified that the counseling was not disciplinary, there was no concern about the truthfulness of the report, and that the arrest itself had been valid. She further testified that, as a result of the counseling, she went to a one day training program on report writing. The state argued that the matter was not a proper subject for cross-examination because the counseling was not disciplinary in nature and did not relate to Ortiz' ability or propensity to tell the truth. The defendant's attorney argued that the counseling was disciplinary in nature and, even if it were not, a history of writing police reports in a negligent manner was relevant to her ability to tell the truth. The court granted the motion in limine, reasoning that the incident did not reflect on Ortiz' veracity, but rather concerned her report writing ability at a time when she had been on the police force for less than two years.[5]

At trial, Ortiz testified that she approached the passenger side of the vehicle after it had stopped. She saw the defendant reach for the steering wheel and Pia attempt to remove the defendant from the vehicle. She saw the defendant kick Pia. She testified that she kicked the defendant after the defendant kicked Pia. She noted that the defendant continued to struggle. On cross-examination, she testified that she had developed strong relationships with her fellow officers, that police culture valued solidarity, and that her ability to see during the event was hampered by dust, dirt, and smoke in the air.

[5] The constitutional claim was not preserved at trial, but we review the matter pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The record is adequate for review, but the defendant was not deprived of a constitutionally protected right.

"Generally speaking, the Confrontation Clause[6] guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . The confrontation clause does not, however, 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. . . . 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. . . . The proffering party bears the burden of establishing the relevance of the offered testimony." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Reeves*, 57 Conn. App. 337, 344–45, 748 A.2d 357 (2000).

"Under the abuse of discretion standard we make every reasonable presumption in favor of upholding the trial court's rulings, considering only whether the court reasonably could have concluded as it did. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail. . . . If, however, we conclude that the trial court improperly excluded certain evidence, we will proceed to analyze [w]hether [the] limitations on impeachment, including cross-examination, [were] so severe as to violate [the defendant's rights

[6] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

under] the confrontation clause of the sixth amendment . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Annulli*, 309 Conn. 482, 491–92, 71 A.3d 530 (2013).

The issue, then, is whether the court abused its discretion in excluding the evidence showing that Ortiz had received counseling regarding report writing. The defendant argues that the court's ruling prohibited him from placing relevant impeachment material before the jury. The defendant argues that the material was relevant because it related to Ortiz' ability to report an incident accurately. We do not agree.

The excluded evidence concerned verbal counseling and training received by Ortiz regarding how to write more detailed police reports. The court was justified in finding that the evidence had no relation to the ability or propensity of Ortiz to tell the truth, and certainly had nothing to do with the question of whether the defendant had kicked Pia. The counseling and training pertained only to her ability to write *factually* detailed police reports. Accordingly, the court did not abuse its discretion in precluding evidence regarding counseling received by Ortiz concerning report writing. Compare § 6-6 of the Connecticut Code of Evidence (inquiry into specific instances of conduct probative of witness' character for untruthfulness permitted). Having concluded that the trial court did not abuse its discretion in determining that the evidence was not relevant, this court concludes that the defendant's constitutional claim necessarily fails.[7] See *State* v. *Annulli*, supra, 309 Conn. 492 n.6.

II

The defendant next claims that the court deprived him of his right to present a defense by finding inadmissible certain testimony of three East Hartford Police

[7] We note that the defendant effectively cross-examined Ortiz on several topics, including her desire to support her colleagues and her compromised

Officers, Jason Cohen, Neves and Caruso. He argues that one theory of defense was aimed at the requirement that, to be found guilty of interfering with an officer in violation of § 53a-167a, the officer must have been acting "in the performance of his duties." The defendant claims that evidence tending to show that the Hartford police were acting unreasonably and in excess of their authority was improperly excluded. More specifically, he claims that the court's rulings excluding testimony about the investigation of the East Hartford robbery, aspects of the various pursuits, and other crimes for which the police may have suspected the defendant and his brother were erroneous. We disagree.

Cohen testified to the jury that on the night of June 10, 2012, he was assigned to investigate a robbery at the Family Dollar store in East Hartford. The state objected to this line of questioning. Outside the presence of the jury, the state argued that details of the investigation of the East Hartford robbery were not relevant to the crimes charged, which directly involved only the confrontation between the Hartford officers and the defendant in Hartford. Cohen testified, in an offer of proof, that after investigating the robbery at the Family Dollar store by interviewing witnesses, reviewing phone records and examining surveillance footage, he determined that one suspect was approximately five feet two inches tall and the other suspect was approximately five feet five inches tall. He further testified that his investigation cleared the operator and passenger of the Camry that was stopped on the night of June 10, 2012, as suspects in the robbery.

The court ruled that the details of the investigation pertained to a collateral issue that was not directly relevant to the elements of the crime charged, but ruled

ability to observe the incident. We also note that the jury found the defendant not guilty of the charge of assault of public safety personnel.

that Cohen would be permitted to testify that the defendant and his brother were cleared as suspects in the robbery. In the presence of the jury, then, Cohen testified that the defendant and his brother were eliminated as suspects in the Family Dollar store robbery.

Prior to the testimony of Neves and Caruso before the jury, the defendant's attorney made an offer of proof as to certain testimony he wanted to elicit from the officers. Neves testified about his involvement in the pursuit of the Camry by East Hartford police.[8] He stated that he monitored Caruso's chase of the vehicle on his radio and that Caruso described the vehicle as a white Toyota Camry and provided its license plate number. Neves further testified that, while monitoring the radio in his police cruiser, he heard a Hartford Police Department dispatch indicating that Hartford police officers had begun pursuit of the Camry after East Hartford police suspended their pursuit. He heard that the vehicle in question was also suspected of having been involved in a robbery in Hartford. After East Hartford police dispatch informed Hartford police dispatch that the vehicle was also suspected of a robbery in East Hartford, East Hartford dispatch then so informed Neves. The following day, Neves spoke with the communications supervisor at the East Hartford Police Department and listened to dispatches between the Harford and East Hartford Police Departments and between the East Hartford police dispatcher and himself.

Caruso testified in the offer of proof that at 9:52 p.m. on June 10, 2012, he learned through police dispatch that there had been a report of a robbery at the Family Dollar store in East Harford. He described his near

[8] Neves and Caruso testified during their respective offers of proof regarding the details of the pursuit of the Camry by East Hartford police. The state did not object to the admission of this evidence, and evidence of the details of the pursuit of the vehicle by East Hartford police officers was admitted into evidence.

collision with the Camry and his pursuit of the vehicle. He testified that Sampson, the operator of the vehicle and the defendant's brother, was arrested and charged with operating a motor vehicle while his license was under suspension, reckless driving, engaging police in pursuit, illegal entry onto a limited access highway, interfering with an officer and reckless endangerment in the first degree for placing the passenger in danger. Caruso further testified that the victims of the Family Dollar store robbery were unable to identify the perpetrator and that Sampson denied involvement in the robbery. He further testified that he, himself, had no direct involvement with the defendant that evening.

At the conclusion of the offer of proof, the state objected to Neves' testimony concerning the dispatches on the ground that it constituted irrelevant hearsay. The state objected to Caruso's testimony concerning the events surrounding the exculpation of the defendant and Sampson from the robbery on the ground of relevancy. The court ruled that the testimony of Neves, and Caruso regarding the investigation into the robbery and ultimate exculpation of the defendant and Sampson from the robbery was irrelevant because it would not assist the trier of fact in determining whether the state had met the elements of the crime of assault of public safety personnel or the lesser included offense of interfering with an officer. The court further reasoned that, in any event, the results of the robbery investigation were already in evidence. The court sustained the state's objection to all of Neves' testimony regarding the ultimately mistaken information regarding the defendant's possible involvement in the robbery in Hartford, reasoning that it was not relevant and was hearsay. The court further ruled that Caruso's testimony regarding the charges brought against Sampson was not relevant.

"[T]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . When defense evidence is excluded, such exclusion may give rise to a claim of denial of the right to present a defense. . . . A defendant is, however, bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes." (Citation omitted; internal quotation marks omitted.) *State* v. *West*, 274 Conn. 605, 624–25, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005).

Section 4-1 of the Connecticut Code of Evidence provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." "As it is used in [the Connecticut Code of Evidence], relevance encompasses two distinct concepts, namely, probative value and materiality. . . . Conceptually, relevance addresses whether the evidence makes the existence of a fact material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . In contrast, materiality turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law. . . . If evidence is relevant and material, then it may be admissible." (Citations omitted; emphasis omitted; internal

quotation marks omitted.) *State* v. *Zillo*, 124 Conn. App. 690, 696–97, 5 A.3d 996 (2010). "[T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 272 Conn. 515, 542, 864 A.2d 847 (2005).

The defendant argues that the excluded testimony of Cohen, Neves and Caruso was relevant to the issue of the reasonableness of the force used by Pia in arresting the defendant, and that he was entitled to the jury's consideration of evidence relevant to that issue. Specifically, the defendant claimed that if Pia's use of force was unreasonable, his actions were not within the scope of his duties, and, as a result, the defendant could not be guilty of assault of public safety personnel.[9] The defendant also argues that the radio dispatches from East Hartford police officers about the robbery investigation were not hearsay because they were offered for the effect on the listener, not for the truth of the matter asserted.[10] He contends that it would have been reasonable for the finder of fact to assume, on the basis of the dispatches, that the Hartford police officers were aware of the reported height of the robbery suspects, which was shorter than the defendant's height,[11] and for the police officers to have assumed, mistakenly, that

[9] The lesser offense of interfering with an officer, § 53a-167a (a), of which the defendant was convicted, provides in relevant part: "A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer . . . *in the performance of such peace officer's . . . duties*." (Emphasis added.)

[10] "Statements of declarants offered to show their effect on the listener, not for the truth of the contents of the statements, are not hearsay and are admissible." *Dinan* v. *Marchand*, 279 Conn. 558, 572, 903 A.2d 201 (2006).

[11] The defendant testified that he is six feet one inch tall.

the suspects were armed. He argues that this evidence tends to show that Pia, acting on incorrect information, unreasonably pursued what he incorrectly thought was a dangerous perpetrator of an armed robbery and, thus, that Pia was not acting in the performance of his duties.[12]

The court did not abuse its discretion in excluding testimony concerning the radio dispatches. Neves testified during the offer of proof that he heard radio dispatches indicating that Hartford police continued pursuit of the vehicle after East Hartford police ended their pursuit, and that the vehicle was also suspected to have been involved in a Hartford robbery. The effect, if any, that the dispatches had on the listener, Neves, who was not involved in the struggle with the defendant, was not relevant to the reasonableness of Pia's use of force. More fundamentally, there was no direct evidence that Pia heard the same dispatches. The defendant introduced, through cross-examination of Pia, the essence of the radio dispatches that Pia had heard, which showed that Pia had reason to believe that East Hartford police had been pursuing the vehicle because of a possible connection with an East Hartford armed robbery. Pia, however, testified that he did not remember receiving a radio dispatch stating that the vehicle was also suspected of having been involved in a Hartford robbery.

We also conclude that the court did not abuse its discretion in ruling that Cohen's testimony about the details of the investigation of the East Hartford robbery

[12] We have some difficulty in fathoming the defendant's theory. He does not contest that the Hartford police pursued the defendant and his brother, who refused to pull over, in a wild chase that ended only by the use of stop sticks. The defendant's brother fled on foot, leaving the defendant in the car. The defendant did not follow the officer's orders but, rather, engaged in elusive tactics and struck an officer. The defendant was free to introduce evidence regarding the amount of force that the officers used.

was not relevant. The testimony setting forth the details of Cohen's investigation pertained to a collateral issue that did not tend to prove or to disprove any element of the charged offense or any element of the lesser included offense. His investigation occurred *after* the defendant's arrest, and, therefore, could not have been a factor influencing Pia's actions on the night of the arrest. Cohen, Caruso and Neves never testified that the height of the robbery suspects was included in the radio dispatches, and a reasonable inference could not be drawn that Pia heard a radio dispatch containing that information. Cohen, in fact, was permitted to testify that the defendant and Sampson were later eliminated as suspects in the East Hartford robbery.

The court did not abuse its discretion in concluding that information about the charges brought against Sampson arising out of his actions as the driver of the Camry was not relevant. There was evidence before the jury as to the details of the pursuit of the Camry through East Hartford and Hartford. The charges brought against Sampson did not tend to prove or to disprove any element of the crime charged against the defendant, or of the lesser included offense, nor did it have any tendency to prove or disprove the reasonableness of the force used by Pia.

For the foregoing reasons, we determine that the court did not abuse its discretion in ruling that portions of the proffered testimony of Cohen, Neves, and Caruso were not relevant. The essence of the defense—the reasonableness of Pia's use of force—was before the jury and the court did not improperly limit the defendant's ability to present the defense. Accordingly, we conclude that the defendant's right to present a defense was not violated.

The judgment is affirmed.

In this opinion the other judges concurred.

TEAGHAN MAHONEY ET AL. *v.* LORI STORCH SMITH ET AL.
(AC 38220)

Sheldon, Keller and Prescott, Js.

Syllabus

The plaintiffs sought to recover damages, both individually and on behalf of their minor child for medical malpractice from the defendants, S, a pediatrician who performed a circumcision on the child, and the professional corporation in which S practiced. The plaintiffs alleged that S was negligent in performing the procedure, during which she used a device called a Mogen clamp to perform the circumcision. The procedure resulted in the amputation of a portion of the glans of C's penis. During the trial, the defendants' counsel offered a video that depicted a circumcision using the Mogen clamp in order to assist the jury in understanding how a circumcision is performed using that device. After excusing the jury, the court watched the video and heard arguments as to its admissibility. The plaintiffs' attorney argued that the video should not be shown to the jury because it was not previously produced for the plaintiffs, because it would confuse the jury, and because the defendants' expert, a pediatrician who testified that the video accurately depicted a circumcision procedure and that the video would assist the jury, did not rely on the video in forming his opinion. The court ruled that the video was admissible as demonstrative evidence. When trial resumed, the defendants' expert testified that the video did not depict the actual circumcision that S performed on C. The court then permitted the video to be shown for demonstrative purposes only. The video, which depicted the entirety of a Mogen circumcision procedure and had no sound, was shown to the jury, and the defendants' expert narrated the events depicted in the video. After the trial ended, the jury returned a verdict for the defendants, and the plaintiffs subsequently filed a motion to set aside the verdict and for a new trial on the basis of the court's decision to permit the showing of the video. Thereafter, the trial court denied the plaintiffs' motion to set aside the verdict and for a new trial, and the plaintiffs appealed to this court. *Held*:

1. This court declined to review the merits of the plaintiffs' claims that the defendants' use of the video violated the relevant rules of practice (§§ 13-4, 13-15) regarding disclosure of experts and the continuing duty to disclose, because the video and related testimony from the defendants' expert were not disclosed, and that the video and the related expert testimony were irrelevant and unduly cumulative; the plaintiffs did not distinctly raise those claims in connection with their motion to set aside the verdict and for a new trial.

2. There was no merit to the plaintiffs' claim that the video, and testimony of the defendants' expert concerning it, were prejudicial and confusing to the jury because the portions of the video showing the patient receiving anesthesia and the physician applying clamps used to control bleeding were aspects of the procedure that were not at issue in the trial; it was not apparent to this court how those parts of the video would confuse the jury, and the court concluded that those parts of the video likely clarified the earlier direct testimony of the plaintiffs' expert witness regarding the use of anesthesia and the clamps; furthermore, the plaintiffs' claim that the video was prejudicial because they were precluded from responding to it was unavailing, because, prior to trial, the defendants provided the plaintiffs with an exhibit list that identified the video, and the plaintiffs did not request to watch the video prior to its introduction at trial, nor did they choose to file a motion in limine seeking to preclude its admission into evidence, move for a continuance after it was marked for identification, or recall their expert witness to serve as a rebuttal witness concerning the video.
3. The trial court properly rejected the plaintiffs' claim that it improperly denied their motion to set aside the verdict and for a new trial because the court did not instruct the jury that the video was for demonstrative purposes only: the purpose of the video, which was to show to the jury how a circumcision is performed utilizing a Mogen clamp, would have been readily apparent to the jury; moreover, the plaintiffs having failed to comply with the prerequisites to appellate review of their allegation of instructional impropriety because they did not raise this claim at the time the trial court instructed the jury, this court could not say that the trial court abused its discretion in denying the plaintiffs' motion.
4. This court declined to review the plaintiffs' claim, raised for the first time on appeal, that the trial court abused its discretion by allegedly discouraging the jury from rehearing the expert medical testimony during deliberation: this claim was unpreserved because the plaintiffs, at the time of trial, did not object to the manner in which the trial court responded to the jury's playback request.

Argued February 3—officially released July 18, 2017

Procedural History

Action to recover damages for the named defendant's alleged medical negligence, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Hon. William B. Rush*, judge trial referee; verdict for the defendants; thereafter, the court denied the plaintiffs' motion to set aside the verdict and rendered judgment in accordance with the verdict, from

which the plaintiffs appealed to this court; subsequently, the court, *Hon. William B. Rush*, judge trial referee, granted the plaintiffs' motion for rectification. *Affirmed.*

Alan Scott Pickel, with whom, on the brief, was *Anthony Cenatiempo*, for the appellants (plaintiffs).

Michael R. McPherson, for the appellees (defendants).

Opinion

KELLER, J. This appeal arises from a medical malpractice action brought by the plaintiffs, Thomas and Roxanne Mahoney, both individually and on behalf of their minor child, Teaghan Mahoney (child), against the defendants, Lori Storch Smith and Bay Street Pediatrics, the professional corporation in which Dr. Storch Smith practiced. The plaintiffs alleged that Dr. Storch Smith was negligent in performing a circumcision on the child, who was a newborn at the time. The procedure resulted in the amputation of a portion of the glans—or head—of the child's penis. Following a trial, the jury returned a verdict for the defendants. On appeal, the plaintiffs claim that the trial court abused its discretion by (1) declining to set aside the verdict and order a new trial, and (2) discouraging the jury from rehearing expert medical testimony during deliberations. We disagree with the plaintiffs and, accordingly, affirm the judgment of the court. Additional facts will be provided within the context of each of the plaintiffs' claims.

I

The plaintiffs' first claim is that the court abused its discretion by declining to set aside the verdict and order a new trial. We disagree.

The following facts, as could reasonably have been found by the jury, are pertinent to this claim. Dr. Storch

Smith, a pediatrician, performed the circumcision at Norwalk Hospital on December 29, 2010. She used a device known as a Mogen clamp to perform the procedure. The Mogen clamp is one of several medical devices commonly used to circumcise newborns. It is designed to clamp, and therefore isolate, the patient's foreskin above the glans, after which the foreskin is excised using a scalpel. In the present case, Dr. Storch Smith applied the Mogen clamp and excised what she thought was solely the child's foreskin. After observing that the procedure produced an unusually large amount of blood, however, she opened the excised foreskin and observed, in her words, a "small piece" of glans. The child, along with the amputated portion of the glans, was thereafter transported to Yale-New Haven Hospital for treatment by a pediatric urologist. That same day, the pediatric urologist successfully reattached the amputated portion of the glans.

Trial commenced on April 15, 2015, and consisted largely of expert medical testimony concerning the standard of care for performing circumcisions using the Mogen clamp. During direct examination of the defendants' expert, Scott Siege, a pediatrician, the following exchange occurred:

"[The Defendants' Counsel]: . . . Did you also, doctor, at my request, review a video that depicts a circumcision procedure being performed with a Mogen clamp?

"[Siege]: Yes. . . .

"[The Defendants' Counsel]: Doctor, what did the video, that you reviewed at my request, depict?

"[Siege]: It depicted a circumcision using the Mogen clamp . . . that held to the standard of care for a Mogen circumcision.

"[The Defendants' Counsel]: . . . In your experience, having read the depositions of all the witnesses

in the case, is it difficult to explain the details of the procedure without any visual frame of reference? . . .

"[Siege]: Yes, it is very difficult.

"[The Defendants' Counsel]: All right. And would the video, in your opinion, assist the jury in understanding how a circumcision is performed using a Mogen clamp?

"[Siege]: Yes.

"[The Defendants' Counsel]: Your Honor, I offer the video."

After excusing the jury, the court watched the video and heard arguments as to its admissibility. The plaintiffs' attorney argued that the video should not be shown to the jury because it was not previously produced for the plaintiffs, it would confuse the jury, and Dr. Siege did not rely on it in forming his expert opinion. The court ruled that the video was admissible as demonstrative evidence.[1] When the jury returned and the defendants' attorney resumed direct examination, Dr. Siege confirmed that the video did not depict the actual circumcision that Dr. Storch Smith performed on the child. The defendants then offered the video "for demonstrative purposes only," which the court permitted.

The video, which the defendants' attorney indicated was found on the Internet, was approximately two and one-half minutes in duration. It had no sound. Its title, "The Pollock Technique," was displayed in a corner of the video screen. The video depicted an unidentified individual performing the entirety of a Mogen circumcision on a newborn, including the application of local anesthesia to the patient's penis, as well as the use of

[1] "[D]emonstrative evidence is not part of the incident and is offered to illustrate other evidence, either real or testimonial. Demonstrative evidence is a pictorial or representational communication incorporated into a witness's testimony." C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 11.1, p. 656.

hemostats (clamps typically used to control bleeding) to assist in applying the Mogen clamp to the patient's foreskin. While the video played for the jury, Dr. Siege narrated the events depicted therein.

Because the video was not admitted as a full exhibit, the jury did not have access to it during its deliberations. After the jury returned its verdict, the plaintiffs filed a motion to set aside the verdict and for a new trial (postverdict motion) on the basis of the court's decision to permit the showing of the video. See Practice Book § 16-35. By way of a memorandum of decision dated July 10, 2015, the court denied that motion, precipitating this claim on appeal.

We review the court's denial of the postverdict motion for abuse of discretion. See, e.g., *Hall* v. *Bergman*, 296 Conn. 169, 179, 994 A.2d 666 (2010); *Hughes* v. *Lamay*, 89 Conn. App. 378, 383, 873 A.2d 1055, cert. denied, 275 Conn. 922, 883 A.2d 1244 (2005). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *Hall* v. *Bergman*, supra, 179.

"[T]he role of the trial court on a motion to set aside the jury's verdict is . . . to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did." (Internal quotation marks omitted.) Id. Additionally, "[a trial court may] set aside a verdict where it finds it has made, in its instructions, rulings on evidence, or otherwise in the course of the trial, a palpable error which was harmful to the proper disposition of the case and probably brought about a different

result in the verdict." (Internal quotation marks omitted.) *Bovat* v. *Waterbury*, 258 Conn. 574, 583, 783 A.2d 1001 (2001).

In claiming that the court abused its discretion by denying the postverdict motion, the plaintiffs make three distinct arguments. We address each in turn.

A

The plaintiffs first argue that the defendants' use of the video violated expert disclosure rules under Practice Book § 13-4, and the continuing duty to disclose under Practice Book § 13-5, because the video and related testimony from Dr. Siege were not disclosed pursuant to those provisions. The plaintiffs, however, did not distinctly raise this argument in connection with their postverdict motion. Accordingly, we decline to review the merits of this argument. See *AvalonBay Communities, Inc.* v. *Zoning Commission*, 130 Conn. App. 36, 62 n.24, 21 A.3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011).

B

The plaintiffs next argue that the video, and Dr. Siege's testimony concerning it, were irrelevant, as well as unduly cumulative, prejudicial, and confusing to the jury. See Conn. Code Evid. §§ 4-2 and 4-3.

The plaintiffs' attorney did not argue in connection with the postverdict motion that the video was irrelevant or cumulative. We therefore decline to reach the merits of these aspects of the present claim. See *State* v. *McCall*, 187 Conn. 73, 84, 444 A.2d 896 (1982).

Although we conclude that the plaintiffs preserved their arguments that the video and Dr. Siege's attendant testimony were unduly confusing and prejudicial by asserting these grounds in their postverdict motion,

those arguments are without merit. The plaintiffs contend that the portions of the video showing the patient receiving anesthesia and the physician applying hemostats to the patient's foreskin were confusing to the jury because those aspects of the procedure were not at issue in the trial. It is not apparent to us how those parts of the video would confuse the jury. If anything, they likely clarified the earlier direct testimony of the plaintiffs' expert witness, David Weiss, a pediatrician, who stated during an in-court demonstration of the Mogen clamp: "[B]efore you do the circumcision you'll anesthetize the baby and you'll take some hemostat[s] . . . . And you can take a piece of the [foreskin] . . . you will take the hemostats and pull [the foreskin] through [the Mogen clamp] . . . ."

The plaintiffs further argue that the video was prejudicial because "they were in essence precluded from responding to it with their own video or expert." This argument is unavailing. As with all of the other evidence, the defendants marked the video for identification prior to trial. An exhibit list identifying the video as a "[v]ideo demonstrating circumcision procedure" was provided to the plaintiffs prior to trial as well. The plaintiffs could have asked to watch the video prior to its introduction at trial, but did not do so; nor did they file a motion in limine seeking to preclude its admission into evidence, move for a continuance after it was marked for identification, or recall Dr. Weiss to serve as a rebuttal witness concerning the video.

C

Finally, the plaintiffs contend that the court improperly denied their postverdict motion in light of the fact that it did not instruct the jury that the video was for demonstrative purposes only. The plaintiffs made only brief reference to this issue in their memorandum in support of the postverdict motion, asserting that

"[p]rior to the offering of the video, there was no instruction given to the jury relative [to its] use and consideration of the video . . . ." Although the court did not address this ground in its memorandum of decision denying the motion, it determined that the video "was not an attempt to reenact the activities of [Dr. Storch Smith] at the time of the circumcision and primarily portrayed to the jury how a circumcision is performed utilizing a Mogen clamp." Because we agree with the court's observation and that the purpose of the video would have been readily apparent to the jury, we conclude that the court properly rejected the plaintiffs' argument on this ground. We further observe that the plaintiffs did not raise this issue when the court instructed the jury; thus, "[i]n the face of the [plaintiffs'] noncompliance with the prerequisites to appellate review of [their] allegation of instructional impropriety, we cannot say that the court abused its discretion in denying the motion to set aside the verdict." *Lewis* v. *Drew*, 132 Conn. App. 306, 314, 31 A.3d 448 (2011).

For all of the foregoing reasons, we reject the plaintiffs' claim.

II

Second, the plaintiffs claim that the court abused its discretion by allegedly discouraging the jury from rehearing the expert medical testimony during deliberation. Because this claim is unpreserved, we decline to reach its merits.

The following facts are relevant to this claim. As previously mentioned in part I of this opinion, at trial, the plaintiffs and the defendants presented the expert testimony, respectively, of Dr. Weiss and Dr. Siege. During its deliberations, the jury sent the court a note that read in part as follows: "Can we please view the testimony of [Dr. Weiss] . . . . [and] can we please view the testimony of [Dr. Siege]?" The court responded to

the jury in part: "We only have a transcript; it's not a videotape. So we're talking about [a] transcript of it. As to those two [physicians], I've conferred with counsel. They believe that each of the [physician's testimony] will last about a half a day; it will take about an entire day to read the entire testimony. If that's what you want, that's what we'll give you. If there's something more specific you're interested in, we'll be glad to consider whether we can do that in a shorter period of time, but we don't know. I'm not forcing you to do anything. If that's what you want, you'll get the testimony . . . . So what I'm going to ask you to do is to go back in, discuss what you want to do about Dr. Weiss' testimony and Dr. Siege's testimony."

The jury returned to its deliberations, after which it sent the court another note. The new note read: "If we ask for testimony, is it read in court or is it transcribed and made available to the jury in deliberations?" The court responded: "[I]t will be played back via the [court] monitor. So I'll send you back in. We're prepared to do whatever you want." Ultimately, the jury did not request that the testimony be replayed.

The plaintiffs argue on appeal that "rather than comply with Practice Book § 16-27, which mandates that the jury be provided with the [expert] testimony, the court . . . took steps to discourage [it] from getting [its] request met." The plaintiffs, however, did not object at the time to the manner in which the court responded to the jury's playback request at trial. "For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 730, 941 A.2d 309 (2008). We therefore decline to review the merits of this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

SHARAY FREEMAN *v.* A BETTER WAY WHOLESALE AUTOS, INC.
(AC 38503)

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

Syllabus

The plaintiff sought to recover damages for violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and fraudulent misrepresentation. The plaintiff alleged, inter alia, that the defendant automobile dealership refused to return a deposit she had paid after she had attempted to purchase a motor vehicle from the defendant. The listed sales price for the vehicle was $10,995, and upon test driving the vehicle, the plaintiff signed a purchase order that set forth the purchase price and other costs and expenses, including an initial deposit of $2500. The plaintiff was told that her deposit would be returned if the defendant could not secure financing for her purchase. The plaintiff used an online loan calculator that estimated that her financing payments for the vehicle would be approximately $320 per month for forty-two months, and thereafter she paid the deposit. A few days later, the plaintiff was informed by the defendant that her monthly payment would be more than $500, more than what she could afford. The defendant's loan officer stated that because of the plaintiff's credit history, the lending bank had set a higher interest rate than what was permitted by law, and the defendant had to buy down the loan to bring it within legal limits. The plaintiff was also informed that the bank was requiring her to take out gap insurance and a service contract for the vehicle. After the plaintiff told the loan officer that she could not afford those payments, the loan officer calculated a new monthly rate of $447 per month, with other service-related fees included, which was still too expensive for the plaintiff. When the plaintiff asked for a return of her deposit, the defendant told her it was nonrefundable, but could be applied to a different vehicle for purchase. Thereafter, the plaintiff returned to the dealership and spoke with the defendant's finance director, who informed the plaintiff that he had secured new financing terms and proposed monthly payments of $334.40 for forty-eight months, six months longer than the original term. The plaintiff declined those terms, again requested a refund of her deposit, and when the defendant refused, the plaintiff was unable to purchase another vehicle for about one year while she saved money for another deposit. Following a trial, the court rendered judgment for the plaintiff on both counts of her complaint, awarding her $2500 in compensatory damages and $7500 in punitive damages. The court also ruled that the plaintiff was entitled to attorney's fees, but set a future hearing to determine the amount. From the trial court's judgment, the defendant appealed to this court, claiming that the trial court erred, as

a matter of law, in concluding that the defendant violated CUTPA and committed fraudulent misrepresentation by not disclosing certain material facts, and by awarding the plaintiff punitive damages and attorney's fees. Following the filing of the appeal, the trial court awarded the plaintiff $26,101.50 in attorney's fees, but the defendant did not amend its appeal to challenge that award. *Held*:

1. The portion of the defendant's appeal challenging the trial court's award of attorney's fees was dismissed: it is well settled that an appellate court lacks jurisdiction to review an award of attorney's fees until the trial court actually determines the amount of those fees, and the trial court here having issued a postjudgment award of attorney's fees following the defendant's initiation of its appeal, and the defendant having failed to amend its appeal once that award was issued, this court did not have subject matter jurisdiction over the defendant's claim because the specific amount of attorney's fees was not properly before the court.
2. The trial court properly applied the law to the facts in the case and found that the defendant violated CUTPA: the evidence in the record demonstrated that the defendant violated the public policies behind the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.) and the relevant regulation (§ 42-110b-28 [b] [1]) of state agencies by failing to disclose the financing terms to the plaintiff before requiring that she place her deposit, and that the defendant's conduct was unethical because it only offered the plaintiff financing deals that either included unwanted products and services, a higher sales price, or both, and provided a misleading assurance regarding the refund of the plaintiff's deposit to induce the plaintiff to pay the deposit; furthermore, the record also supported the determination that the plaintiff suffered an ascertainable loss of her $2500 deposit, as having a dealership credit was not the equivalent of having full use of the money.
3. The trial court did not abuse its discretion in awarding the plaintiff punitive damages after finding that the defendant acted in reckless disregard of the plaintiff's rights and that it did so in order to augment its profit, as those findings were fully supported by the record; the defendant never presented a financing package to the plaintiff that contained only the items that she had agreed to purchase at the price she had agreed to pay.
4. The trial court properly determined that the defendant committed fraud by nondisclosure of material facts: there was ample evidence that the defendant perpetrated a fraud against the plaintiff by failing to disclose material facts regarding the financing of the vehicle and the plaintiff's deposit, as the refundability of the plaintiff's deposit and how it tied into the terms of the financing and the levying of extra costs to recoup the defendant's buy down were never disclosed to the plaintiff and the defendant misled the plaintiff into paying the deposit.

Argued March 28—officially released July 18, 2017

Procedural History

Action to recover damages for, inter alia, violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant was defaulted for failure to comply with a court order; thereafter, the court, *Huddleston*, *J.*, granted the defendant's motion to open the judgment; subsequently, the matter was tried to the court; judgment for the plaintiff; thereafter, the court denied the defendant's motion to reargue, and the defendant appealed to this court; subsequently, the court granted in part the plaintiff's motion for attorney's fees and costs. *Dismissed in part*; *affirmed in part.*

Kenneth A. Votre, for the appellant (defendant).

Richard F. Wareing, with whom was *Daniel S. Blinn*, for the appellee (plaintiff).

Opinion

MULLINS, J. The defendant, A Better Way Wholesale Autos, Inc., appeals from the judgment of the trial court rendered in favor of the plaintiff, Sharay Freeman, on her complaint. On appeal, the defendant claims that the court erred, as a matter of law, in concluding that (1) the defendant violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA), (2) an award of punitive damages was appropriate, (3) the defendant committed fraudulent misrepresentation by nondisclosure of material facts, and (4) an award of attorney's fees to the plaintiff was appropriate. We dismiss for lack of a final judgment that portion of the appeal contesting the award of attorney's fees[1] and otherwise affirm the judgment of the trial court.

[1] On April 1, 2015, the court awarded the plaintiff damages, interest, costs, and attorney's fees under CUTPA. With respect to the award of attorney's fees, however, the court ruled that the plaintiff was entitled to them, but that "[t]he amount . . . [would] be determined in a later proceeding to be initiated by the plaintiff . . . ." Following the court's denial of the defendant's motion to reconsider, the defendant filed the present appeal on Octo-

The parties stipulated to the following facts before the trial court. "The defendant is a Connecticut corporation that operates a motor vehicle dealership in Naugatuck [(dealership)] . . . . It advertised a 2007 Honda Odyssey EX-L [(vehicle)] for sale at a price of $10,995. The plaintiff paid a $2500 deposit for the vehicle on February 18, 2013. She submitted a credit application to obtain financing for the vehicle. The defendant forwarded the plaintiff's credit application to two financing

ber 30, 2015. The trial court subsequently issued a March 18, 2016 ruling following a hearing on the merits of the plaintiff's motion for attorney's fees, and it awarded the plaintiff $26,101.50 in attorney's fees. In this appeal, the defendant raises a claim regarding the award of attorney's fees; it did not amend its October 30, 2015 appeal, however, to challenge the March 18, 2016 postjudgment order awarding attorney's fees.

Prior to oral argument in this case, we ordered, sua sponte, the parties to be prepared to address, at oral argument, the jurisdictional issue presented by the defendant's failure to amend its appeal to include the postjudgment order awarding $26,101.50 in attorney's fees. Each party had an opportunity to address this issue during oral argument.

It is well settled that this court lacks jurisdiction to review a trial court's decision to award attorney's fees until the court actually determines the specific amount of those fees. *Ledyard* v. *WMS Gaming, Inc.*, 171 Conn. App. 624, 634–35, 157 A.3d 1215, cert. granted, 325 Conn. 921, A.3d (2017); *Hirschfeld* v. *Machinist*, 131 Conn. App. 352, 355 n.2, 29 A.3d 159 (2011); *Burns* v. *General Motors Corp.*, 80 Conn. App. 146, 150–51 n.6, 833 A.2d 934, cert. denied, 267 Conn. 909, 840 A.2d 1170 (2003). Accordingly, a trial court's supplemental postjudgment order determining the amount of attorney's fees to be awarded to a prevailing party "may raise a collateral and independent claim that is separately appealable as a final judgment"; *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1988); and, if the nonprevailing party already has filed an appeal, it should amend its appeal if it wishes to challenge the postjudgment award. See id., 524. Because the defendant has not amended its appeal, this court lacks jurisdiction over its claim challenging the award of attorney's fees. See *McKeon* v. *Lennon*, 131 Conn. App. 585, 610–11, 27 A.3d 436 (dismissing portion of appeal challenging award of attorney's fees where trial court had not determined specific amount of attorney's fees prior to filing appeal), cert. denied, 303 Conn. 901, 31 A.3d 1178 (2011); *Sullivan* v. *Brown*, 116 Conn. App. 660, 661–63, 975 A.2d 1289 (dismissing, sua sponte, appeal challenging award of statutory attorney's fees and costs where trial court had not determined precise amount of attorney's fees and costs prior to defendants' filing appeal), cert. denied, 294 Conn. 914, 983 A.2d 852 (2009). Accordingly, we dismiss this aspect of the appeal.

companies, American Credit and United Consumer Finance. The plaintiff did not agree to the terms offered to her and did not purchase the vehicle. Before bringing this action, the plaintiff requested a refund of her deposit, but the defendant refused to return it."

In addition to the parties' stipulation, the court also found the following relevant facts. The plaintiff was in need of reliable transportation to get to work and to transport her children. When she saw the defendant's advertisement for the vehicle, it was priced approximately two thousand dollars less than other comparable vehicles. She telephoned the dealership to make sure the vehicle still was available. Upon finding that it was available, she rented a car to drive from Manchester to Naugatuck in order to test drive the vehicle.

When she arrived at the dealership in Naugatuck, the plaintiff met with Alex Pierre, a salesman, and inquired as to what costs she would incur in addition to the price of the vehicle if she were to purchase it. Pierre told her that she would have to pay a conveyance fee, registration, sales tax, and finance charges for the vehicle. Pierre also told the plaintiff that she would have to put down a deposit of $2500 to initiate the credit approval process. He also told her that the deposit would be refundable if the credit application was not approved; otherwise, the deposit would be nonrefundable.

On February 16, 2013, the plaintiff signed a retail purchase order (purchase order) for the vehicle. The purchase order set forth a cash purchase price for the vehicle of $10,995, a VIN etch service fee of $198, a dealer conveyance fee of $598, sales tax of 6.35 percent, an unspecified amount for registration of the vehicle, which the plaintiff reasonably expected to be under $150, and the plaintiff's deposit of $2500. The order did not show any financing information or other charges.

The plaintiff placed her initials near each of the listed fees. Just under the area that showed the plaintiff's deposit was the statement, "NO REFUND OF DEPOSIT." Notwithstanding that statement, Pierre told the plaintiff that her deposit would be returned if the defendant could not secure financing for the plaintiff's purchase of the vehicle.[2] The plaintiff, however, did not put down her deposit at that time.

After leaving the dealership, the plaintiff used an online loan calculator to determine the amount of her monthly payments over a forty-two month term. Taking the purchase price of $10,995, and adding the additional fees and costs as set forth on the purchase order, and then subtracting the required $2500 deposit, the plaintiff determined that her monthly payments would be approximately $320 per month, assuming the maximum possible interest rate of 19 percent; see General Statutes § 36a-772.[3] She believed she could afford a monthly payment in this amount.[4]

[2] The court also noted that John Albano, the finance director for the dealership, confirmed at trial that the defendant had a policy of returning deposits if it was unable to secure financing for the desired vehicle.

[3] General Statutes § 36a-772 provides in relevant part: "(a) A retail seller of motor vehicles may charge, contract for, receive or collect a finance charge expressed as an annual percentage rate on any retail installment contract covering the retail sale of a motor vehicle in this state, which charge shall not exceed the rates indicated for the respective classifications of motor vehicles as follows: . . . (3) on sales made on or after October 1, 1987 . . . (C) used motor vehicles of a model designated by the manufacturer by a year more than two years prior to the year in which the sale is made, nineteen per cent."

[4] Although the trial court did not calculate the approximate amount of the payment in its memorandum of decision, for convenience, we do so here: $10,995 (vehicle price) + $698.18 (sales tax of 6.35 percent) + $198 (etching fee) + $598 (conveyance fee) + $150 (reasonable registration fee estimate) = $12,639.18 - $2500 (deposit) = $10,139.18. Financing the amount of $10,139.18, over a forty-two month period, at the maximum rate of interest of 19 percent, the plaintiff's expected payment would be approximately $332.34. The total approximate cost, with financing, is $16,458.28 ($332.34 x 42 months = $13,958.28 + $2500 deposit = $16,458.28).

On February 18, 2013, the plaintiff returned to the dealership and paid the $2500 deposit. Pierre told the plaintiff that the dealership would process her application and let her know whether she was approved, which he did a few days later. Pierre told the plaintiff to bring in her W-2 form and an insurance card for the new vehicle. The plaintiff obtained insurance, and brought a copy of her W-2 form and her insurance card to the defendant. Because the plaintiff recently had received an increase in her income, which was not reflected on her W-2 form, her credit approval was delayed until she could obtain additional documentation.

On February 23, 2013, the plaintiff traveled back to the dealership, where she met with Rob Italiano, a loan officer, who asked her to sign papers. The plaintiff asked Italiano how much her monthly payment would be, and he told her that it would be more than $500. The plaintiff was shocked that the cost was so much higher than her calculations and much higher than she could afford. Italiano told her that because of her credit problems, the bank had set her interest rate at 26 percent, and, because Connecticut law does not permit a rate higher than 19 percent, the defendant had to buy down the loan to get it within the legal limits. He also told her that the bank was requiring her to take out gap insurance and a service contract for the vehicle. The plaintiff told Italiano that she could not afford those payments.

Italiano then came back with a new monthly rate of $447. He used two different methods to calculate that payment. One listed the sales price as $10,995, but added other service related contracts amounting to $3163. The other listed a sales price of $12,441.58, with stated sales tax of $949.58, and various service related contracts amounting to $2864. Each of these proposals required the plaintiff to pay approximately $21,292.90 over the forty-two month life of the loan, and was thousands of

dollars more than she would have paid under her own calculations. Furthermore, the plaintiff did not want the service contracts, lifetime oil changes, or the tire and wheel service, each of which would have required her to drive from Manchester to Naugatuck for service. Accordingly, she asked for the return of her deposit. Pierre told her that the deposit was nonrefundable, but that it could be applied to a different vehicle. The plaintiff left the dealership without signing the sales agreement.

On March 3, 2013, the plaintiff returned to the dealership and spoke with John Albano, its finance director. Albano told the plaintiff that he had been able to secure financing within the range of the monthly payment that the plaintiff originally had sought. Albano proposed a payment arrangement of $334.40 for forty-eight months,[5] which was six months longer than the original financing, and which substantially increased the total cost to the plaintiff.[6] The plaintiff refused those terms,

[5] During trial, the defendant submitted exhibit A, which is a document of credit approval for the plaintiff from United Consumer Finance. That document, which is dated February 11, 2014, contains two columns, one for the vehicle without warranty, and the other for the vehicle with warranty. Both columns list a sales price for the vehicle of $12,500.

The "without warranty" column also includes the following: tax of $793.75; registration fees of $140; down payment of $2500; VSI fee of $250; and total financed amount of $11,183.75, with payments listed at $334.40 per month for forty-eight months. Pursuant to our calculations, this equates to a total payout of $16,051.20 for the loan, plus the $2500 deposit, for a total cost, with interest, of $18,551.20.

The column entitled "with warranty," in addition to the sales price of $12,500, contains the following: tax of $902.91; registration fees of $140; down payment of $2500; VSI fee of $250; warranty of $1719; and total financed amount of $13,011.91, with payments listed at $360.27 per month for fifty-four months. Pursuant to our calculations, this equates to a total payout of $19,454.58 for the loan, plus the $2500 deposit, for a total cost, with interest, of $21,954.58.

[6] The court noted that Albano testified that "approximately 30 percent of the defendant's customers have poor credit ratings that require the defendant to seek financing from subprime lenders. These lenders may require the dealership to pay an 'acquisition fee' for such loans that the dealership cannot pass on to the customer because it would raise the interest rate

and, again, requested that the defendant refund her deposit. The defendant refused. As a result, the plaintiff was unable to purchase another vehicle for approximately one year, while she saved money for another deposit.[7]

In her complaint, the plaintiff alleged a violation of CUTPA and fraudulent misrepresentation. The defendant filed an answer to the complaint, and it set forth six special defenses, namely, that (1) the defendant did not violate the federal Truth in Lending Act 15 U.S.C. § 1601 et seq. (TILA);[8] (2) the defendant complied with all federal laws and maintained procedures and training reasonably adapted to avoid violation of TILA, and therefore, the plaintiff's claims were barred; (3) the defendant's actions fell outside its primary trade or business of selling automobiles, and therefore CUTPA was inapplicable; (4) the plaintiff's action was barred by the doctrine of unclean hands; (5) the defendant was not required by TILA to make any disclosures

above the statutory limit of 19 percent. The defendant cannot make money on such transactions unless it sells additional services. On the particular transaction with the plaintiff, the defendant would have lost money if it had not added extra charges, such as for the oil changes and service contract, that were profitable to the dealership." The court further noted: "The sales representatives who meet with the customers do not sell the 'extras.' Those are sold by the finance department after the customer has signed the purchase order. The sales representative receives a flat commission of $350, while the finance manager who sells the extras receives a commission of 4 percent of the cost of those extras. In this case, with the extras proposed by Italiano, the defendant would have made a profit of about $1000, while it would have lost money if it had offered the plaintiff financing on the original terms."

[7] The court also found that the defendant never presented the plaintiff with a finance package that contained the advertised price of the vehicle with only the fees with which she had agreed, as set forth on the purchase order. All of the packages presented by the defendant would have required the plaintiff to pay thousands of dollars more than she reasonably had calculated using the purchase order and the maximum allowable interest rate.

[8] The state's TILA provisions are set forth at General Statutes § 36a-675 et seq.

because the parties never closed the deal; and (6) the plaintiff's claims were precluded by the terms of the agreement to purchase the vehicle. The plaintiff denied each of the special defenses.

On November 20, 2014, the case was tried before the court, *Huddleston*, *J*. On April 1, 2015, the court issued a thorough memorandum of decision in which it found in favor of the plaintiff on both counts of her complaint, and it rendered judgment in the amount of $10,000, consisting of $2500 in compensatory damages and $7500 in punitive damages. Additionally, the court awarded prejudgment and postjudgment interest and costs. The court also ruled that the plaintiff was entitled to attorney's fees pursuant to CUTPA and that a hearing would be held to determine those fees in accordance with Practice Book § 11-21.

Thereafter, the defendant filed a motion for reconsideration of the trial court's decision, which the court denied. On October 30, 2015, the defendant filed the present appeal. Subsequently, on March 18, 2016, the court awarded the plaintiff $26,101.50 in attorney's fees. The defendant did not amend its appeal to challenge that award. See footnote 1 of this opinion.

I

The defendant claims that the court erred, "as a matter of law," in concluding that the defendant violated CUTPA. Specifically, it argues that the plaintiff failed to allege a "particular violation of a specific statute, regulation, or other law,"[9] and that the one applicable statute, General Statutes § 14-62,[10] "was fully complied

[9] Contrary to this assertion, the plaintiff clearly alleged a violation of CUTPA, § 42-110a et seq. in count one of her complaint.

[10] General Statutes § 14-62 (a) provides in relevant part: "Each sale shall be evidenced by an order properly signed by both the buyer and seller, a copy of which shall be furnished to the buyer when executed, and an invoice upon delivery of the motor vehicle, both of which shall contain the following information: (1) Make of vehicle; (2) year of model, whether sold as new or used, and on invoice the identification number; (3) deposit, and (A) if

with by the [defendant]" because the purchase order provided, "in writing, that the deposit was not refundable . . . ." Furthermore, the defendant argues, the plaintiff failed to establish that she suffered an ascertainable loss. The plaintiff argues that the court properly found a violation of CUTPA because the defendant's conduct violated public policy, it was "immoral, unethical, oppressive, and/or unscrupulous," it caused injury to consumers, and it caused the plaintiff to suffer an ascertainable loss in the form of her $2500 deposit. We agree with the plaintiff.

"[Section] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . [I]n determining whether a practice violates CUTPA we have adopted the criteria [formerly] set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. . . . In order to enforce this prohibition,

the deposit is not refundable, the words 'No Refund of Deposit' shall appear at this point, and (B) if the deposit is conditionally refundable, the words 'Conditional Refund of Deposit' shall appear at this point, followed by a statement giving the conditions for refund, and (C) if the deposit is unconditionally refundable, the words 'Unconditional Refund' shall appear at this point; (4) cash selling price; (5) finance charges, and (A) if these charges do not include insurance, the words 'No Insurance' shall appear at this point, and (B) if these charges include insurance, a statement shall appear at this point giving the exact type of coverage . . . ."

CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money . . . as a result of the use or employment of a [prohibited] method, act or practice . . . . Because CUTPA is a self-avowed remedial measure, General Statutes § 42-110b (d), it is construed liberally in an effort to effectuate its public policy goals. . . .

"Moreover, [w]hether a practice is unfair and thus violates CUTPA is an issue of fact, to which we must afford our traditional deference." (Citations omitted; internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 880–81, 124 A.3d 847 (2015). "[When] the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Centimark Corp.* v. *Village Manor Associates Ltd. Partnership*, 113 Conn. App. 509, 523, 967 A.2d 550, cert. denied, 292 Conn. 907, 973 A.2d 103 (2009). If an appellant "challenges the court's interpretation of CUTPA, [however,] our review is plenary." *System Pros, Inc.* v. *Kasica*, 166 Conn. App. 732, 764, 145 A.3d 241 (2016).

In the present case, the court thoroughly analyzed § 42-110b[11] and carefully applied its factual findings to its analysis. Specifically, the court found that the defendant engaged in the following deceptive conduct: "The defendant expressly represented the cost of the vehicle would be $10,995, that there would be additional costs for sales tax, conveyance fees, a VIN etch fee, registration, and unspecified finance charges, and that the plaintiff's deposit would be returned if financing could not

[11] General Statutes § 42-110b provides in relevant part: "(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

be obtained. These representations implied that there would be no other mandatory charges and that a legal rate of interest would be charged. These representations were made for the purpose of inducing the plaintiff to pay a substantial cash deposit. The plaintiff reasonably interpreted the defendant's representations to mean that her deposit would be refunded if financing could not be obtained for the vehicle at a legal rate of interest for the advertised price and only those additional charges that had been disclosed. The defendant failed to explain that the deposit would be nonrefundable if the defendant offered any financing on any terms, including terms that required the plaintiff to purchase services she did not want or to pay a price greater than the advertised price. This omission was material and induced the plaintiff to make a $2500 deposit. The defendant's conduct was deceptive and violated CUTPA." (Footnote omitted.)

The court next analyzed each of the three criteria set out by the cigarette rule and determined that the defendant violated each of them in one or more ways. As to the first criterion, the court found in relevant part: "[T]he defendant violated established *public policy* in several ways, each of which independently is sufficient to satisfy the first prong of the cigarette rule. First, *the public policy* established by federal and state truth in lending laws requires adequate disclosure of financing terms so that a consumer can make an informed economic choice before committing to a proposed transaction. The defendant's failure to disclose financing terms before requiring a substantial nonrefundable deposit violates the public policy of fair disclosure reflected in the truth in lending laws. . . .

"[T]he defendant [also] violated § 42-110b-28 (b) (1) of the [R]egulations of [Connecticut State Agencies, promulgated by] the Department of Consumer Protection. That section provides: '(1) It shall be an unfair or

deceptive act or practice for a new car dealer or used car dealer to fail to sell or lease, or refuse to sell or lease, a motor vehicle in accordance with any terms or conditions which the dealer has advertised, including, but not limited to, the advertised price.' The defendant never made the vehicle available to the plaintiff on the terms upon which she agreed to purchase it. The purchase order that she signed reflected the advertised sale price of $10,995, a VIN etch service fee of $198, a dealer conveyance fee of $598, sales tax of 6.35 percent, and an undisclosed registration fee that the plaintiff reasonably believed would be less than $150. . . . She was never offered financing for a transaction including those terms and only those terms. The installment contracts offered to her at a monthly payment rate of $447.45 included extra products and services that she had not agreed to purchase . . . and an increased price of $12,441.58 . . . . The installment contract offered to her at a monthly rate she could afford reflected a sales price of $12,500. . . . The defendant was unwilling to sell her the vehicle at the advertised price of $10,995 with no extras because it would lose money on the deal if it did so."[12] (Citations omitted; emphasis added.)

[12] The court also concluded that the defendant's actions violated § 14-62 because (1) the defendant failed to include the financing terms in the purchase order it required the plaintiff to sign and (2) the purchase order provided that the deposit was nonrefundable, while the admitted practice of the defendant, as relied on by the plaintiff when providing her deposit, was to refund a deposit if financing could not be obtained. The court found that, because the terms of financing were not disclosed fully and involved undisclosed mandatory costs that essentially were used to hide the higher than legally permitted financing charges, the defendant violated the statute. The defendant contends that this was error as a matter of law, in part, because the plaintiff did not specifically plead the applicability of this statute. We note, however, that the court clearly found that the defendant, itself, raised this statute before the trial court and argued that it fully complied with it. The defendant does not challenge this finding on appeal. Nevertheless, because there were additional bases for the court's finding that the defendant violated the first criterion of the cigarette rule, we need not consider whether the court was correct in its determination that the defendant specifically violated § 14-62.

The defendant contends that it did not violate TILA and that the court erred in finding that it violated § 42-110b-28 (b) (1) of the regulations. The defendant argues that (1) the plaintiff never alleged that the defendant's actions violated TILA, and (2) the regulation applies only to "*the sale of the vehicle as advertised*," and it "never refused to sell the vehicle to [the] plaintiff at the advertised price of $10,995." (Emphasis in original.) We disagree with both contentions.

Firstly, the court found that the defendant violated the *public policy* behind TILA, as had been argued by the plaintiff before the trial court; it did not find that the defendant violated TILA itself. The defendant also had set forth, inter alia, special defenses in which it claimed that it had complied with TILA. That issue, then, clearly was before the trial court and both parties had an opportunity to address it fully. In concluding that the defendant violated *the public policy* behind TILA, the court found that the defendant failed to disclose the financing terms to the plaintiff before requiring that she put down a $2500 deposit on a vehicle. This fact is beyond dispute. We agree with the court that this action violated the *public policy* behind TILA. See *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, supra, 318 Conn. 880 (in assessing CUTPA violation, court must consider whether practice "offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness").

As to the defendant's contention that the court improperly concluded that it violated § 42-110b-28 (b) (1) of the regulations, we disagree. Section 42-110b-28 (b) (1) specifically prohibits a used car dealer from refusing to sell a vehicle in accordance with the terms or conditions that have been advertised, including, but

not limited to, the advertised price. In this case, it is undisputed and the court expressly found that the defendant advertised the vehicle for sale at a price of $10,995. The terms disclosed to the plaintiff on the purchase order included this cash purchase price, a VIN etch service fee of $198, a dealer conveyance fee of $598, sales tax of 6.35 percent, and an undisclosed registration fee that the plaintiff reasonably believed would be less than $150. Despite the foregoing, however, the defendant then refused to sell the vehicle to the plaintiff on those terms, but, instead, required that she either pay more for the vehicle or buy additional service type contracts that she did not want.[13] We conclude that the court properly found that this conduct violated § 42-110b-28 (b) (1).

The court next applied its factual findings to the second criterion of the cigarette rule, namely, whether the conduct of the defendant was immoral, unethical,

[13] In its appellate brief, the defendant argues in part that there was no evidence that the defendant mandated these extras, and, in fact, when the plaintiff "told the [defendant] that she was not interested in purchasing any of the extras . . . these extras were stripped from the sales [contract]." The defendant then cites to three specific pages of the trial transcript. We thoroughly have reviewed those pages and surrounding pages and conclude that the testimony on the referenced pages firmly provided that the defendant refused to remove the gap insurance, and it did not give the plaintiff any documentation about what extras it still was requiring after the plaintiff complained and asked for the return of her deposit.

The defendant first cites to page thirty-five of the transcript. A review of that page reveals the plaintiff's testimony that Italiano told her that "gap insurance and a service contract" were added to the purchase order, along with "lifetime oil changes." On the following page, we find the plaintiff's testimony that Italiano told her "that that's what the bank required to get me approved." On the next page cited by the defendant, page sixty-four of the transcript, is the plaintiff's testimony that Albano reduced the proposed payments by more than $100 per month, but the plaintiff stated that she was not aware of him removing the charges for the warranty. On the following page, the plaintiff stated that she believed the new figure still included a service contract. On the final page cited by the defendant, page seventy-two, is the plaintiff's testimony that she "was never told that any of the gap insurance was removed."

oppressive, or unscrupulous. The court specifically found that the defendant's conduct was unethical: "[T]he defendant . . . offered [the plaintiff] only [financing] deals that either included unwanted products and services or a higher sales price or both. The defendant also provided a misleading assurance regarding the availability of a refund of the deposit to induce the plaintiff to pay the deposit. Its conduct in so doing was unethical."

The defendant contends that its action in helping the plaintiff to lower "her monthly financing payment cannot be found to be immoral, unethical, oppressive, or unscrupulous." We disagree, and conclude that the record, as set forth previously in this opinion, supports the court's conclusion that the defendant's conduct was unethical.

Next, the court analyzed the third criterion of the cigarette rule by considering whether the defendant's conduct was injurious to consumers and competitors, and it found: "The defendant's advertised price of $10,995 for the vehicle was [approximately] $2000 lower than prices for similar vehicles advertised by other dealers. This low price was intended to draw in customers, like the plaintiff, who are searching for affordable transportation. [Approximately] 30 percent of the customers shopping at the defendant's dealership have credit problems that require the defendant to turn to subprime lenders to arrange discount financing. Such financing requires the defendant to pay an 'acquisition fee' that it cannot charge back to the customer because doing so would raise the interest rate above the maximum of 19 percent allowed by law for used vehicles that are more than two years old. To make money on such a deal, the defendant must tack on extras, such as the tire and wheel service or lifetime oil changes, on which the dealership makes a profit. By requiring a deposit

that it will not refund if it can obtain any type of financing, the defendant forces customers either to buy cars under terms they did not previously accept or to forfeit their deposits. The plaintiff . . . was harmed by this practice because, without the refund of her deposit, she was unable to purchase a different car for the year it took her to save enough money for a down payment.

"The defendant's conduct also harmed competitors. It advertised a low price for the vehicle, took the money the plaintiff had available for a down payment, and then forced her to choose between accepting previously undisclosed terms that added thousands of dollars to the total price or forfeiting her deposit. With either choice, the plaintiff's business was unavailable to competing dealerships that more accurately disclosed the cost of the vehicle before extracting a significant financial commitment." The defendant sets forth no argument in its brief, save for a few sentences and no analysis in a footnote set forth in its statement of facts, challenging the court's findings on this third criterion. Accordingly, we conclude that it is uncontested.

As to whether the plaintiff proved that she suffered an ascertainable loss, the court found: "The plaintiff has proved by a preponderance of the evidence that she sustained an ascertainable loss. The fact that the deposit theoretically remains available to her as a store credit does not make the money freely available to her. The plaintiff testified that when she searched the defendant's lot for an alternative vehicle, the only one that was suitable for her needs within her price range was a Saturn. When she inquired about it, she was told that it had been sold earlier in the day. Without the refund of her deposit, she was unable to purchase another car for a year because it took her that long to save up the money for a down payment."

In regards to this determination by the court, the defendant argues that the plaintiff's deposit remains

with the defendant and that she may use it for another vehicle; therefore, it contends, the plaintiff has suffered no ascertainable loss. We disagree.

Our Supreme Court has explained that, under § 42-110g (a) of CUTPA, the term "ascertainable loss," "do[es] not require a plaintiff to prove a specific amount of actual damages in order to make out a prima facie case." *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 612–13, 440 A.2d 810 (1981). The court further explained: "[T]he inclusion of the word 'ascertainable' to modify the word 'loss' indicates that plaintiffs are not required to prove actual damages of a specific dollar amount. 'Ascertainable' means 'capable of being discovered, observed or established.' . . . 'Loss' has been held synonymous with deprivation, detriment and injury. . . . It is a generic and relative term. . . . 'Damage,' on the other hand, is only a species of loss. . . . The term 'loss' necessarily encompasses a broader meaning than the term 'damage.' . . . Whenever a consumer has received something other than what he bargained for, he has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known." (Citations omitted.) Id., 613–14.

Clearly, having lost the use of her $2500, the plaintiff suffered an ascertainable loss. The fact that she may have a credit, with a dealership with which she no longer wants to do business, that can be used to purchase a vehicle she does not want, is not the equivalent of having full use of the money. We conclude that the court properly found that the plaintiff had suffered an ascertainable loss.

After reviewing the record and the court's findings, which are fully supported by the record, we conclude that the court properly applied the law to the facts in

this case, and that it properly found that the defendant violated CUTPA.

II

The defendant next claims that the court erred, "as a matter of law," in awarding punitive damages to the plaintiff. It argues: "[The defendant] did not require the plaintiff to purchase any additional add-ons or extras that she did not wish to purchase and removed all such add-ons when requested. Therefore, the evidence did not show that [the defendant] recklessly disregarded the rights of others because the [defendant] removed all add-ons as requested by the [plaintiff]. The legal conclusion of the trial court is in error." (Footnote omitted.) We disagree.

"A court may exercise its discretion to award punitive damages to a party who has suffered any ascertainable loss pursuant to CUTPA. See General Statutes § 42-110g (a). In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . Accordingly, when the trial court finds that the defendant has acted recklessly, [a]warding punitive damages and attorney's fees under CUTPA is discretionary . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done. . . . Further, [i]t is not an abuse of discretion to award punitive damages based on a multiple of actual damages." (Citations omitted; internal quotation marks omitted.) *Votto* v. *American Car Rental, Inc.*, 273 Conn. 478, 485–86, 871 A.2d 981 (2005).

In this case, the court found that "the defendant's conduct was done with a reckless disregard for the rights of others and that an award of punitive damages is warranted. The defendant's agent admitted that some 30 percent of the defendant's customers have credit

problems that require the defendant to find subprime lenders who will not finance the full value of the loan, but rather require the dealer to pay an acquisition fee that cannot be passed on to the customer because doing so would raise the interest rate above the percentage allowed by law. The defendant will lose money on such deals if it cannot sell extras on which it makes a profit. The extras are not offered by the sales agents who initially meet with the customers to sell a vehicle, but only later, by the finance managers, after financing has been obtained. By that time, the customer has paid a deposit that the plaintiff deems to be nonrefundable because financing was obtained. The court infers from the testimony of the defendant's agent that the plaintiff's situation was not unique, but rather reflected a regular business practice of the defendant. By offering financing bundled with unanticipated extras, at a time when the customer has made a substantial deposit, the defendant places customers in the untenable situation in which the plaintiff found herself—forced either to accept unwanted goods and services at a higher cost than the customer had expected to pay or to forfeit the deposit.

"The defendant's agent testified that, because of the discount financing, the defendant would have lost money on the sale to the plaintiff if it had provided financing on the advertised sale price without any unwanted extras. With the unwanted extras, the defendant would have made a profit of approximately a thousand dollars, but the plaintiff would have had to pay several thousand additional dollars above what she had reasonably calculated. When the plaintiff declined the extras, the defendant retained her deposit, effectively netting two and [one-half] times the amount of the profit it would have made had she accepted the extras. The court accordingly finds that the defendant's practice was used to augment the defendant's profit.

"The defendant's wrongdoing was hard to detect before the customer paid the deposit. Although the purchase order stated that the deposit was nonrefundable, the salesman assured the plaintiff that the store's policy was to refund deposits if financing could not be obtained. By omitting material facts about the conditions under which a deposit would be refunded, the defendant concealed its actual practice from the plaintiff and, the court infers, from similarly situated customers who could obtain financing only through subprime lenders.

"The injury and damages in this case, while substantial to a customer like the plaintiff with little cash to spare, are relatively small in relation to the cost and inconvenience of litigation to recover them. An award of punitive damages of some multiple of the actual damages is appropriate to punish and deter the conduct at issue here. See *Ulbrich* v. *Groth*, [310 Conn. 375, 456–57 n.66, 78 A.3d 76 (2013)]." After making these findings, the court awarded punitive damages in the amount of $7500, or three times the compensatory damages of $2500.

The defendant claims that there was no basis for punitive damages and that the court's legal conclusion was in error. We disagree.

The court made very clear findings to support its decision to award punitive damages in this case after finding that the defendant acted in reckless disregard for the plaintiff's rights and that it did so in order to augment its profit. As the court stated: "The defendant never presented a financing package to the plaintiff that contained only the items she has agreed to purchase, at the price she had agreed to pay." On this basis, which is fully supported by the record, we conclude that the court did not abuse its discretion in awarding punitive damages to the plaintiff.

III

The defendant next claims that the court erred, "as a matter of law," in finding that it was liable for fraudulent misrepresentation by nondisclosure of material facts. It argues that the plaintiff "failed to present clear and satisfactory evidence that [it] made any false representations as a statement of fact. . . . [The defendant] did not do or say anything illegal in obtaining the nonrefundable deposit from [the plaintiff]." We disagree.

On this claim, the court specifically found: "In this case, the defendant's salesman, in response to a direct inquiry by the plaintiff, told her that the additional expenses she would have to pay, above the sales price of the car, consisted of the dealer conveyance fee, registration, and sales tax. The purchase order further disclosed an optional VIN etching fee. To induce her to put down a $2500 deposit, the salesman assured her that her deposit would be refunded if financing could not be obtained. He did not explain to her that the dealership construed 'financing' to mean any financing, on any terms, regardless of whether those were the terms to which she had agreed. Because he volunteered information in response to her inquiries, he had a duty fully and fairly to explain the defendant's conditional refund policy.

"From the credible evidence presented in this case, the court infers that the defendant will not offer financing on terms in which it will take a loss. In this case, it first attempted to recoup the loss that the discount financing [caused] by bundling extra services with the vehicle sales contract. It also told the plaintiff that the lender required gap insurance and a service contract. When the plaintiff declined those extras, the defendant then offered her financing with the deal stripped of all the extras—demonstrating that the extras were not

lender requirements, but the defendant's own requirements—but with a sales price of $12,500 rather than the advertised price of $10,995 that the plaintiff had agreed to pay. These were, in effect, counter offers of a substituted transaction rather than an extension of credit for the deal the plaintiff believed she had accepted. The defendant nevertheless considered such counteroffers to be an extension of financing that terminated the plaintiff's right to receive a refund of her deposit.

"Having told the plaintiff that (1) her only additional charges would include the dealer conveyance fee, the registration fees, sales tax, and the VIN etching fee, and (2) her deposit would be refunded to her if financing could not be obtained, the defendant led the plaintiff to believe that she would be offered financing for the items shown on the purchase order form she signed or her deposit would be returned. The defendant knew, however, that its finance managers would not offer financing that caused the dealership to take a loss on the transaction and would not return the deposit if it made any counteroffers with financing. In the circumstances of this case, the defendant was required to explain its conditional refund practice fully and fairly. Its failure to do so caused the plaintiff to pay the deposit and then deprived her of its refund under circumstances in which the deposit should have been refunded to her. The court finds, accordingly, that the clear and convincing evidence establishes that the defendant committed fraud by nondisclosure of material facts."

After finding the defendant liable for fraudulent misrepresentation, however, the court declined to award damages on that count because the plaintiff's entitlement to damages under that theory of liability were identical to her damage award on the first count alleging a violation of CUTPA. Therefore, the court determined

that it would not award damages separately on this count.

"The essential elements of an action in fraud, as we have repeatedly held, are: (1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury. . . . Fraud is not to be presumed but must be proven by clear and satisfactory evidence. . . . Fraud and misrepresentation cannot be easily defined because they can be accomplished in so many different ways. They present, however, issues of fact. . . . The trier is the judge of the credibility of the testimony and the weight to be accorded it. . . . The decision of the trial court will not be reversed or modified unless it is clearly erroneous in light of the evidence and the pleadings in the record as a whole." (Citations omitted; internal quotation marks omitted.) *Miller* v. *Appleby*, 183 Conn. 51, 54–55, 438 A.2d 811 (1981).

Upon review, we conclude that there was ample evidence to support the trial court's conclusion of fraudulent misrepresentation by the defendant. It is clear from the court's findings and the record in this case that the defendant perpetrated a fraud against the plaintiff by failing to disclose material facts regarding the financing of this vehicle and the plaintiff's deposit. The defendant told the plaintiff that in addition to the advertised purchase price, she would have to pay a $598 dealer conveyance fee, a VIN etching fee of $198, 6.35 percent sales tax, and an undisclosed registration fee. The plaintiff initialed each of these fees on the purchase order. The defendant told the plaintiff that it required a $2500 deposit that was refundable if financing could not be secured. The defendant did not tell the plaintiff that additional fees would be required or that her price

would be higher depending upon the interest rate available.

The defendant secured financing, but at an interest rate of 26 percent, which is seven percentage points higher than the rate allowed by § 36a-772. To make the deal work then, the defendant had to buy down the loan. To recoup this cost, the defendant attempted to bundle extra services with the vehicle purchase, which the plaintiff did not want. The defendant also told the plaintiff that the lender required gap insurance and a service contract. After the plaintiff refused those extras, the defendant came back with a new offer, increasing the sales price of the vehicle to $12,500. When the plaintiff again refused and requested the return of her deposit, the defendant stated that the deposit was nonrefundable because it had secured financing for the plaintiff. We agree with the court that the refundability of the plaintiff's deposit and how it tied into the terms of the financing and the levying of extra costs to recoup the defendant's buy down were never disclosed to the plaintiff, and that the defendant clearly misled her into paying a sizeable deposit. We conclude, on the basis of these facts, that the court properly determined that the defendant committed fraud by nondisclosure of material facts.

The portion of the appeal challenging the award of attorney's fees is dismissed; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GERALD O'DONNELL (AC 36606)

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

Syllabus

Convicted of the crimes of bribery of a witness and tampering with a witness, the defendant appealed to this court. He claimed, inter alia, that the evidence was insufficient to support his conviction because the state failed to prove both that he intended to bribe a witness, S, when he purchased a television for her, or that he induced or attempted to induce her to testify falsely in a prior proceeding. The defendant, a private investigator, had been assisting attorneys for two men, G and T, who, in 2003, filed petitions for writs of habeas corpus seeking a new trial after having been convicted in 1995 of various crimes, including murder, in connection with the 1993 robbery of a retail store and the shooting death of its owner. S, who was a key witness in the criminal trial of G and T, testified that G and T were at the store on the morning of the murder. Prior to the criminal trial, S, in 1993, gave the police two written statements in which she averred that she was in the vicinity of the store on the morning of the robbery and murder, and identified G and T as having been involved in the incident. Later in 1993, S gave testimony at a hearing in probable cause that was consistent with the events she had described in her first written statement and with her later testimony in the 1995 criminal trial. In 2006, S gave the defendant a signed statement in which she recanted the testimony that she gave in the criminal trial and averred that she had not been present at the scene at the time of the murder and that her prior statements were untrue. The defendant thereafter drove S to visit her mother and to medical appointments, bought her food and a television, helped pay her rent and gave her money that she used to purchase a stereo. The defendant also told S that he did not think that G and T were guilty of the murder, and that she might be able to obtain money in the future, depending on the outcome of G's and T's habeas trial. At the habeas trial in 2009, S testified that she lied in the written statements that she gave to the police in 1993, and in her testimony both at the hearing in probable cause and at the criminal trial. After the habeas court rendered judgments granting G's and T's habeas petitions, the Supreme Court reversed the judgments and remanded the matter for a new habeas trial. In preparation for the second habeas trial, the police in 2011 met with S, who told the police that the defendant had convinced her that her testimony in the 1995

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

criminal trial was wrong and that she should not speak with the state. Although S told the police that she would testify truthfully in the second habeas trial and confirm the testimony that she gave in G's and T's criminal trial, she asserted her fifth amendment privilege in the second habeas trial and did not testify. The habeas court thereafter denied the habeas petition. *Held*:

1. The evidence was sufficient to support the defendant's conviction of bribery of a witness, as the jury reasonably could have found that the defendant intended to bribe S when he purchased the television for her; although S's 2006 recantation to the defendant predated his 2007 purchase of the television, the jury reasonably could have found that he gave the television to S with the intent to influence her testimony at the first habeas trial and to ensure that she testified consistent with her 2006 recantation, as the defendant knew that S had given different accounts as to where she was on the morning of the murder, he helped her pay her rent and gave her money that she used to purchase the stereo, and, after her recantation to him, he drove her to different locations, bought her candy and pizza, and told her that she might be able to obtain money depending on the outcome of the first habeas trial.
2. The defendant's conviction of tampering with a witness was supported by sufficient evidence demonstrating that he induced S to testify falsely in the first habeas trial: contrary to the defendant's claim, the jury was presented with evidence from which it could have concluded that S testified truthfully in 1993 and 1995, and that the defendant had induced S to testify falsely in 2009, as S testified at both the hearing in probable cause in 1993 and the criminal trial in a manner that was consistent with her 1993 written statements to the police, in which she stated that she was in the vicinity of the store at the time of the murder and identified G and T as having been involved in the incident, and testimony from other witnesses supported the assertions that S made in 1993 and 1995; moreover, the defendant's unpreserved claim that the "one-witness-plus-corroboration" rule that is applicable to perjury prosecutions should apply to his conviction of witness tampering was not reviewable, as the claim was not of constitutional magnitude and, thus, not reviewable pursuant to a sufficiency of the evidence analysis, and, nevertheless, there was sufficient evidence of corroboration for the jury reasonably to conclude that the defendant induced or attempted to induce S to testify falsely at the first habeas trial.
3. The trial court did not abuse its discretion in denying the defendant's motion to set aside the verdict, in which he claimed that the evidence was confusing and was presented by the state in a one-sided manner in order to establish that S's 1993 and 1995 version of the events at issue was true; although the defendant claimed that the jury returned its verdict without having had access to highly relative and material information in the transcripts of S's 2006 recantation and her 2009 testimony in the first habeas trial, the defendant cross-examined a state's

witness about S's 2006 statement and marked it as a defense exhibit for identification only but did not seek to have it admitted as a full exhibit, he provided no authority that required the state to offer and the court to admit into evidence S's 2009 habeas trial testimony, S's testimony at the first habeas trial was consistent with her testimony at the defendant's trial, and the jury did not send to the court any notes during deliberations indicating that it was confused by the court's jury instructions as to S's prior statements.

4. The defendant could not prevail on his unpreserved claim that the trial court improperly failed to include in its jury charge on witness tampering an instruction regarding the "one-witness-plus-corroboration" rule, which has been adopted for perjury prosecutions: that court properly charged the jury regarding the elements of tampering with a witness, and even if the "one-witness-plus-corroboration" rule applied to this case, there was sufficient corroboration evidence for the jury reasonably to conclude that the defendant induced or attempted to induce S to testify falsely in the first habeas trial; accordingly, the trial court's failure to charge the jury on the "one-witness-plus-corroboration" rule did not constitute plain error, and this court declined to exercise its supervisory authority over the administration of justice to require trial courts to instruct juries regarding that rule in cases such as the present one.

5. The defendant could not prevail on his claim that the trial court erred when it permitted S to invoke her fifth amendment privilege in front of the jury and refused his request to have her testify, instead, in a proffer outside of the jury's presence concerning her invocation of that privilege; notwithstanding the defendant's assertion that the state had reason to believe S would invoke her fifth amendment privilege, the record showed that the parties and the court assumed that S would invoke the privilege and that the state would immunize her, the state did not attempt to build its case out of inferences arising from the privilege and did not advocate for S to invoke the privilege in the jury's presence, the defendant had the opportunity to cross-examine S when she continued testifying after she invoked the privilege and received immunity, and the jury, which already had heard evidence indicating that on prior occasions S had given conflicting testimony and had invoked her fifth amendment privilege in the second habeas trial, reasonably could have inferred that S invoked the privilege to protect herself from criminal prosecution and not because there was a connection between her possible criminal conduct and the defendant's possible criminal conduct.

6. The trial court did not abuse its discretion when it granted the state's motion to quash the defendant's subpoena for information related to the witness protection program, as the subpoena was overly broad in that it sought records pertaining to all benefits provided by the witness protection program, rather than records supporting a claim that benefits had been provided with the intent to alter testimony or to induce false testimony, and it sought information that was protected from disclosure

by the witness protection statute (§ 54-82t [j]); moreover, although the defendant claimed that the conduct of his defense team was not materially different from that of the state in administering the witness protection program, and that the court, by quashing his subpoena, impaired his right to present a defense, including a selective prosecution claim, the purpose of that program is to protect witnesses from harm, whereas the offenses with which the defendant was charged involved altering testimony or inducing false testimony from a witness, and he presented no evidence that he was similarly situated to the individuals who administer the witness protection program for purposes of his selective prosecution claim.

Argued January 9—officially released July 18, 2017

Procedural History

Substitute information charging the defendant with two counts each of the crimes of tampering with a witness and perjury, and with the crime of bribery of a witness, brought to the Superior Court in the judicial district of Tolland, where the court, *Graham*, *J.*, granted the state's motion to quash; thereafter, the matter was tried to the jury; subsequently, the court granted the defendant's motion for a judgment of acquittal as to one count of tampering with a witness and denied the defendant's motion for a mistrial; verdict of guilty of bribery of a witness and one count of tampering with a witness; thereafter, the court denied the defendant's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Marcia A. Pillsbury*, assistant state's attorney, for the appellee (state).

Opinion

DANAHER, J. The defendant, Gerald O'Donnell, appeals from the judgment of conviction, rendered after a jury trial, of bribery of a witness in violation of General

Statutes § 53a-149 and tampering with a witness in violation of General Statutes § 53a-151. On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction, (2) the trial court erred in refusing to set aside the guilty verdict as being against the weight of the evidence, (3) the court erred in instructing the jury on the elements of tampering with a witness, (4) the court erred in denying the defendant's request for a witness to testify, in a proffer, outside the presence of the jury, and (5) the court erred in granting the state's motion to quash the defendant's subpoena requesting information and materials related to the witness protection program. We affirm the judgment of the trial court.

This appeal comes before this court following extensive litigation involving the murder of Eugenio Vega, the owner of La Casa Green, a retail store on Grand Avenue in New Haven, in the early morning hours of July 4, 1993. An understanding of the facts and procedural history involving the prior litigation, as the jury reasonably could have found, is necessary in order to understand fully the issues presented in the defendant's appeal.

On the morning of Vega's murder, Pamela Youmans went to La Casa Green to make a purchase. Vega was alive when Youmans left the store. After Youmans left but while she was still in the vicinity of La Casa Green, she tossed a coin over her shoulder and a woman with a limp picked it up.[1] That same morning, Mary Boyd walked by La Casa Green and observed two black males inside the store. One of the males was taller than the other. Later that morning, when Boyd went into the store to make a purchase, Vega was not there and did not respond when Boyd called him, so Boyd called 911. Boyd then took some quarters, cigarettes and food

[1] The jury reasonably could have found that Youmans' description of the woman matched the appearance of a woman named Doreen Stiles.

stamps and left before the police arrived because she knew that there was an outstanding warrant for her arrest. When the police responded to the call, they discovered Vega, who had been shot and was deceased, with his hands tied behind his back.

The New Haven Police Department questioned Doreen Stiles in the course of the investigation into Vega's murder. Stiles provided two written statements to the New Haven Police Department. In her first statement, dated July 29, 1993, Stiles described how she was in the vicinity of Vega's store on the morning of the murder when she saw a black male enter the store. Because the man frightened her, Stiles hid next door between the store and an alleyway, where she heard arguing from inside and someone asking Vega for money and to open the safe. She then heard a gunshot and saw two black males leave the store.[2] In her statement of July 29, 1993, Stiles identified George M. Gould as one of the individuals coming out of the store on the date of the murder. On August 2, 1993, Stiles gave a second written statement in which she identified Ronald Taylor as the other individual involved in the incident. At a probable cause hearing on October 14, 1993, Stiles testified consistently with her July 29, 1993 statement to the police. She also testified that she saw Boyd in the vicinity of the store on the morning of the murder. At the criminal trial of Gould and Taylor in January, 1995, Stiles, who testified that she had a disability in

[2] The statement provides: "I was walking toward the store at-on Grand Avenue when I happened to see a black male, heavy set, come across the street and enter the store, and he frightened me, so I—I hid next door between the store and the alleyway of the barber shop, and while I was there I heard some arguing going on and I heard one of the, uh, black guys ask Mr. Vega for money and for him to open the safe, and then I heard a shot, a gun-shot. I—I panicked and got scared and I tried to—to leave, and when I turned, ya know, I got up from where I was and tried to go the opposite way, I saw two black males leave the store and after that I don't know what happened, which way they went or what happened after that."

her leg, identified Taylor and Gould as being present at Vega's store on the morning of his murder.[3] Following a jury trial, Taylor and Gould were each convicted of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-8, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2), 53a-8 and 53a-49, and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (2).[4] Our Supreme Court affirmed the judgments of the trial court, with the exception of Taylor's conviction of attempt to commit robbery in the first degree.[5] *State* v. *Gould*, 241 Conn. 1, 24, 695 A.2d 1022 (1997).

In 2003, following their convictions, Taylor and Gould filed petitions for writs of habeas corpus. At that time, Taylor was represented by Attorney Peter Tsimbidaros and Gould was represented by Attorney Joseph Visone. The defendant was assisting Tsimbidaros and Visone as a private investigator. The defendant previously had worked as an inspector with the New Haven state's attorney's office. At some point, the defendant went to see Stiles, who was in a nursing home in Manchester undergoing rehabilitation for her legs, and indicated that he was investigating Vega's murder. They spoke briefly and, upon questioning by the defendant, Stiles told the defendant that she was not present at the scene at the time of the murder.[6] On December 6, 2006, Stiles

[3] Stiles suffered from health problems at the time of the criminal trial and her testimony was videotaped while she was in a hospital.

[4] Gould and Taylor were acquitted of murder in violation of General Statutes § 53a-54a (a).

[5] Our Supreme Court ordered that Taylor's conviction of attempt to commit robbery in the first degree and robbery in the first degree be merged, and that the sentence on the conviction of attempt to commit robbery in the first degree be vacated. *State* v. *Gould*, 241 Conn. 1, 5, 695 A.2d 1022 (1997).

[6] Stiles described her initial encounter with the defendant as follows: "Well, he sat down and he said I've been working on this case a long time. He said he knows that, you know, there was no possible way that I could have been there because of something about a time difference with me

gave a signed statement to the defendant in which she indicated that her prior statements regarding the murder had been untrue.

Following the defendant's initial meeting with Stiles at the nursing home, the defendant continued to visit Stiles approximately once a week for "a year, maybe more." During those visits, the defendant came to the nursing home and checked to make sure he knew where Stiles was and kept her informed about the case. On two occasions during this period of time, the defendant drove Stiles to visit her mother. He also drove her to doctor appointments and bought her pizza and candy. On May 12, 2007, the defendant purchased a television and service plan for Stiles for a total of $204.43. He also gave Stiles money that she used to buy a stereo and told her that she might be able to obtain money in the future depending on the outcome of Taylor's and Gould's habeas trial.[7]

In 2009, Stiles left the nursing home and moved into a motel with her husband, where she lived for approximately one year. During this time, the defendant periodically visited the motel to make sure that Stiles still lived

regarding another witness; that if I had been there she would have seen me, and I guess she might have stated she didn't see me—I don't know—or whatever. It just was going on like that. And it was only, like, a few minutes, and then he asked me, he said, you really weren't there, were you? And I said, no."

[7] Stiles testified as follows:

"Q. Did . . . the defendant in this case, ever promise you future money, money in the future?

"A. Yes.

"Q. Could you tell us about that, please?

"A. Well, he told me that it depended [on] what happened with the trial.

"Q. And what—what did you understand him to mean by that?

"A. I understood it to mean that if Ronald [Taylor] and George [Gould] got out of jail that they might get some money, and they might—look, you know, in a way, like, kind of help me out if I needed some money.

"Q. Okay. Did you know where that money might come from? If they were going to get money, where would it come from?

"A. I don't know. I guess they might sue the state for being incarcerated."

there and to tell her what was happening with the trial. When Stiles was living in the motel, the defendant took her to visit her mother. Stiles and her husband usually paid the monthly rent of $930 at the motel. There were "a couple of months," however, when the defendant helped to pay the rent.[8] During this time, the defendant told Stiles that Taylor and Gould were trying to get a new trial, and that he did not think they were guilty of Vega's murder. According to Stiles, she and the defendant had become friends and they sometimes discussed their personal lives.

On August 3, 2009, Taylor's and Gould's habeas trial began. At that trial, Stiles testified that she had lied about seeing Taylor and Gould when she gave the two prior statements to the police in 1993, in her testimony at the probable cause hearing in 1993 and in her 1995 criminal trial testimony.[9] On March 17, 2010, the habeas court, *Fuger*, *J.*, granted the habeas petitions, concluding that Taylor and Gould had met their burden of proof with regard to their claim of actual innocence.[10] On July 19, 2011, our Supreme Court reversed the judgments of the habeas court and remanded the matters for a new habeas trial.[11] *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 571, 22 A.3d 1196 (2011).

[8] Stiles later testified that the defendant paid her rent for several months prior to the 2009 habeas trial.

[9] At the defendant's trial in 2013, Stiles testified that she lied in 1993 because, at that time, she was a drug user with no place to live and life was very hard. After the police picked her up, she testified, she was at the police station for so long that she started going through withdrawal, and the police purchased drugs, clothes and food for her, making it easy for her to continue with the lie. She further indicated that she changed her testimony in 2009 because she "had a chance to make right what [she] did wrong then," and she denied that the defendant had convinced her to change her testimony. At the defendant's trial in 2013, Stiles also testified that she was not outside La Casa Green on the morning of July 4, 1993, and did not see Taylor and Gould at that time.

[10] The habeas court rejected the claim of ineffective assistance of counsel, which also was raised in the habeas petition.

[11] The Supreme Court concluded that the habeas court improperly failed to recognize that, under the test set forth in *Miller* v. *Commissioner of*

Once the habeas trial ended, the defendant no longer visited with or spoke to Stiles. This surprised Stiles because prior to the trial, their friendship had been "somewhat consistent" and he had told her that he would stay in touch with her. After the habeas trial in 2009, Stiles and her husband moved from the motel to an apartment in New Haven. On July 6, 2011, Stephen Coppola, a detective with the New Haven Police Department, and Edwin Rodriguez, an inspector with the chief state's attorney's office, went to see Stiles at her apartment in New Haven to verify her address for the second habeas trial that was coming up.[12] She accompanied them to the New Haven Police Department, where she indicated that the defendant had "gotten inside [her] head" and overwhelmed her when he talked about the trial.[13] Stiles indicated that the defendant had convinced her that her testimony in the previous trial was wrong and that she "didn't see what she saw." Finally, Stiles informed Coppola and Rodriguez that the defendant had provided her with a television and stereo. On July 13, 2011, John H. Bannon, Jr., an inspector with the chief state's attorney's office, went to Stiles' apartment to talk to her regarding the statements she had made to the other inspectors. While he was there, Bannon took photographs of a television and stereo. At that meeting, Stiles told Bannon that the defendant had told

Correction, 242 Conn. 745, 700 A.2d 1108 (1997), actual innocence required affirmative evidence that Taylor and Gould did not commit the crimes of which they were convicted, not simply the discrediting of evidence on which the conviction rested. *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 546–47, 22 A.3d 1196 (2011).

[12] John H. Bannon, Jr., an inspector with the chief state's attorney's office, testified that the reason Coppola and Rodriguez went to see Stiles before the Supreme Court decision reversing the first habeas court judgment was because Michael E. O'Hare, the senior assistant state's attorney who handled the first habeas appeal, "was quite confident that the Supreme Court would overturn the ruling in [the first] habeas [trial] and remand it for a second habeas trial."

[13] Stiles also indicated that the defendant told her not to worry, and that as long as she told the truth everything would work out.

her not to speak with the state at all and that the defendant continually was harassing and bothering her.

The second habeas trial began on March 19, 2012. Because Taylor had died in 2011, the second habeas petition proceeded as to Gould only. Tsimbidaros and Visone both represented Gould at the second habeas trial. In preparation for the second habeas trial, Visone, Tsimbidaros and the defendant met with Stiles at her apartment in New Haven on April 11 or 12, 2012. As Tsimbidaros, Visone and the defendant were leaving Stiles' apartment, the defendant shook his head and said, in response to a question by Tsimbidaros, "the places we've had to go and the things we've had to do, you don't want to know."

On May 7, 2012, prior to the conclusion of the second habeas trial, the police executed a search warrant at Stiles' apartment and recovered the television and stereo. That same date, the police arrested the defendant at his home. On May 23, 2012, Bannon served a subpoena on Stiles to testify at the second habeas trial. At that time, Stiles told Bannon that she was going to tell the truth and confirm her original trial testimony. At the second habeas trial, however, Stiles asserted her fifth amendment privilege and did not testify. On September 18, 2012, the second habeas judge, *Sferrazza*, *J.*, denied the second habeas petition.[14]

In this case, the defendant was initially charged with one count of bribery of a witness, in violation of § 53a-149, and two counts of tampering with a witness in violation of § 53a-151. The state subsequently filed a substitute information that added two counts of perjury in violation of General Statutes § 53a-156. Following a jury trial in 2013, the defendant was found guilty of

[14] On September 15, 2015, this court affirmed the judgment of the second habeas court. *Gould* v. *Commissioner of Correction*, 159 Conn. App. 860, 123 A.3d 1259, cert. denied, 319 Conn. 957, 125 A.3d 1012 (2015).

bribery of a witness and one count of tampering with a witness.[15] As a result of his conviction, the defendant was sentenced to a total effective term of four years of incarceration. The defendant then filed the present appeal.

I

The defendant first argues that the evidence was insufficient to establish his guilt of the crimes charged. With regard to the bribery charge, the defendant argues that the state failed to prove that his act of purchasing a television for Stiles on May 12, 2007 was performed with the specific intent to influence her testimony at the habeas hearing in 2009. With regard to the tampering with a witness charge, the defendant first argues that the state failed to prove that he induced or attempted to induce Stiles to testify falsely. The defendant further argues that the state failed to satisfy the "one-witness-plus-corroboration" standard of proof.

Before considering the defendant's specific claims, we set forth the applicable standard of review. "The two part test this court applies in reviewing the sufficiency of the evidence supporting a criminal conviction is well established. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Lewis*, 303 Conn. 760, 767, 36 A.3d 670 (2012). "This court cannot substitute its own judgment for that of the [finder of fact] if there is sufficient evidence to

[15] The court granted the defendant's motion for a judgment of acquittal as to one of the counts of tampering with a witness, and the jury found the defendant not guilty of the two perjury counts.

support the [finder of fact's] verdict." (Internal quotation marks omitted.) *State* v. *Andriulaitis*, 169 Conn. App. 286, 292, 150 A.3d 720 (2016).

A

We first consider the defendant's claim that the evidence was insufficient to establish that he was guilty of bribery of a witness in violation of § 53a-149. That statute provides: "A person is guilty of bribery of a witness if he offers, confers or agrees to confer upon a witness any benefit to influence the testimony or conduct of such witness in, or in relation to, an official proceeding." General Statutes § 53a-149 (a). To obtain a conviction under § 53a-149 (a), "[t]he state . . . was required to establish the following: (1) that the defendant offered, conferred or agreed to confer a benefit, (2) to a witness, (3) with the intent of influencing the witness' testimony or conduct in relation to an official proceeding." (Internal quotation marks omitted.) *State* v. *Brantley*, 164 Conn. App. 459, 472, 138 A.3d 347, cert. denied, 321 Conn. 918, 136 A.3d 1276 (2016). "[I]t is unnecessary that the thing offered or given is to induce a witness to testify falsely. It is sufficient if it were given with intent to influence his testimony or conduct. In the common acceptation of the term, the verb influence means to alter, move, sway, or affect. . . . If the promise or payment [was] made with the intent to affect the testimony or conduct of the prospective witness so that he would thereby be induced to testify more or less favorably to a party than he otherwise would have done, an intent to influence within the meaning of the statute exists." (Internal quotation marks omitted.) Id., 473.

"[I]n determining the defendant's guilt as to the bribery charge, the jury was required to determine what the defendant intended when he made the offer. Intent is a question of fact, the determination of which should

stand unless the conclusion drawn by the trier is an unreasonable one. . . . Moreover, the [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent. . . Intent may be and usually is inferred from conduct. Of necessity, it must be proved by the statement or acts of the person whose act is being scrutinized and ordinarily it can only be proved by circumstantial evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Davis*, 160 Conn. App. 251, 259, 124 A.3d 966, cert. denied, 320 Conn. 901, 127 A.3d 185 (2015).

In the information, the state alleged that "on or about May 12, 2007, in the town of Manchester, the defendant conferred a benefit upon a witness to influence the witness' testimony in an official proceeding . . . ." According to the defendant, there was insufficient evidence to establish that the benefit conferred on Stiles on May 12, 2007, was performed with the specific intent to influence Stiles' 2009 testimony in the first habeas trial. We disagree.

On December 6, 2006, Stiles gave a statement to the defendant recanting her initial trial testimony. On May 12, 2007, the defendant bought Stiles a television and service plan. Although Stiles' December 6, 2006 recantation predated the gift of the television by approximately five months, the jury reasonably could have concluded that the defendant gave the television to Stiles with the intent to influence her testimony at the first habeas trial in 2009. Following the December 6, 2006 recantation, the defendant continued to visit Stiles over the course of the next "year, maybe more." He drove her to visit her mother or to doctor appointments, bought her candy and pizza, and told her that she might be able to obtain money depending on the outcome of the first habeas trial. In addition to the television, the defendant also gave Stiles money that she used to purchase a stereo. He also helped her pay the rent when she lived

in a motel. During this time, the defendant told Stiles that Taylor and Gould were trying to get a new trial, and that he did not think they were guilty of Vega's murder. In discussing this case, the defendant made a comment indicating that Visone and Tsimbidaros did not want to know "the places we've had to go and the things we've had to do . . . ."

Once the first habeas trial ended the defendant no longer visited Stiles. Stiles later told the police that the defendant had "gotten inside [her] head" and had convinced her that her prior testimony was wrong and that she "didn't see what she saw." The defendant knew that Stiles had given different accounts as to where she was on the morning of the murder. Viewing the evidence in the light most favorable to sustaining the verdict, we conclude that the jury reasonably could have found that the defendant purchased the television for Stiles to ensure that she testified consistently with the December 6, 2006 recantation when she testified at the first habeas trial. We conclude, therefore, that the evidence was sufficient to convict the defendant on the charge of bribery of a witness.[16]

B

The defendant next argues that the evidence was insufficient to prove that he was guilty of the charge

[16] The defendant points out that Stiles testified at his criminal trial that he did not convince her to change her testimony in the first habeas trial. Citing *Novak* v. *Anderson*, 178 Conn. 506, 508, 423 A.2d 147 (1979), the defendant contends that although it was the province of the jury to accept or reject Stiles' testimony, the jury in rejecting such testimony "cannot conclude that the opposite is true." (Internal quotation marks omitted.) The evidence was sufficient to convict the defendant of bribery of a witness, however, without the jury necessarily believing the opposite of Stiles' testimony. Rather, the jury could infer, on the basis of the evidence presented, that the defendant told Stiles that he believed her trial testimony was false and that the defendant then followed up with positive reinforcement for her recantation. The jury reasonably could infer that Stiles recanted in order to curry favor with the defendant, who told Stiles what he thought of her testimony.

of tampering with a witness in violation of § 53a-151 (a). That statute provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." General Statutes § 53a-151 (a). "[T]he witness tampering statute has two requirements: (1) the defendant believes that an official proceeding is pending or about to be instituted; and (2) the defendant induces or attempts to induce a witness to engage in the proscribed conduct." *State* v. *Ortiz*, 312 Conn. 551, 562, 93 A.3d 1128 (2014).

"The language of § 53a-151 plainly warns potential perpetrators that the statute applies to *any conduct* that is intended to *prompt a witness* to testify falsely . . . in an official proceeding that the perpetrator believes to be pending or imminent. . . . A defendant is guilty of tampering with a witness if he intends that his conduct directly cause a particular witness to testify falsely . . . . So interpreted, § 53a-151 applies to conduct intentionally undertaken to undermine the veracity of testimony given by a witness. . . . The statute applies to successful as well as unsuccessful attempts to induce a witness to render false testimony." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Carolina*, 143 Conn. App. 438, 444, 69 A.3d 341, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013).

In the information, the state alleged that "on diverse dates . . . from May, 2007 through August, 2009, in the town of Manchester, when he believed that an official proceeding was pending, the defendant induced or attempted to induce a witness to testify falsely in that official proceeding . . . ." According to the defendant, it is uncertain whether Stiles was truthful in 1993 and 1995 (when she gave statements and testified about seeing Gould and Taylor at La Casa Green at the time

of Vega's murder), or whether she was truthful in 2006, 2009 and 2013 (when she made statements and testified that she had lied in 1993 and 1995, and was not present and did not see Gould and Taylor at La Casa Green at the time of Vega's murder). The defendant argues that he believes that Stiles lied in 1993 and 1995, when she inculpated Gould and Taylor, and that she told the truth in 2006, 2009 and 2013, when she exculpated Gould and Taylor. Absent evidence that Stiles was truthful in 1993 and 1995, the defendant argues that the jury could not reasonably have concluded that the defendant specifically intended and induced her to testify falsely in 2009. We disagree.

The jury was presented with the following evidence from which it reasonably could have concluded that Stiles testified truthfully in 1993 and 1995, and that the defendant induced Stiles to testify falsely in 2009. Following Vega's murder in 1993, Stiles gave two written statements to the police in which she stated that she was in the vicinity of the store at the time of the murder, and she identified Gould and Taylor as the individuals involved in the incident. She testified consistently with these statements at the probable cause hearing in 1993 and the criminal trial in 1995. Youmans testified that she saw a woman with a limp in the vicinity of the store on the morning of the murder. Stiles testified at the criminal trial in 1995 that she has a disability in her leg and cannot move quickly. After Gould and Taylor were convicted in 1995, the defendant, who previously had worked with the New Haven state's attorney's office, visited Stiles in his capacity as an investigator for Visone and Tsimbidaros, the attorneys for Gould and Taylor in the first habeas action. After a very brief conversation, the defendant stated: "[Y]ou really weren't there, were you?" In response to this question, Stiles responded that she was not there and gave a signed statement indicating that her prior statements

were untrue. The defendant then followed up with weekly visits to Stiles in which he would give her gifts and drive her to different locations. He also told her that she might be able to obtain money in the future if Gould and Taylor were successful in the habeas trial.[17] On the basis of this evidence, the jury reasonably could have concluded that the defendant induced or attempted to induce Stiles to testify falsely at an official proceeding.

In the second part of his claim that the evidence was insufficient with regard to his conviction of tampering with a witness, the defendant argues that a conviction of tampering with a witness requires the same degree of proof as that necessary to support a perjury conviction, i.e., the "one-witness-plus-corroboration" rule, and in this case, the evidence did not satisfy that standard. The defendant acknowledges that his claim is unpreserved and seeks to prevail pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*); or, in the alternative, the plain error doctrine; Practice Book § 60-5; or our supervisory authority over the administration of justice. We disagree.

We first set forth the applicable standard of review. "Under *Golding*, a defendant may prevail on an unpreserved claim only if the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude

[17] The defendant's conduct toward Stiles was similar to his conduct toward Youmans and Boyd. Youmans testified that the defendant had "stalked" her. Boyd testified that several years after she had testified in the criminal trial, the defendant located her and told her that he wanted to reopen the case. The defendant met with her on seven or eight occasions and would sometimes give her $20 for pizza. The jury was instructed that the evidence of cash gifts to Boyd was admitted "solely to show or establish a common plan or scheme to bribe and/or tamper with witnesses and may be used only for that purpose."

alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Tarver*, 166 Conn. App. 304, 321, 141 A.3d 940, cert. denied, 323 Conn. 908, 150 A.3d 683 (2016).

According to the defendant, *Golding* review is warranted because the record is adequate for review and a claim of evidentiary insufficiency is of constitutional magnitude alleging the violation of a fundamental right. While we agree that "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding*"; (internal quotation marks omitted) *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015); we disagree that the defendant's claim is one of evidentiary insufficiency. The defendant, rather, is asking, for the first time on appeal, that we impose the "one-witness-plus-corroboration" rule that is applicable to a charge of perjury and apply it to his conviction of tampering with a witness.

The "one-witness-plus-corroboration" rule is not an element of the crime of tampering with a witness for purposes of a sufficiency of the evidence analysis. "[T]he two witness rule is a quantitative rule of evidence which provides that a person may not be convicted of perjury upon the testimony of a single witness as to the falsity of the statement made. . . . Originally, the rule required that in order to sustain a conviction for perjury, the falsity of the defendant's oath had to have been proven by the sworn testimony of two or more live witnesses. Over the years, however, the rule has been modified to permit a conviction upon the sworn

testimony of one live witness if that testimony is supported by proof of corroborative circumstances, the so-called one-witness-plus-corroboration rule. . . . It has been said that [t]he rule of evidence in perjury cases presents an almost unique exception to the general rule that evidence which is sufficient to convince the jury of the defendant's guilt beyond a reasonable doubt is sufficient to sustain a conviction." (Citations omitted; internal quotation marks omitted.) *State* v. *Sanchez*, 204 Conn. 472, 477, 528 A.2d 373 (1987).

In *Sanchez*, our Supreme Court specifically referred to the two witness rule for perjury as a "quantitative rule of evidence . . . ." Id.; see also *United States* v. *Koonce*, 485 F.2d 374, 377 (8th Cir. 1973) (two witness rule in perjury cases not constitutionally mandated). In *State* v. *Castillo*, 121 Conn. App. 699, 712, 998 A.2d 177, cert. denied, 297 Conn. 929, 998 A.2d 1196, cert. denied, 562 U.S. 1094, 131 S. Ct. 803, 178 L. Ed. 2d 537 (2010), we declined to review the defendant's claim that the court improperly charged the jury with regard to the two witness rule contained in General Statutes § 54-83, which provides in relevant part that "[n]o person may be convicted of any crime punishable by death . . . without the testimony of at least two witnesses, or that which is equivalent thereto." In discussing that statute, we stated that "§ 54-83 is a statutory enactment that prescribes the nature of the evidence that the state must adduce to prove its case. Unlike the reasonable doubt rule . . . the evidentiary burden imposed by § 54-83 is not constitutionally compelled." (Citations omitted; internal quotation marks omitted.) *State* v. *Castillo*, supra, 712. On the basis of the foregoing, we conclude that the defendant's unpreserved claim that the "one-witness-plus-corroboration" rule should apply to his conviction of tampering with a witness is not of constitutional magnitude and, therefore, is not reviewable pursuant to a sufficiency of the evidence analysis.

Finally, even if we were to review the defendant's claim and conclude that the "one-witness-plus-corroboration" rule is applicable to this case, the state presented sufficient evidence of corroboration for the jury reasonably to conclude that the defendant induced or attempted to induce Stiles to testify falsely at the first habeas trial. The testimony from Youmans and Boyd supported a finding that Stiles was in the vicinity of the store on the morning of the murder in 1993. Stiles maintained, until after Gould's and Taylor's criminal trial in 1995, that she had been at that location. On December 6, 2006, the defendant stated to her: "[Y]ou really weren't there, were you?" In addition to the testimony from Stiles regarding the defendant's visits with her, the jury heard evidence that the defendant purchased a television for her and gave her money to purchase a stereo.[18] In addition to Stiles' testimony that the defendant had told her that she might be able to obtain money if Gould and Taylor were successful in the habeas trial, the parties stipulated that on March 18, 2011, after the favorable ruling in the first habeas trial, Tsimbidaros filed a claim for compensation with the state Office of the Claims Commissioner on behalf of Gould and Taylor. Finally, the jury heard evidence that the defendant made a comment indicating that Visone and Tsimbidaros did not want to know "the places we've had to go and the things we've had to do" regarding this case.

On the basis of the foregoing, and applying the applicable standard of review, we conclude that the evidence was sufficient to convict the defendant on the charge of tampering with a witness.[19]

[18] On the basis of his investigation, Bannon was able to determine that the defendant purchased the television on May 12, 2007. He was unable to determine when and by whom the stereo was purchased.

[19] We similarly decline to reverse the defendant's conviction under our inherent supervisory authority over the administration of justice or under the plain error doctrine on the ground that the "one-witness-plus-corroboration" rule should apply to this case.

II

The defendant next claims that the court erred in denying his motion to set aside the guilty verdict as against the weight of the evidence. According to the defendant, the evidence in this case was highly confusing, due in large part to the state's selective presentation of evidence and its reliance on statements admitted pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).[20] We disagree.

"The proper appellate standard of review when considering the action of a trial court granting or denying a motion to set aside a verdict and a motion for a new trial is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . We do not . . . determine whether a conclusion different from the one reached could have been reached. . . . A verdict must stand if it is one that a jury reasonably could have returned and the trial court has accepted." (Citation omitted; internal quotation marks omitted.) *State* v. *Fred C.*, 167 Conn. App. 600, 606, 142 A.3d 1258, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016).

"As we repeatedly have emphasized, the trial court is uniquely situated to entertain a motion to set aside

[20] "In *State* v. *Whelan*, supra, 200 Conn. 753 . . . we adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination. This rule has also been codified in § 8-5 (1) of the Connecticut Code of Evidence, which incorporates all of the developments and clarifications of the *Whelan* rule that have occurred since *Whelan* was decided." (Internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 768–69, 155 A.3d 188 (2017).

a verdict as against the weight of the evidence because, unlike an appellate court, the trial [court] has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. . . . Indeed, we have observed that, [i]n passing upon a motion to set aside a verdict, the trial judge must do just what every juror ought to do in arriving at a verdict. . . . [T]he trial judge can gauge the tenor of the trial, as we, on the written record cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Internal quotation marks omitted.) *State* v. *Scott C.*, 120 Conn. App. 26, 38, 990 A.2d 1252, cert. denied, 297 Conn. 913, 995 A.2d 956 (2010).

The defendant's primary argument is that the state presented evidence in a one-sided manner in order to establish that Stiles' original version of the events was truthful. The defendant points out that the state offered into evidence Stiles' initial statement to the police, dated July 29, 1993, a redacted transcript of Stiles' October 14, 1993 testimony at the hearing in probable cause and a redacted transcript of her January 19, 1995 criminal trial testimony. The state also provided a three and one-half hour videotape of Stiles' criminal trial testimony. The transcription of Stiles' initial recantation on December 6, 2006, however, was marked as an exhibit for identification only, and Stiles' 2009 habeas trial testimony never was placed into evidence. According to the defendant, this resulted in the jury's returning a guilty verdict without having had access to highly relevant and material information. Citing *State* v. *Chin Lung*, 106 Conn. 701, 704, 139 A. 91 (1927), the defendant contends that the verdict should be set aside because the jury was "influenced by lack of knowledge or understanding . . . ." (Emphasis omitted; internal quotation marks omitted.) In support of this claim, the defendant argues that the trial became "a trial within a trial within

a trial . . . ." (Internal quotation marks omitted.) On the contrary, a central question before the jury was whether it should credit Stiles' recantation of her original testimony and statements.

Stiles' 2006 statement was marked as a defense exhibit for identification. The defendant did not seek to have this statement admitted as a full exhibit during Stiles' testimony; he did, however, cross-examine John M. Waddock, a supervisory assistant state's attorney in the New Haven state's attorney's office, with regard to the statement.[21] Stiles' 2009 habeas testimony appears to be consistent with her testimony at the defendant's trial, and the defendant has not pointed to any authority requiring the state to offer and the court to admit the 2009 habeas trial testimony under those circumstances.[22]

The defendant also contends that confusion may have arisen as a result of the court's charge concerning its consideration of Stiles' previous statements. Specifically, the court charged that Stiles' 1993 statement to the police, her 1993 testimony at the hearing in probable cause and her 1995 criminal trial testimony could be considered for credibility and substantive purposes; her statement to the police in 2011 recanting the previous recantation that she made to the defendant in 2006

[21] The state objected to the defendant's cross-examination of Waddock on the ground that Stiles' 2006 statement was not in evidence and that the defendant was attempting to get it before the jury by reading from it.

[22] Section 8-6 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule *if the declarant is unavailable as a witness*: (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing." (Emphasis added.)

In the present case, Stiles was available and testified at the defendant's trial.

could be considered only for credibility purposes.[23] "The jury [is] presumed to follow the court's directions in the absence of a clear indication to the contrary." (Internal quotation marks omitted.) *State* v. *Fernandez*, 169 Conn. App. 855, 870, 153 A.3d 53 (2016). The record reflects that the court marked the jury charge as an exhibit and provided that exhibit to the jury for its use during deliberations. We note that during its deliberations, the jury did not send any notes to the court indicating that it was confused by this charge. The only notes from the jury pertained to evidence of audiotapes alleged to have been made of Youmans.[24]

On the basis of the foregoing, we cannot conclude that the court abused its discretion in denying the defendant's motion to set aside the verdict.

III

The defendant next argues that the court, when instructing the jury regarding the elements of tampering

[23] The court charged as follows: "Testimony has been presented that Doreen Stiles made a statement out of court inconsistent with her testimony at this trial. That on July 6, 2011, to [Detective] Sergeant [Tony] Reyes and [to Detective Alberto Matthew] Merced, she renounced her 2009 recantation of her 1995 testimony. You should consider this evidence only as it relates to the credibility of her testimony, not as substantive testimony. In other words, consider this evidence as you would any other evidence of inconsistent conduct in determining the weight to be given to the testimony of Doreen Stiles in this courtroom.

"Also in evidence as exhibits are prior statements of Ms. Stiles, specifically exhibits 17, 28 and 30. To the extent you find such statements inconsistent with her trial testimony here, you may give such inconsistency the weight to which you feel it is entitled in determining her credibility here in court. You may also use exhibits 17, 28 and 30 for the truth of their content and find facts from them. Remember, however, that you may not use [Detective] Merced's testimony as to Doreen Stiles' statement of July 6, 2011, for the truth of its content or find facts from it."

[24] We also note that prior to trial, the court inquired whether counsel would like the jurors to be able to take notes. Counsel for the defendant indicated that he preferred they not take notes. Subsequently, following cross-examination of Waddock, the jury sent a note to the court requesting notepads and pens to take notes. Counsel for the defendant expressed concern that to do so at that point in the trial could cause the jury to place

with a witness, erred in failing to instruct the jury regarding the "one-witness-plus-corroboration" rule adopted for perjury prosecutions in *State* v. *Sanchez*, supra, 204 Conn. 472. According to the defendant, whether the corroboration rule is viewed as an "element" of the crime or as the "quantum of evidence" required to prove falsity, the failure to give the instruction had the same harmful effect and clearly contributed to the verdict. The defendant concedes that this instructional claim was not preserved at trial, but requests that we consider it pursuant to the plain error doctrine; Practice Book § 60-5; or our supervisory authority over the administration of justice.[25] We conclude, in accordance with our discussion of the "one-witness-plus-corroboration" rule in the defendant's sufficiency of the evidence claim, that the defendant cannot prevail on this related instructional claim.

The court properly charged the jury regarding the elements of tampering with a witness. The court further

more emphasis on what came after Waddock's testimony. The court declined to provide the notepads and pens at that stage of the proceedings.

[25] The defendant initially requested that we review this claim pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, the plain error rule; Practice Book § 60-5; and our supervisory authority over the administration of justice. The state responded that because the defendant had waived this claim pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), this claim failed to satisfy the third prong of *Golding*. In his reply brief, the defendant acknowledged that in *State* v. *Bellamy*, 323 Conn. 400, 403, 147 A.3d 655 (2016), our Supreme Court reaffirmed the validity of the *Kitchens* waiver rule. He also conceded that, in light of the fact that the "one-witness-plus-corroboration" rule enunciated in *State* v. *Sanchez*, supra, 204 Conn. 472, is a "quantitative rule of evidence"; id., 477; rather than an essential element of the crime that would implicate constitutional considerations, his instructional claim did not qualify for *Golding* review. Although not reviewable under *Golding*, the defendant's claim is still subject to the plain error doctrine, as a *Kitchens* waiver does not foreclose claims of plain error. See *State* v. *McClain*, 324 Conn. 802, 805, 155 A.3d 209 (2017). Similarly, the defendant's waiver does not preclude our review of this claim pursuant to our inherent supervisory authority over the administration of justice. See *State* v. *Fuller*, 158 Conn. App. 378, 391, 119 A.3d 589 (2015).

instructed that "[i]f you think a witness has deliberately testified falsely, you should carefully consider whether you should rely on . . . any part of that witness' testimony."[26] As we stated in part I B of this opinion, even if we assume that the "one-witness-plus-corroboration" rule applies to this case, the state presented sufficient evidence of corroboration for the jury reasonably to conclude that the defendant induced or attempted to induce Stiles to testify falsely at the first habeas trial. As pointed out by the state, evidence of the defendant's intent to induce Stiles' false testimony came from multiple sources, all of which corroborated each other. In particular, the defendant's statement indicating that Visone and Tsimbidaros did not want to know "the places we've had to go and the things we've had to do" regarding this case provides corroboration that the defendant was attempting to induce Stiles to testify falsely at the first habeas trial. Accordingly, we conclude that the court's failure to charge the jury regarding the "one-witness-plus-corroboration" rule was not plain error requiring reversal of the judgment. This is not a case in which "the existence of the error is so obvious that it affects the fairness of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 595–96, 134 A.3d 560 (2016). Similarly, we decline to exercise our supervisory authority over the administration of justice to require that the *Sanchez* corroboration instruction be given in cases such as the present case.

IV

The defendant next argues that the court erred in refusing the defense request to have Stiles testify in a proffer, outside the presence of the jury. According to the defendant, the denial of that request allowed the

[26] The court included the corroboration requirement in its charge on the two perjury counts.

prosecution to elicit, in the presence of the jury, Stiles' invocation of the fifth amendment.

The following additional facts are relevant to our resolution of this claim. On the second day of trial, the state indicated its intent to interrupt Bannon's testimony in order to call Stiles to the witness stand. The defendant objected and, during the discussion that followed, argued that the state did not know what the substance of Stiles' testimony would be.[27] Thereafter, the state interrupted Bannon's testimony to call Stiles. Outside the presence of the jury, the defendant argued that Stiles had "an unusual relationship with the truth and may or may not recall things the same way twice from moment to moment . . . ." The defendant understood, however, that it was Stiles' "present intent . . . to take the [witness] stand and testify that the truth is what she said in 2009 . . . and that her testimony in [1995] was untruthful." The defendant argued that the state was offering Stiles' testimony solely for the purpose of thereafter impeaching her with a prior inconsistent statement under *State* v. *Whelan*, supra, 200 Conn. 753, which was improper. The defendant renewed his claim that the state did not know what Stiles was going to say, but argued that it "[doesn't] matter what she says. The state simply wants her up there as a warm pulse, which will either agree with them in its theory of this case or disagree, in which case it will seek to offer her prior inconsistent testimony."

The defendant noted that the state was prepared to immunize Stiles and asked the court to advise Stiles

[27] Defense counsel argued that "the state has no idea what the next witness is going to say, and that's Doreen Stiles . . . whose lawyer has informed me that she intends to get on the . . . stand and say the police bullied her the first time and that [the defendant] did not induce her to change her testimony, and so the state, apparently—and it is an open question what Ms. Stiles will do apparently from moment to moment. Her testimony changes like the New England weather. But the state has in its possession and has announced privately an intention to seek to admit her prior testimony as *Whelan* testimony."

with regard to her fifth amendment rights. The court declined to do so, noting that Stiles had her own attorney who was present in court, and had counsel when she invoked the fifth amendment in the second habeas trial. The defendant then asked that Stiles "testify . . . by way of proffer outside the jury's presence" because the state did not know what she was going to say and could not offer her testimony solely for the purpose of impeaching her. The court responded by noting that Stiles had testified inconsistently in the prior proceedings, making it difficult to have "great confidence" in the substance of Stiles' testimony.[28] The defendant then moved for a mistrial, arguing that the state had "made no proffer, nor can [it] make a proffer of what this witness will say . . . ." During the ensuing discussion, the court "anticipated that [Stiles was] going to take the fifth amendment when she [took] the witness stand . . . and be granted immunity and only then testify, and she's testified in a contradictory fashion on previous occasions." The state subsequently declined to make a proffer, noting that the defense was "not entitled to a preview of each witness" and that Stiles had been "so contaminated, so tampered with, bribed, pushed by this defendant, that's why we're bringing these charges." Ultimately, the court denied the motion for a mistrial.

William Paetzold, Stiles' attorney, then introduced himself and represented that Stiles was going to assert

[28] The court stated: "Well, the problem . . . as I understand it, this witness has previously testified in one direction at the original murder trial and a completely different direction at the [first] habeas [trial] and then took the fifth amendment at [the second] habeas [trial]. I don't know how anybody could be confident with what she's going to say today, and I don't know that the state or anyone's current belief as to what she's going to state today, based upon a conversation with her attorney, is something that can be taken with great confidence.

"What her testimony will be is what her testimony will be, and under these circumstances, I don't see how anyone could have great confidence in what her testimony will be on direct and in the crucible of cross-examination."

her fifth amendment right. Paetzold inquired about what procedure would be followed for her to do so, and the court instructed that it needed to be done in the presence of the jury and in response to specific questions. There was no objection to that procedure. The parties agreed that Paetzold could stand behind Stiles, who was in a wheelchair, until the fifth amendment issues were resolved. In the presence of the jury, the state then called Stiles as a witness. After some preliminary questions, the prosecutor asked Stiles to explain "how it was that [she] personally became involved in the criminal investigation [pertaining to] Mr. Vega." At that point, Paetzold interrupted and stated that he was advising Stiles to invoke her fifth amendment right concerning the specifics of her involvement in the case. The court asked Stiles if she was invoking her fifth amendment right and Stiles answered affirmatively. The prosecutor then immunized Stiles pursuant to General Statutes § 54-47a (1). The defendant inquired whether the immunity pertained to federal as well as state prosecution. After addressing the defendant's concern, the court noted that Stiles had counsel, and, as the defendant was not making an objection, the state could proceed. The state finished its direct examination, and the defendant cross-examined Stiles without Stiles invoking her fifth amendment right again.

According to the defendant, the court committed evidentiary trial error when it refused his request to have Stiles testify, initially, by way of a proffer outside the jury's presence. The defendant argues that this ruling allowed the state to strengthen its case by means of an inference arising from Stiles' invocation of the privilege in the jury's presence. The state counters that the defendant's unpreserved evidentiary claim should not be reviewed. If reviewed, the state argues, that the defendant cannot prevail because allowing this testimony was neither erroneous nor harmful. We will review this

claim but agree with the state that the defendant cannot prevail on the merits of this claim.

We initially note that the defendant's claim that the court improperly allowed Stiles to invoke her fifth amendment privilege in the presence of the jury is a claim of evidentiary trial error. *State* v. *Dennison*, 220 Conn. 652, 661, 600 A.2d 1343 (1991). Thus, "the claim is reviewable under the standard of harmless error applicable to nonconstitutional claims . . . and the defendant bears the burden of establishing that the trial court's erroneous ruling was harmful to him in that it probably affected the outcome of the trial." (Citation omitted.) Id.

According to the state, the defendant argued at trial that the court should have granted his request for a testimonial proffer to determine which version of Stiles' prior testimony she was going to set forth; on appeal, however, he argues that it was to prevent Stiles from invoking her fifth amendment right in the presence of the jury. Because the articulated basis for the request at trial differs from the argument raised on appeal, the state argues that we should decline to review this claim. Although "we will not review a claim unless it was distinctly raised at trial . . . we may . . . review legal arguments that differ from those raised before the trial court if they are subsumed within or intertwined with arguments related to the legal claim raised at trial." (Citations omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 203, 982 A.2d 620 (2009). In the present case, although the specific argument in support of the defendant's request for a proffer differs from the argument raised at trial, we conclude that we may review it, as it is subsumed within or intertwined with the claim raised in the trial court.

Turning to the merits of this claim, "[i]t is widely held that it is improper to permit a witness to claim

a testimonial privilege in front of the jury where the witness's intention not to testify is known beforehand. . . . Our appellate courts follow that general rule. Our Supreme Court has stated [that] . . . [i]t is firmly established that [n]either [the state nor the defendant] has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him. . . . The rule is grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations. The jury may think it high courtroom drama of probative significance when a witness takes the Fifth. In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination. . . . Accordingly, we have held that a witness may not be called to the stand in the presence of the jury merely for the purpose of invoking his privilege against self-incrimination. . . . Such testimony is not relevant, and could be prejudicial." (Citations omitted; internal quotation marks omitted.) *State* v. *Iverson*, 48 Conn. App. 168, 173–74, 708 A.2d 615, cert. denied, 244 Conn. 930, 711 A.2d 728 (1998).

"In *Namet* [v. *United States*, 373 U.S. 179, 186–87, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963)], the United States Supreme Court identified two areas where prejudice can occur. First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second theory seems to rest upon the conclusion that, in the

circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." (Citations omitted; internal quotation marks omitted.) *State* v. *Dennison*, supra, 220 Conn. 661–62. "[I]n order to determine whether the ruling of the trial court was prejudicial, we must consider the invocation of the privilege in response to the specific questions in the context and circumstances of the case." Id., 662.

With regard to the first area mentioned in *Namet*, the defendant argues that although the state had every reason to believe that Stiles would invoke her fifth amendment privilege, it resisted the defendant's efforts to obtain a testimonial proffer outside the presence of the jury. According to the defendant, this is a strong indication that the state wanted the jury to see Stiles invoke the privilege before she was given immunity. The record, however, reveals that the parties and the court assumed that Stiles would invoke the privilege, and that the state would immunize her. The state objected to the defendant's request for a proffer on the ground that the defendant was not entitled to "a preview of each witness . . . ." The state did not attempt to build its case out of inferences arising from the privilege, and it did not advocate for Stiles to invoke the privilege in the jury's presence. See *Namet* v. *United States*, supra, 373 U.S. 189 (prosecution's "few lapses" in asking questions held to be privileged did not amount to "planned or deliberate attempts by the Government to make capital out of witnesses' refusals to testify" particularly when "defense counsel not only failed to object on behalf of the defendant, but in many instances actually acquiesced in the procedure as soon as the rights of the witnesses were secured"); *United States* v. *Puntillo*, 440 F.2d 540, 543 (7th Cir. 1971) (The United

States Court of Appeals for the Seventh Circuit concluded that "[t]he prosecution made no conscious or flagrant attempt to bolster its case as the result of the invocation by the witness of his testimonial privilege. In fact, it was the judge who insisted that a record of the witness' refusal to testify be made in the jury's presence."). With regard to the second area set forth in *Namet*, we note that after Stiles invoked her fifth amendment privilege and received immunity, she continued her testimony, and the defendant had the opportunity for cross-examination. See *Namet* v. *United States*, supra, 189 (indicating that "[t]he effect of these questions was minimized by the lengthy nonprivileged testimony" given by the witnesses).

We disagree with the defendant that allowing Stiles to invoke the privilege in front of the jury permitted the jury to conclude that she was a recalcitrant or obstructionist witness who would not testify unless given immunity. On the contrary, the jury had already heard evidence indicating that Stiles had given conflicting testimony on prior occasions and that she had invoked the fifth amendment privilege in the second habeas trial. We likewise disagree with the defendant's contention that the invocation permitted the jury to infer that there was a direct connection between Stiles' possible criminal conduct and the defendant's possible criminal conduct. Contrary to the defendant's claim, the jury reasonably could infer that Stiles, who was represented by counsel, invoked the privilege to protect herself from criminal prosecution and not because she was connected to the defendant.

Accordingly, because the defendant has not established that the trial court committed evidentiary error, he cannot prevail on this claim.

V

The defendant's final claim is that the court erred in quashing the defense subpoena for information and

materials related to the witness protection program. We disagree.

The following facts are necessary for the resolution of this claim. Prior to the commencement of trial, the defendant filed a subpoena, directed to the Office of the Chief State's Attorney, asking for "[r]ecords of the Witness Protection Program; including number of witness[es] who applied to Program, number of witnesses admitted; terms of acceptance; cost of each witnesses' participation; moneys paid to or on behalf of witnesses; whether any such witnesses or state agents were prosecuted for crimes against the administration of justice in connection with Witness Protection Program activities." The defendant also filed an "omnibus motion for further discovery, selective prosecution hearing, and dismissal."[29] The state filed a motion to quash the subpoena on the grounds that it was overly broad, sought documents that were not relevant, and sought to compel the production of documents that included privileged and sensitive information. The defendant filed an objection to the state's motion to quash.

On September 18, 2013, the court heard arguments on the defendant's omnibus motion and the state's motion to quash. The defendant argued that the prosecution of the defendant reflected "a vindictive reaction by the state to a defense team that embarrassed the state" and contended that what the defense team did was not "materially different" from what the state does in the witness protection program, yet the defendant

[29] In the motion, the defendant requested "an order permitting him to inspect, copy, and have produced in court the number of any state witnesses accepted into the state's witness protection program, the terms of the witnesses' acceptance into the program, the costs associated with the witnesses' participation in the program, whether any such witnesses or managers were prosecuted for offenses against the administration of justice, and any additional material . . . that may be relevant to the claims" set forth in the motion.

was being prosecuted for his conduct. The defendant argued that he wanted all records of the witness protection program and indicated that he did not see a security issue, as the court could order him not to disclose the information that he received to anyone.[30] In response, the state argued that because every person accepted into the witness protection program was different, there was no "certain threshold or certain type of blanket form that is filled out and submitted in order for someone to be accepted." Instead, these cases are handled on a case-by-case basis considering "what the situation is, what the danger is, what types of resources these individuals have that they can continue to rely on if, in fact, they're accepted into the program."

At the conclusion of the hearing, the court denied the defendant's omnibus motion in its entirety, granted the state's motion to quash, and overruled the defendant's objection to the state's motion to quash. In its ruling, the court first concluded that the evidence presented by the defendant did not justify an evidentiary hearing on the selective prosecution claim, and, since the threshold for an evidentiary hearing was not satisfied, the claim of selective prosecution also failed on

[30] The trial transcript states:

"The Court: You want every record with regard to the witness protection program. That would necessarily indicate the names of everybody in the witness protection program. That would necessarily indicate where they're routinely housed. That would necessarily indicate—it could necessarily indicate from what restaurants or groceries agents routinely obtain food for people that are housed in order to take it to them.

"[The Defendant's Counsel]: We want the very sort of details that the state is going to present against [the defendant] as to the benefits they provide to their witnesses. Now—

"The Court: Do you see a security problem involved for the individuals—

"[The Defendant's Counsel]: None.

"The Court: —per the essence of the program?

"[The Defendant's Counsel]: None; because you can order me not to disclose them to anyone, and that routinely happens in cases involving national security where defense counsel—limitations are placed upon defense counsel who are provided with access, who nonetheless have a right to present a defense."

the merits. In rejecting the defendant's claim that he had been singled out, the court disagreed with his attempt to analogize the present case to the witness protection program.[31] The court further found that the "defendant's unsupported assertions [did] not suffice to demonstrate that the defendant [was] the victim of invidious discrimination based on impermissible considerations." With regard to the motion to quash, the court concluded that the information sought fell within the "prosecutorial privilege" and that, given the purpose of the witness protection program, i.e., the protection of witnesses, and the court's reasoning in addressing the selective prosecution claim, the defendant had failed to demonstrate good cause for the release of the requested information. See Practice Book § 40-12.

On appeal, the defendant argues that the court erred in quashing the subpoena, thereby impairing his state and federal constitutional rights to present a defense, including a selective prosecution claim. The defendant contends that the subpoena was "sufficiently particularized so that the documents sought may be readily identified"; *Three S. Development Co.* v. *Santore*, 193 Conn. 174, 179, 474 A.2d 795 (1984); and that the materials

[31] The court stated: "[T]he defendant is accused of bribing a witness to change her testimony. This situation is distinctly different and a far cry from incidences where the state, acting in its official capacity and pursuant to statute, offers goods and services to a witness who faces a potential risk of harm for testifying against a defendant charged with a serious criminal offense.

"The defendant has not provided any evidence to suggest that the state conditions that protection pursuant to the witness protection statute upon specific or favorable testimony from that witness, nor can this practice be gleaned from the statute.

"The plain language of the statute indicates that the primary policy concerning protecting witnesses facing a potential risk of harm for testifying against a defendant charged with a serious offense.

"The court cannot find that the state, acting in its official capacity in carrying out the mandates of the statutory witness protection program, is similarly situated to the defendant, who allegedly attempted to bribe a witness with a television in order to elicit favorable testimony."

were " 'highly relevant' " to his selective prosecution claim, which was part of his defense. See *State* v. *DeCaro*, 252 Conn. 229, 258, 745 A.2d 800 (2000). Without the information regarding the witness protection program, the defendant contends, he was not in a position to make the prima facie showing that is necessary to obtain an evidentiary hearing on a selective prosecution claim.[32]

We begin by noting that the standard of review applicable to the granting of a motion to quash and the denial of a request for an evidentiary hearing to prove selective prosecution is abuse of discretion. See *State* v. *Colon*, 272 Conn. 106, 265, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Perez*, 82 Conn. App. 100, 109, 842 A.2d 1187, cert. denied, 269 Conn. 904, 852 A.2d 734 (2004).

"In cases in which the defense of selective prosecution has been asserted . . . the defendant must prove (1) that others similarly situated have generally not been prosecuted and that he has been singled out and (2) that he is the victim of invidious discrimination based on impermissible considerations such as race, religion, or the exercise of a constitutionally protected right." (Internal quotation marks omitted.) *State* v. *Payne*, 100 Conn. App. 13, 19, 917 A.2d 43, cert. denied, 282 Conn. 914, 924 A.2d 139 (2007). "[A]n evidentiary hearing to prove selective prosecution is not a matter of right and is not available to every defendant, but rather is to be granted at the discretion of the trial court following a prima facie showing by the defendant that

[32] According to the state, this claim is moot because the defendant has challenged only the granting of the motion to quash, and not the court's ruling that he was not entitled to an evidentiary hearing on his selective prosecution claim. The defendant argues, however, that because the court granted the motion to quash, he was unable to make the prima facie showing that is necessary to obtain an evidentiary hearing on a selective prosecution claim. We, therefore, disagree that this claim is moot.

a legitimate claim exists with regard to both prongs of the selective prosecution test." (Internal quotation marks omitted.) Id., 20.

"To warrant discovery [or an evidentiary hearing] with respect to a claim of selective prosecution, a defendant must present at least some evidence tending to show the existence of the essential elements of the defense . . . . Mere assertions and generalized proffers on information and belief are insufficient. . . . [T]o engage in a collateral inquiry respecting prosecutorial motive, there must be more than mere suspicion or surmise. If a judicial inquiry into the government's motive for prosecuting could be launched without an adequate factual showing of impropriety, it would lead far too frequently to judicial intrusion on the power of the executive branch to make prosecutorial decisions. Unwarranted judicial inquiries would also undermine the strong public policy that resolution of criminal cases not be unduly delayed by litigation over collateral matters. . . . When a request for an evidentiary hearing and a motion to dismiss on the basis of a defense of selective prosecution are rooted in mere speculative and unduly myopic assertions, a trial court does not abuse its discretion in denying an evidentiary hearing and motion to dismiss. . . . Furthermore, because the amount of evidence needed to support a selective prosecution claim on the merits is greater than that which justifies an evidentiary hearing, it necessarily follows that, when an evidentiary hearing is not warranted, a defendant's merits claim must also fail." (Citations omitted; internal quotation marks omitted.) Id., 20–21.

In the present case, the defendant presented no evidence that he was similarly situated to the individuals who administer the witness protection program. Although the defendant argued that his conduct was not materially different from the services that the state

provides for witnesses in the witness protection program, that program is actually intended to protect witnesses from harm for having testified against a defendant. General Statutes § 54-82t.[33] As discussed previously, the bribery and tampering offenses with which the defendant was charged involved altering testimony or inducing false testimony from a witness. The defendant's subpoena, therefore, was overly broad in that it sought records regarding all benefits provided by the witness protection program, rather than records supporting a claim that benefits had been provided with the intent to alter testimony or induce false testimony. See *State* v. *Montgomery*, 254 Conn. 694, 728, 759 A.2d 995 (2000) ("[i]f the subpoena on its face is too broad and sweeping, it is subject to a motion to quash" [internal quotation marks omitted]). In addition, the subpoena sought information that is protected from disclosure by the witness protection statute. See General Statutes § 54-82t (j).[34] On the basis of the foregoing, we conclude that the court did not abuse its discretion in granting the state's motion to quash the subpoena.

The judgment is affirmed.

In this opinion the other judges concurred.

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[33] A "[w]itness at risk of harm" is defined as a "witness who, as a result of cooperating in an investigation or prosecution of a serious felony offense, has been, or is reasonably likely to be, intimidated, harassed, threatened, retaliated against or subjected to physical violence." General Statutes § 54-82t (a) (2).

[34] General Statutes § 54-82t (j) provides: "Any record of the Division of Criminal Justice or other governmental agency that, in the reasonable judgment of the Chief State's Attorney or a state's attorney, would disclose or would reasonably result in the disclosure of the identity or location of any person receiving or considered for the receipt of protective services under this section . . . shall be confidential and not subject to disclosure under the Freedom of Information Act, as defined in section 1-200."

STONES TRAIL, LLC *v.* TOWN OF WESTON
(AC 38078)

Sheldon, Mullins and Harper, Js.

Syllabus

The plaintiff developer brought an action seeking to recover damages from the defendant town as a result of its alleged inverse condemnation or regulatory taking of certain of the plaintiff's real property. The plaintiff also alleged various violations of its federal constitutional rights. The plaintiff had purchased the property with the purpose of dividing it into six buildable lots. Before the closing of the purchase, the plaintiff submitted three maps of the property to the town. The town's attorney determined that the property depicted on one of the maps was not a subdivision, and that map was stamped accordingly and filed in the town land records. Thereafter, the other two maps, which altered the lot lines of the property to depict six potentially developable lots, were stamped with the identical language and filed in the land records. The plaintiff completed the purchase of the property, in reliance on the review of the lots by town officials and the stamped notation. The plaintiff did not seek or obtain approval from the town's Planning and Zoning Commission for the subdivision of the lots, believing that such approval was not necessary because the town's prior procedure had been to place the same stamped language on maps when it was determined that subdivision approval was not needed. Thereafter, the plaintiff was informed by several town officials that it had to seek subdivision approval from the commission prior to subdividing the properties. The town's attorneys rejected the plaintiff's requests to reconsider that determination and urged the plaintiff to apply to the commission for subdivision approval. The town's zoning enforcement officer also denied the plaintiff's request for a certificate of zoning compliance, which was upheld by the town's Zoning Board of Appeals. Prior to trial, the town filed four motions to dismiss the plaintiff's action on the ground that its claims were not ripe and that the court therefore lacked subject matter jurisdiction. Those motions were denied. The jury returned a verdict in the plaintiff's favor on its constitutional claims, after which the trial court, sua sponte, set aside the verdict and dismissed the action for lack of subject matter jurisdiction. In dismissing the action, the court relied on facts that were developed throughout the proceedings and at trial in determining that the plaintiff's claims were not ripe because the plaintiff had failed to obtain a final decision from the commission on its subdivision proposal. The court issued a revised memorandum of decision in which it deleted the references to the doctrine of exhaustion of administrative remedies that had been included in the initial memorandum of decision. The court determined that those references were dicta

and removed them to avoid ambiguity or confusion as to the basis of its initial decision. On appeal, the plaintiff claimed, inter alia, that the principle of finality of judgments superseded the reconsideration of the town's claims of lack of subject matter jurisdiction, and that the trial court was precluded by the law of the case doctrine from reconsidering the four pretrial rulings that rejected the town's ripeness claims. *Held*:

1. The principle of the finality of judgments did not bar the trial court from reconsidering the ripeness of the plaintiff's claims and whether it had subject matter jurisdiction over those claims, as the court's reconsideration of its jurisdiction was not a collateral attack on a judgment rendered in another proceeding, reconsideration was necessary on the basis of facts that were developed at trial and were unknown to the court when it previously considered the issue of ripeness, and reconsideration was important so as to prevent a miscarriage of justice to ensure that the court had jurisdiction under the circumstances here, in which the plaintiff did not comply with the town's zoning regulations, but, rather, sought to circumvent those procedures.
2. Contrary to the plaintiff's claim, the law of the case doctrine did not bar the trial court from revisiting the issue of ripeness and, thus, its jurisdiction; although the issue of ripeness had been considered four times previously, the law of the case doctrine does not mandate that a court adhere to all rulings made at prior stages in the proceedings, and the trial court here explained that it reconsidered the issue of ripeness on the basis of facts that were developed at trial.
3. The trial court properly determined that although the plaintiff had vested rights in the property at issue, it did not have vested rights in the configuration of the property as it sought to reconfigure it, nor could it have acquired such vested rights without having sought approval of its reconfiguration in accordance with the town's established protocol and procedures; the zoning enforcement officer's denial of the plaintiff's application for a certificate of zoning compliance was a conditional decision that did not vest the plaintiff with rights to the property at issue, the zoning officer having refused to issue the certificate before the plaintiff presented its application to and received subdivision approval from the town's commission, and having merely referred the initial determination of the subdivision issue and the validity of the property lots to the administrative body charged with deciding those issues.
4. The plaintiff's claim that the trial court improperly relied on a prior decision of this court in ruling that it lacked subject matter jurisdiction was unavailing; the trial court's jurisdictional inquiry was based on the factual record developed throughout the proceedings up until the jury's verdict, and it was clear that in assessing whether it had subject matter jurisdiction, the court considered factual differences between the claims here and in the prior decision of this court.

5. The plaintiff could not prevail on its claim that the trial court improperly rejected its assertion that it would have been futile to apply to the commission for subdivision approval and, thus, that it should have been excused from having to do so; the plaintiff's obstacles to obtaining subdivision approval were self-imposed, as the plaintiff had been directed by every town representative with whom it spoke about the matter to seek approval from the commission, but never did so, and the plaintiff's principal testified that he did not seek subdivision approval because it was a time-consuming and expensive process, and because his attorney told him that it might impair the collateral to his mortgage loan or be viewed as an admission that the lot line adjustments were invalid.
6. Notwithstanding the plaintiff's claims to the contrary, the trial court's ripeness review applied to the plaintiff's claims of alleged violations of its constitutional rights, as those constitutional claims were inextricably intertwined with the plaintiff's takings and inverse condemnation claims, the allegations in the complaint underlying the takings and inverse condemnation claims having mirrored those set forth in the constitutional claims.
7. The plaintiff could not prevail on its claim that the trial court materially altered its decision when it filed a revised memorandum of decision that omitted references in the original decision to the exhaustion of administrative remedies doctrine; the court's original decision mentioned that doctrine only in passing and without discussion of how it would apply to the present case, that doctrine did not form the basis of the court's decision, and the lack of any reference to that doctrine in the revised memorandum of decision served to dispel any ambiguity or confusion concerning the basis of the court's original decision.

Argued March 13—officially released July 18, 2017

Procedural History

Action to recover damages for, inter alia, the alleged violation of certain of the plaintiff's constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Karazin*, *J.*, denied the defendant's motion to dismiss; thereafter, the court, *Hon. Taggart D. Adams*, judge trial referee, denied the defendant's motion to dismiss; subsequently, the court, *Hon. Edward R. Karazin*, *Jr.*, judge trial referee, denied the defendant's motions to dismiss; thereafter, the matter was tried to the jury before *Lee*, *J.*; verdict for the plaintiff; subsequently, the court, *Lee*, *J.*, denied the defendant's

motion for judgment notwithstanding the verdict and rendered judgment in accordance with the verdict; thereafter, the court, *Lee*, *J.*, set aside the verdict and dismissed the action for lack of subject matter jurisdiction, and the plaintiff appealed to this court; subsequently, the court, *Lee*, *J.*, issued an articulation of its decision. *Affirmed.*

Robert A. Fuller, with whom was *Paul J. Pacifico*, for the appellant (plaintiff).

Thomas R. Gerarde, with whom was *Patricia C. Sullivan*, for the appellee (defendant).

Opinion

SHELDON, J. The plaintiff, Stones Trail, LLC, brought this action against the defendant, the town of Weston (town), arising from its attempts to develop certain real property located in Weston, alleging, inter alia, denial of equal protection of the law in violation of 42 U.S.C. § 1983; denial of procedural due process in violation of 42 U.S.C. § 1983; inverse condemnation or regulatory taking of land in violation of 42 U.S.C. § 1983; and inverse condemnation or regulatory taking of land in violation of the fifth amendment to the United States constitution[1] and article first, § 11, of the state constitution.[2] The plaintiff appeals from the trial court's dismissal of its claims on the basis of its determination that the lack of a final decision from the town's Planning and Zoning Commission (commission) rendered them

[1] As a claim against a subdivision of the state, this claim was treated as a claim under the fifth and fourteenth amendments to the United States constitution. Even so, we will refer to it, as did the parties and the trial court, as a claim under the fifth amendment.

[2] Prior to trial, the plaintiff's claim for violation of substantive due process was stricken as legally insufficient. The plaintiff's additional claims, one for a declaratory judgment and another asserting municipal estoppel, were dismissed prior to trial. Those rulings have not been challenged on appeal.

unripe for adjudication. We affirm the judgment of the trial court.[3]

The trial court set forth the following relevant facts and procedural history. "[Robert] Walpuck, [doing business as the plaintiff], Stones Trail, LLC, entered into a contract to purchase the property on Ladder Hill Road in Weston . . . (the property) on March 18, 1998. The property was composed of four smaller lots varying from one to two acres in size and one large lot (the Great Gate lot), with the total property aggregating about seventeen acres. The property was located in a two acre zone. Prior to closing the purchase, [the plaintiff] commissioned a title report, which was forwarded to the town. [The plaintiff] submitted three maps of the property to the town. Map #3447 depicted the property as it had appeared since 1937, consisting of four small lots and one large lot. On September 18, 1998, Town Attorney Christopher Jarboe wrote to the code enforcement officer that the property depicted on map #3447 was not a subdivision and should be stamped accordingly and filed on the land records. On the same day, the town engineer and [the] town code enforcement officer stamped and signed map #3447 with a stamp reading as follows: 'The Town Engineer and Code Enforcement Office hereby attest to the fact that this plan is neither a subdivision nor a resubdivision as defined by the General Statutes of Connecticut and the Town of Weston and may be recorded without prior approval of the Weston Planning and Zoning Commission.' Approximately a week later, on September 24, 1998, map #3448, which altered the property in that the Great Gate lot on map #3447 was divided into two, yielding a total of six lots, was filed and stamped with the same language. Map #3449 was also filed and

[3] Because we reject all of the plaintiff's claims on appeal, we need not address the town's proposed alternative ground to affirm, which is that the plaintiff failed to seek any variances.

stamped with the same language on September 24, 1998. Map #3449 substantially altered the lots so that the four smaller lots each slightly exceeded two acres, giving the developer six potentially developable lots. Map #3448 and map #3449 were not stamped and filed on the Weston Land Records until roughly a week after the date of . . . Jarboe's letter. . . .

"Walpuck testified that he felt he did not need subdivision approval and that he could achieve his objective of six buildable lots by lot line adjustments. According to . . . Walpuck, the procedure in Weston since 1991 was to place the aforementioned stamped language on a map when it was determined that no subdivision approval was needed. This procedure apparently was recommended by Town Counsel Harry Hefferan in 1991, who wrote, '[i]n the event a map is requested to be filed without subdivision or resubdivision action by the Planning and Zoning Commission acting in its planning function, the same shall be presented by its proposed filer to the town engineer and to the code enforcement officer for their examination. If those officers determine that it is unnecessary to appear before the Planning and Zoning Commission because there is no subdivision or resubdivision as so defined, they shall so indicate on the face of the map and the town clerk may accept for filing such map.' . . .

"Walpuck testified that, in reliance on the review of the lots by town officials and the stamped notation on map #3449, in October, 1998, the plaintiff completed the purchase of the property, having obtained a $1.1 million mortgage from Ridgefield Bank. The mortgage agreement included a provision allowing for the severance or release of individual lots upon payment of an allocated amount. . . .

"Subsequently, on February 14, 2000, special counsel for the commission, Attorney Barry Hawkins, advised

the plaintiff's attorney by letter that he had 'determined that under applicable Connecticut law and the Weston Planning and Zoning Regulations and Subdivision By-Laws . . . Walpuck must seek subdivision approval from the Weston Planning and Zoning Commission prior to dividing his properties situated at 10 Ladder Hill Road and 96 Georgetown Road in Weston . . . .' Hawkins explained that the plaintiff's 'extensive and aggressive lot line adjustments' appeared to be an attempt to 'circumvent compliance with [the town's] Subdivision By-Laws.' Hawkins also notified the plaintiff that he had advised the town's zoning enforcement and building officials not to issue zoning or building permits to the plaintiff, should it attempt to develop the lots. Hawkins advised the plaintiff that it should apply to the commission for subdivision approval, and that '[t]he Planning and Zoning Commission is willing to work with . . . Walpuck to accomplish reasonably the safe and proper development of his properties in accordance with applicable subdivision statutes and regulations.'

"On March 22, 2000, Hawkins wrote to the town's tax assessor, advising that the lot line adjustments reflected on the recorded maps did not create additional building lots, and that, therefore, the plaintiff's property should be taxed as one parcel of land. In May, 2000, the tax assessor revised the tax assessment map so that the plaintiff's property was taxed as a single lot. This did not affect the existing lot lines, however.

"In 2002, [the plaintiff] was in default on its mortgage. The bank threatened foreclosure, and . . . Walpuck sought permission to sell one of the reconfigured lots to generate cash to cure the default. However, the Ridgefield Bank refused to release any of the six lots from the plaintiff's mortgage because of, among other things, uncertainty about the legitimacy of the six lot configuration shown on map #3449. Subsequently, the

bank commenced a mortgage foreclosure action against the plaintiff in February, 2002.

"Upon receiving Hawkins' letter, the plaintiff did not seek subdivision approval from the commission or appeal the position of the letter to the Zoning Board of Appeals. Instead, in 2004 and 2005, the plaintiff made requests to town attorneys Kenneth Bernhard and Patricia C. Sullivan to reconsider the town's position, based on the plaintiff's contention that the parcels did not constitute a subdivision under General Statutes § 8-18. The town attorneys rejected these requests and urged [the] plaintiff to apply for subdivision approval. Instead, [the] plaintiff commenced the present action in [November], 2005. . . . Walpuck testified that he did not apply for subdivision approval because it was a time-consuming and expensive process, and because his lawyer told him that it might impair the collateral to his loan, or, 'since it could be viewed' as a possible admission that the lot line adjustments were invalid.

"In April, 2006, subsequent to the commencement of this action, the plaintiff filed an informal, handwritten application with town Zoning Enforcement Officer Robert Turner for a certificate of zoning compliance for parcel D on map #3449. Turner denied the application, noting that he lacked authority to grant a certificate of zoning compliance for anything other than the smaller, preexisting lot called the 'Honor Leeming Lot' on an older map of the property in its previous, nonconforming configuration. Turner further stated that the proposed lot line arrangements shown on map #3449 'would have to be reviewed before permission can be given.' Turner continued, '[a]s has been explained to you on a number of prior occasions, the way to legitimately divide the property purported to be owned by [the plaintiff] adjacent to the Honor Leeming parcel, is by filing a subdivision application with the Planning and Zoning Commission.'

"The plaintiff appealed Turner's decision to the Zoning Board of Appeals, which upheld Turner's decision. The plaintiff then appealed to the Superior Court, which dismissed the action for lack of aggrievement because the plaintiff had lost the property to foreclosure in August, 2006. See *Stones Trail, LLC* v. *Weston*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-06-4010003-S, 2008 WL 2168967 (May 6, 2008) (*J. Downey, J.*).

"Walpuck also testified that the subsequent owner of the property in question successfully applied to the commission for subdivision approval. The subsequent owner received formal subdivision approval for four lots, which were larger than those proposed by . . . Walpuck, and which allowed the construction of considerably larger houses."

The plaintiff commenced this action in November, 2005, by way of an eight count complaint. Of those eight counts, the following proceeded to trial: denial of equal protection of the law in violation of 42 U.S.C. § 1983; denial of procedural due process in violation of 42 U.S.C. § 1983; inverse condemnation or regulatory taking of land in violation of 42 U.S.C. § 1983; and inverse condemnation or regulatory taking of land in violation of the fifth amendment to the United States constitution and article first, § 11, of the state constitution.[4] The plaintiff's three § 1983 claims were tried to the jury, and its federal and state constitutional claims were simultaneously tried to the court. The jury returned a verdict in favor of the plaintiff on all three § 1983 counts and awarded damages to the plaintiff in the amount of $5,000,000.

Following trial, the court, sua sponte, raised the issue of whether the plaintiff's claims were ripe for adjudication, and thus whether it had jurisdiction over them. In

[4] See footnote 1 of this opinion.

so doing, it explained: "Over the course of nine and one-half years, this case has amassed an extensive procedural history. Of relevance to the present discussion are the defendant town's motions, on four separate occasions before trial, to dismiss the plaintiff's claims for lack of subject matter jurisdiction, arguing that [the] plaintiff had failed to apply to the commission for subdivision approval, that its claims were unripe for adjudication, and any appealed act of the town lacked finality. On each occasion, the [town's] motion was denied. See *Stones Trail, LLC* v. *Weston*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-05-4007138-S, 2014 WL 6765409 (October 23, 2014) (*Hon. Edward R. Karazin, Jr.*, judge trial referee); *Stones Trail, LLC* v. *Weston*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-05-4007138-S, 2013 WL 4046688 (July 19, 2013) (*Hon. Edward R. Karazin, Jr.*, judge trial referee); *Stones Trail, LLC* v. *Weston*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-05-4007138-S, 2011 WL 6976565 (December 16, 2011) (*Hon. Taggart D. Adams*, judge trial referee); *Stones Trail, LLC* v. *Weston*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-05-4007138-S, 2007 WL 2039086 (June 25, 2007) (*Hon. Edward R. Karazin, Jr.*, judge trial referee). Among the parties' posttrial motions is the town's fifth motion to dismiss, this time premised on its argument that the plaintiff's § 1983 taking[s] claims were unripe when the jury rendered its verdict because the court had yet to render a decision on the plaintiff's state law takings claim.

"[The town's] first and second motions to dismiss were decided prior to the Appellate Court's decision on January 15, 2013, in *Lost Trail, LLC* v. *Weston*, [140 Conn. App. 136, 57 A.3d 905, cert. denied, 308 Conn. 915, 61 A.3d 1102 (2013)]. That case, as more fully explained

[herein], was essentially a companion case to the present action, involving the identical stamps by Weston officials and correspondence with attorneys acting on behalf of the town. . . . Walpuck, the principal in both Stones Trail, LLC, and Lost Trail, LLC, filed both lawsuits in December, 2005, and subsequently lost both properties to foreclosure. In the *Lost Trail, LLC* litigation, the Appellate Court and federal courts agreed with the jurisdictional challenges of the defendant town and dismissed each of [the] plaintiff's claims due to its failure to apply to the commission for subdivision approval. See id.; *Lost Trail, LLC* v. *Weston*, 485 F. Supp. 2d 59 (D. Conn. 2007), aff'd, *Lost Trail, LLC* v. *Weston*, 289 Fed. Appx. 443 (2d Cir. 2008).

"The town based its third and fourth pretrial motions to dismiss on the Appellate Court and federal court decisions in *Lost Trail, LLC*, but the [trial] court, without the benefit of the full factual record which has been developed at trial, noted differences between *Lost Trail, LLC*, and the facts as then presented to it in the instant case, and denied both motions. See *Stones Trail, LLC* v. *Weston*, supra, 2014 WL 6765409; *Stones Trail, LLC* v. *Weston*, supra, 2013 WL 4046688.

"As explained [previously], in its posttrial motion to dismiss, the [town] did not reassert the arguments raised in its previous motions to dismiss. The court, however, in light of the facts developed at trial, and the Appellate Court and federal court decisions in *Lost Trail, LLC*, elected to raise and reconsider, sua sponte, the issue of the court's subject matter jurisdiction."

On June 9, 2015, the court issued a memorandum of decision, in which it set aside the jury's verdict and dismissed all of the plaintiff's claims for lack of subject matter jurisdiction on the ground that its claims were not ripe because it had failed to obtain a final decision from the commission on its subdivision proposal. In its

decision, the court specifically discussed Connecticut's law requiring that a plaintiff must establish the finality of the determination made in his case before he is entitled to judicial review of his regulatory takings claim. The court then proceeded in its memorandum of decision to separately discuss the federal law requirement of ripeness, as set forth in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), which provides that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." The court further noted in its discussion of the federal ripeness requirement that (1) a plaintiff is excused from obtaining a final decision if it would have been futile to pursue such a course, and (2) although the ripeness requirement discussed in *Williamson* was announced in a takings context, the requirement had been extended to equal protection and due process claims asserted in land use cases. Finally, the court discussed *Lost Trail, LLC*, and concluded that, "[g]iven the substantial conformity of the facts between the present case and *Lost Trail, LLC* . . . the legal outcome should conform as well." The court ultimately determined that, because the plaintiff had both "failed to prove that a final decision was rendered by any administrative body charged with allegedly depriving [the] plaintiff of its rights," or "that it would have been futile to pursue available administrative remedies," it was necessary to dismiss the plaintiff's claims for lack of subject matter jurisdiction. Judgment entered in accordance with the trial court's June 9, 2015 memorandum of decision on that same date. On June 19, 2015, the plaintiff timely filed this appeal.

Subsequently, the town filed a motion for articulation, seeking clarification of the basis for the court's June

9, 2015 decision. Specifically, the town argued that clarification was necessary because, in the court's June 9, 2015 memorandum of decision, the court had made several references to the exhaustion of administrative remedies doctrine, which need not be satisfied before bringing a § 1983 claim, thereby creating an ambiguity as to whether the trial court had applied that doctrine. In particular, the town noted that the trial court had included a reference to the exhaustion of administrative remedies doctrine in the conclusion of its memorandum of decision, stating that it was dismissing the plaintiff's federal takings and § 1983 claims "for lack of ripeness due to the plaintiff's failure to exhaust administrative remedies." The town therefore sought in its motion for articulation to have the trial court clarify that (1) the sole basis for its dismissal of the plaintiff's federal takings and § 1983 claims was lack of ripeness under *Williamson*, (2) the futility exception is the exception to the *Williamson* ripeness test and not the futility exception to the exhaustion of administrative remedies doctrine, and (3) the plaintiff did not satisfy the futility exception with respect to its § 1983 claims.

The court granted the town's motion over the plaintiff's objection, and noted that "it is clear that the court rendered its decision on the § 1983 claims based on its finding that the lack of a final (or any) decision from the [commission] rendered the appeal unripe. Any references to exhaustion of administrative remedies were unnecessary dicta and will be removed to avoid any ambiguity or confusion as to the basis of the court's decision." On October 19, 2015, the court issued a revised memorandum of decision consistent with its articulation.

On appeal, the plaintiff claims that (1) "the concept of finality of judgments supersedes reconsideration of claims of lack of subject matter jurisdiction based on ripeness for review under the facts of this case after

four pretrial motions denied that claim"; (2) the four pretrial rulings rejecting the town's ripeness claims constituted the law of the case by which the court was bound, and thus it was precluded from reconsidering those rulings after the jury returned its verdict; (3) it had vested property rights to the six lots at issue in this case, and thus it was not required to apply to, nor was a decision on its application required from, the commission, to establish finality; (4) this court's decision in *Lost Trail, LLC* v. *Weston*, supra, 140 Conn. App. 136, is distinguishable from the present case, and thus the trial court improperly relied upon it; (5) the futility exception to ripeness applies to this case; (6) ripeness does not apply to its § 1983 claims alleging equal protection and procedural due process violations; and (7) the court's articulation improperly altered the basis for its decision.[5] The first two of the plaintiff's claims concern the propriety of the trial court's decision, sua sponte, to reconsider the issue of subject matter jurisdiction. The remaining claims go to the merits of the trial court's decision that the plaintiff's claims were unripe, and thus that it lacked subject matter jurisdiction over them.

Because the trial court devoted a great deal of attention to, and relied in large part upon, *Lost Trail, LLC* v. *Weston*, supra, 140 Conn. App. 136, we set forth the trial court's general description of the pertinent factual and procedural history, and legal rulings, in that case.

[5] The plaintiff also claims that "[t]he regulatory takings claim based on the Connecticut constitution was incorrectly dismissed for lack of finality, and the state constitution does not apply to the equal protection and procedural due process claims." In support of this claim, the plaintiff claims to be challenging a ruling that the trial court purportedly made regarding its "regulatory takings claim under the Connecticut constitution" in response to the fifth motion to dismiss, which was filed by the town after the jury returned its verdict. Because the court dismissed the plaintiff's regulatory takings claim "for lack of finality" upon its sua sponte raising of the issue of subject matter jurisdiction, the plaintiff's claim in this regard is unfounded.

The trial court recounted: "*Lost Trail*, *LLC* v. *Weston*, supra, 136, was essentially a companion case to the present case, and involved nearly identical facts, including, *inter alia*, the purchase of land on Georgetown Road in Weston in 1997 intended for development by [a limited liability company] controlled by . . . Walpuck; the attempt to create additional buildable lots through the adjustment of lot lines; and the filing of maps showing the existing and proposed configuration in the summer of 1998. The Lost Trail maps received the same stamped language from town officials one month before the Stones Trail maps. The letter of February 14, 2000, from special counsel Hawkins, advising that an application to the commission for subdivision approval was required, referred to both the Lost Trail and Stones Trail properties in its 're' line, and the letter made no distinction between them. As in the present case, rather than pursue subdivision approval from the commission, counsel for Lost Trail argued with the town attorneys, the property went into default and ultimately foreclosure. Lost Trail, LLC, commenced an action against the town in the same month as did Stones Trail, LLC, for the same alleged violations, i.e., denial of equal protection, denial of due process, and a regulatory taking, all in violation of 42 U.S.C. § 1983, and regulatory takings claims premised on the United States and Connecticut constitutions.

"The legal action proceeded somewhat more quickly in *Lost Trail*, *LLC*, than in *Stones Trail*, *LLC*. Upon removal to federal court, the . . . town . . . successfully moved to dismiss Lost Trail's § 1983 claims for lack of ripeness. The District Court's summary of Lost Trail, LLC's, arguments, namely, that it was exempt from the subdivision approval process and that it would have been futile to submit permit applications under the circumstances, underscores *Lost Trail*, *LLC*,'s similarity to the present case. The court noted that Lost

Trail relies heavily on the alleged 1998 decision of the former Town Attorney and Zoning Enforcement Officer, as noted on [the stamps on] map #3443 and map #3444, that changes to Lost Trail's property converting two lots . . . to four lots did not require subdivision approval. . . . Lost Trail asserts that in 2000 [by way of special counsel Hawkins' letter] the Town reversed this decision and now considers the four lots invalid because they lack subdivision approval from the Planning and Zoning Commission. Lost Trail argues that this reversal, coupled with specific instructions to various town officials not to issue permits until a proper subdivision application is processed, sufficiently meets the finality test in the first part of the *Williamson* decision and places this case squarely under the futility exception to the finality rule. . . . *Lost Trail, LLC* v. *Weston*, supra, 485 F. Supp. 2d 65.

"The court disagreed, holding that Lost Trail has failed to demonstrate that the Town has rendered a final decision as to how subdivision or zoning regulations will be applied to Lost Trail's property and whether the Town will prohibit all economically beneficial uses. That the Town refuses to recognize maps, recorded by Lost Trail and depicting four lots, without formal consideration by the Planning and Zoning Commission through the subdivision approval process does not constitute a final decision as to the outcome of that process. [Id., 65]. Nor does the Town's alleged prospective refusal to issue zoning or building permits until subdivision approval is obtained for the four lots demonstrate either a final decision or futility exempting Lost Trail from the final decision requirement. Lost Trail's futility argument hinges largely on what it deems a purely legal question, namely whether the [Georgetown] lots exist as a matter of law as [four] separate parcels under Connecticut statutory law and case law.

. . . Regardless of the merit to Lost Trail's legal argument, it has never been presented to the Planning and Zoning Commission for its formal consideration and thus Lost Trail has not obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property. . . . Id., 66. The District Court dismissed the plaintiff's equal protection and due process claims along with its takings claim, having noted that '[the plaintiff's claims] asserting denial of equal protection, denial of substantive and procedural due process, and inverse condemnation or regulatory taking of plaintiff's land in violation of the Fifth Amendment are . . . all tested under the first prong of the *Williamson* test for ripeness.' [Id., 64]. On appeal, the United States Court of Appeals for the Second Circuit affirmed, by summary order, the District Court's dismissal of all of the plaintiff's federal claims. *Lost Trail, LLC* v. *Weston*, 289 Fed. Appx. 443 (2d Cir. 2008).

"The District Court remanded the state law counts to the Superior Court. [The] [d]efendant town filed motions to dismiss the plaintiff's three remaining state law claims, which were granted on the ground that the plaintiff had failed to obtain a final decision from the commission and to exhaust available administrative remedies prior to seeking declaratory relief. See *Lost Trail, LLC* v. *Weston*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-05-5000500-S, 2009 WL 1532642 (May 8, 2009) (*Pavia, J.*); *Lost Trail, LLC* v. *Weston*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-05-5000500-S, 2011 WL 2739436 (June 9, 2011) (*Hon. Alfred J. Jennings, Jr.*, judge trial referee).

"On appeal, the Appellate Court first noted Lost Trail's argument that its division of the . . . property plainly did not constitute a subdivision under § 8-18;

thus, as a matter of law, the commission had no jurisdiction over the matter. In Lost Trail's view, [t]here was nothing for the . . . [c]ommission to decide as to either (1) whether subdivision approval was necessary for the property . . . or (2) to review and approve (or deny) a subdivision application. Because this issue was beyond the commission's purview, Lost Trail asserts that the finality requirement is simply beside the point. Lost Trail additionally argues that, even if it was required to seek the commission's consent, the town effectively approved the division of the two preexisting parcels into four separate lots in August, 1998, when the final maps were stamped and signed by town officials and recorded in the town land records. Lost Trail characterizes the town's subsequent actions as a revocation of this apparent approval, which revocation inflicted an immediate injury ripe for adjudication. . . . *Lost Trail, LLC* v. *Weston*, supra, 140 Conn. App. 144–45.

"The Appellate Court disagreed, holding that [t]he rationale for requiring a final and authoritative determination from local administrators as a prerequisite to asserting a regulatory takings claim is well illustrated here. Although Hawkins suggested that, in his opinion, Lost Trail's division of the Georgetown Road property created a subdivision, he did not have the authority to speak for or to bind the commission. Indeed, he recommended that Lost Trail apply for subdivision approval and stated that the commission was willing to work with Lost Trail to ensure the safe and proper development of the Georgetown Road property. This correspondence cannot be considered a definitive position on the issue from an authoritative initial decision-maker. . . . Lost Trail tries to circumvent the finality requirement by arguing that its use of the subject property so obviously did not constitute a subdivision that the commission's involvement was gratuitous. Strength

of unilateral conviction is not, however, a substitute for a final administrative decision. As the town correctly points out, property owners cannot be their own arbiters of whether the commission has the authority to act. . . . Furthermore, by refusing to engage the commission in the zoning approval process, Lost Trail eliminated the possibility that this matter could be resolved by local political choices and settlements. . . . Lost Trail's prediction of futility turned out to be wrong—in January, 2011, the commission agreed with Lost Trail and disavowed Hawkins' position. . . . Id., 148–49. If Lost Trail had sought the opinion of the commission when Hawkins first suggested that Lost Trail's use of its property created a subdivision, these issues could have been settled—that is, the commission would have been given the opportunity to adopt or to correct Hawkins' position. If the commission, as constituted twelve years ago, had decided these issues favorably to Lost Trail, Lost Trail could have then sought building permits and zoning certification. Had it decided the issue adverse to Lost Trail, Lost Trail presumably could have appealed years ago. Having failed to do so, it cannot now challenge the town's actions in court as an unconstitutional taking. Id., 150–51.

"Finally, the Appellate Court addressed Lost Trail's argument that it was exempted from applying to the commission for subdivision approval by the futility exception, specifically, that once Hawkins informed zoning and building officials that, in his opinion, Lost Trail had illegally subdivided its property, it was pointless to apply for zoning certificates and building permits from those officials because § 8-3 (f) precludes a building official from issuing a building permit in the absence of a zoning permit or certificate in writing from the zoning enforcement official that the proposal is consistent with zoning regulations. Lost Trail additionally contends that an application for zoning permits, without

first engaging the commission in the zoning approval process, would have been futile because the town did not recognize the attempted division of its property into four lots. Id., 151.

"The court rejected these arguments, holding that [h]aving already rejected Lost Trail's reasons for opting out of the planning and zoning review process, we hold that its futility argument must also fail. Although a property owner need not pursue patently fruitless measures to satisfy the finality doctrine . . . it cannot claim futility by setting up its own obstacles. Put simply, Lost Trail claims that it would have been futile to pursue step two of an administrative process, applying for zoning and building permits, because it refused to engage in step one, pursuing the opinion of the commission as to whether a subdivision had been created. . . . Id., 151–52. Moreover, [i]t is futile to seek a[n] [administrative] remedy only when such action *could not* result in a favorable decision and *invariably* would result in further judicial proceedings. . . . It is clear that the commission could have determined that Lost Trail had not created a subdivision—as it later did—or approved an application to subdivide its property, clearing the way for zoning and building permits to be issued. Thus, we reject Lost Trail's attempt to bootstrap its way to futility. . . . Id., 152. In rejecting Lost Trail's futility argument, the court also noted that '[i]n its reply brief, Lost Trail advances its futility argument by delineating its interactions with several town officials regarding the status of its . . . property: the town attorney, the zoning enforcement officer, and the tax assessor. None of these officials was a substitute for the commission.' Id., 152 n.11; see also *Murphy* v. *New Milford Zoning Commission*, 402 F.3d 342, 352–54 (2d Cir. 2005) (holding that a plaintiff's land use claims were not ripened by the town zoning enforcement officer's issuance of a cease and desist order where the plaintiff could have

pursued a variance application to the Zoning Board of Appeals)." (Emphasis in original; internal quotation marks omitted.)

Against this backdrop, the trial court stated: "Given the substantial conformity of the facts between the present case and *Lost Trail, LLC*, supra, 140 Conn. App. 136, the court believes that the legal outcome should conform as well. Of course, the court is bound to follow the Appellate Court's decision in *Lost Trail, LLC*, and it is persuaded by the District Court's decision." The court further noted that the doctrine of collateral estoppel might have precluded some of the claims that had been decided in *Lost Trail, LLC*, but did not engage in an estoppel analysis, since neither of the parties had argued or briefed it. The court then went on to consider its jurisdiction in the present case, which is the issue before us on appeal.

Generally, "[t]he standard of review of a challenge to a court's granting of a motion to dismiss is well established. In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Bloom* v. *Miklovich*, 111 Conn. App. 323, 335–36, 958 A.2d 1283 (2008). With the foregoing in mind, we address each of the plaintiff's claims in turn.

I

The plaintiff first claims that the principle of finality of judgments barred the trial court's reconsideration of whether it had subject matter jurisdiction over the plaintiff's claims under the circumstances of this case

because the issue of ripeness had been determined four times prior to trial and the case had gone to verdict. We are not persuaded.

"[I]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Fernandez* v. *Commissioner of Correction*, 139 Conn. App. 173, 177–78, 55 A.3d 588 (2012), cert. granted on other grounds, 307 Conn. 947, 60 A.3d 960 (2013) (appeal withdrawn May 28, 2013).

Nevertheless, "even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments, particularly when the parties have had a full opportunity originally to contest the jurisdiction of the adjudicatory tribunal. . . . Under this rationale, at least where the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if he did have such an opportunity, whether there are strong policy reasons for giving him a second opportunity to do so." (Internal quotation marks omitted.) *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013).

"Litigation about whether subject matter jurisdiction exists should take into account whether the litigation is a collateral or direct attack on the judgment, whether the parties consented to the jurisdiction originally, the

age of the original judgment, whether the parties had an opportunity originally to contest jurisdiction, the prevention of a miscarriage of justice, whether the subject matter is so far beyond the jurisdiction of the court as to constitute an abuse of authority, and the desirability of the finality of judgments. *Connecticut Pharmaceutical Assn., Inc.* v. *Milano*, 191 Conn. 555, 468 A.2d 1230 (1983); *Vogel* v. *Vogel*, [178 Conn. 358, 362–63, 422 A.2d 271 (1979)]; *Monroe* v. *Monroe*, 177 Conn. 173, 413 A.2d 819, [cert. denied], 444 U.S. 801, 100 S. Ct. 20, 62 L. Ed. 2d 14 (1979); 1 Restatement (Second), Judgments § 12 [(2012)]." (Internal quotation marks omitted.) *Morris* v. *Irwin*, 4 Conn. App. 431, 434, 494 A.2d 626 (1985).

"We have strongly disfavored collateral attacks upon judgments because such belated litigation undermines the important principle of finality. . . . The law aims to invest judicial transactions with the utmost permanency consistent with justice . . . . Public policy requests that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown." (Citations omitted; internal quotation marks omitted.) *Gennarini Construction Co.* v. *Messina Painting & Decorating Co.*, 15 Conn. App. 504, 512, 545 A.2d 579 (1988). "A collateral attack is an attack upon a judgment, decree or order offered *in an action or proceeding other than that in which it was obtained*, in support of the contentions of an adversary in the action or proceeding . . . ." Id., 511–12.

Here, the court's reconsideration of its jurisdiction was not a collateral attack on a judgment rendered in another proceeding. Although the parties had opportunities to argue the issue of ripeness prior to trial, and the court considered it four previous times, and the case had been tried and the jury's verdict accepted, the court determined that reconsideration was necessary based upon facts that were developed at trial and were

unknown to the court when previously considering the issue of ripeness. Although it may seem unfair for the trial court to have revisited the issue again, after trial and after the jury returned a sizeable verdict in the plaintiff's favor, it is, as noted, important to prevent a miscarriage of justice, to ensure that the court did, in fact, have jurisdiction over the plaintiff's claims, particularly under these circumstances, where the plaintiff did not comply with municipal procedures to ensure compliance with local zoning regulations, but, instead, sought to circumvent those procedures. We thus conclude that the principle of the finality of judgments did not bar the trial court from reconsidering the ripeness of the plaintiff's claims and its jurisdiction over them.

II

The plaintiff next claims that the trial court was barred by the law of the case doctrine from reconsidering the issue of ripeness when it had already been considered four times previously during the proceedings. We disagree.

"The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Olson* v. *Mohammadu*, 169 Conn. App. 243, 263, 149 A.3d 198, cert.

denied, 324 Conn. 903, 151 A.3d 1289 (2016). "[T]he application of the law of the case doctrine involves a question of law, over which our review is plenary." (Internal quotation marks omitted.) *Glastonbury* v. *Sakon*, 172 Conn. App. 646, 657, A.3d (2017).

Here, the trial court explained that it was reconsidering the issue of ripeness, and, thus, its jurisdiction, based upon facts that were developed at trial. In light of that development, and because the law of the case doctrine does not mandate that a court adhere to all rulings made at earlier stages in the proceedings, we cannot conclude that it was improper for the court to revisit the issue of ripeness in this case.

III

The plaintiff next claims that its rights in the lots at issue in this case were vested, and thus that it was not required to apply to, nor was a decision required from, the commission, to establish finality for the purposes of establishing the ripeness of its claims. The plaintiff claims that because it had "vested property rights" in the six lots at issue in this action, Turner, as the zoning enforcement officer, was the initial decision maker whose decision was required to establish the ripeness of the plaintiff's claims. The plaintiff claims that Turner's decision denying the plaintiff's application on the basis that the plaintiff was required to seek subdivision approval from the commission constituted a final decision revoking the plaintiff's vested rights in the six lots at issue herein. We are not persuaded.

"A final decision has been rendered when the initial decision-maker [has] arrived at a definitive position on the issue that inflict[ed] an actual, concrete injury . . . . If a property owner has not obtained a final decision from the administrative agency applying the regulation, the reviewing court lacks jurisdiction to rule on a taking claim. The jurisdictional nature of finality derives

from its similarity to ripeness." (Internal quotation marks omitted.) *Lost Trail, LLC* v. *Weston*, supra, 140 Conn. App. 147. Our Supreme Court has made it clear that "[a] plaintiff is not entitled to judicial review of the merits of his regulatory takings claim until he has met the requirement of establishing the finality of the agency determination." *Gil* v. *Inland Wetlands & Watercourses Agency*, 219 Conn. 404, 415, 593 A.2d 1368 (1991).

The plaintiff asserted this same claim to the trial court in opposing dismissal of its claims for lack of ripeness. The trial court rejected the claim, explaining: "The plaintiff's argument is unavailing for two reasons. . . . First, a vested property right is simply a term used to describe a constitutionally protectable property interest, which must be demonstrated in order to assert a takings claim. See *Brady* v. *Colchester*, 863 F.2d 205, 212 (2d Cir. 1988) (in the context of fourteenth amendment due process claim, employing the term vested property right interchangeably with property interest . . . that was protectable under the fourteenth amendment . . . .). The court's research has failed to disclose any authority for the proposition that the existence of a vested property right excuses the plaintiff from the separate requirements of subject matter jurisdiction for its § 1983 challenges.

"Second, the court is persuaded by the District Court's holding in *Lost Trail, LLC*, that the town's alleged prospective refusal to issue zoning or building permits until subdivision approval is obtained for the four lots [does not] demonstrate either a final decision or futility exempting Lost Trail from the final decision requirement. Lost Trail's futility argument hinges largely on what it deems a purely legal question, namely whether the [Georgetown] lots exist as a matter of law as [four] separate parcels under Connecticut statutory law and case law. . . . Regardless of the merit to Lost

Trail's legal argument, it has never been presented to the Planning and Zoning Commission for its formal consideration and thus Lost Trail has not obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property . . . . *Lost Trail, LLC* v. *Weston*, supra, 485 F. Supp. 2d 66]. The court also notes that the Appellate Court plainly held, albeit while addressing Lost Trail's municipal estoppel claim, that Lost Trail . . . cannot demonstrate that the town ever actually repudiated [the] apparent approval [in the form of stamping the maps of Lost Trail's property] because Lost Trail did not engage in the zoning approval process. *Lost Trail, LLC* v. *Weston*, supra, 140 Conn. App. 154–55.

"Thus, even if the court were to accept the plaintiff's characterization of Turner as the initial decision maker, his decision rejecting the plaintiff's application for a certificate of zoning compliance was not a final one. Instead, it was conditional, with Turner refusing to issue the certificate before the plaintiff had presented its application to the commission and received subdivision approval. Turner merely referred the initial determination of the subdivision issue and the validity of the plaintiff's lots to the administrative body charged with deciding those issues. See General Statutes § 8-26 (a) (All plans for subdivisions and resubdivisions, including subdivisions and resubdivisions in existence but which were not submitted to the commission for required approval, whether or not shown on an existing map or plan or whether or not conveyances have been made of any of the property included in such subdivisions or resubdivisions, shall be submitted to the [planning and zoning] commission with an application in the form to be prescribed by it. The commission shall have the authority to determine whether the existing division of any land constitutes a subdivision or resubdivision under the provisions of this chapter, provided nothing

in this section shall be deemed to authorize the commission to approve any such subdivision or resubdivision which conflicts with the applicable zoning regulations . . . .)." (Internal quotation marks omitted.)

We agree with the trial court that although the plaintiff had vested rights in the property at issue in this case, it did not have vested rights in the configuration of that property as it sought to reconfigure it, nor could it have acquired such vested rights without seeking approval of its proposed reconfiguration in accordance with established protocol and procedures. Indeed, none of the case law cited by the plaintiff in its brief to this court supports the plaintiff's claim. We thus agree with the trial court's thorough and well reasoned analysis of this claim. It would serve no useful purpose to discuss it further.

IV

The plaintiff next claims that this court's decision in *Lost Trail, LLC*, supra, 140 Conn. App. 136, was factually distinguishable from the present case, and thus that the trial court improperly relied upon it as binding precedent in this case. Although the trial court relied heavily upon *Lost Trail, LLC*, its jurisdictional inquiry was based upon the factual record developed throughout the proceedings, up to the jury's verdict, *in this case*. The court relied upon *Lost Trail, LLC*, for its legal analysis and factual similarities. To the extent that *Lost Trail, LLC*, differed factually from the case at hand, it is clear that the trial court considered any factual differences in assessing its jurisdiction over the plaintiff's claims in this case. The court properly bore in mind the prior rulings in *Lost Trail, LLC*, with an eye to the consistent application of the relevant legal principles as they applied to the facts before it here. We cannot conclude that the court's reliance on *Lost Trail, LLC*, for that purpose was in error.

V

The plaintiff next claims that the court erred in rejecting its claim that it would have been futile to apply to the commission for subdivision approval, and thus that it should have been excused from applying to the commission for that approval. We disagree.

"To demonstrate the requisite finality, a property owner asserting a regulatory takings claim bears the burden of proving that the relevant government entity will not allow *any* reasonable alternative use of his property." (Emphasis in original.) *Gil* v. *Inland Wetlands & Watercourses Agency*, supra, 219 Conn. 415. Thus, "although repeated applications and denials are not necessary to show finality, in most cases, a property owner must do more than submit one plan to an agency in order to establish that the agency's decision is final for the purposes of the takings clause. . . . [R]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." (Citation omitted; internal quotation marks omitted.) Id., 417.

"A property owner, for example, will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile. That is, a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied." *Murphy* v. *New Milford Zoning Commission*, supra, 402 F.3d 349.

In considering the plaintiff's claim of futility, the trial court noted with approval this court's prior decision in *Lost Trail, LLC*, in which the plaintiff also claimed that it would have been futile to apply to the commission for subdivision approval, and thus that it should not have been required to do so in order to demonstrate finality. The court explained, inter alia, the following

as it pertained to the plaintiff's futility argument: "[W]ith regard to the plaintiff's futility argument, the Appellate Court held that Lost Trail cannot claim futility by setting up its own obstacles. Put simply, Lost Trail claims that it would have been futile to pursue step two of an administrative process, applying for zoning and building permits, because it refused to engage in step one, pursuing the opinion of the commission as to whether a subdivision had been created. . . . *Lost Trail, LLC* v. *Weston*, supra, 140 Conn. App. 152. Moreover, [i]t is futile to seek a[n] [administrative] remedy only when such action *could not* result in a favorable decision and *invariably* would result in further judicial proceedings. . . . It is clear that the commission could have determined that Lost Trail had not created a subdivision—as it later did—or approved an application to subdivide its property, clearing the way for zoning and building permits to be issued. Thus, we reject Lost Trail's attempt to bootstrap its way to futility. . . . Id." (Emphasis in original; internal quotation marks omitted.) The court thus rejected the plaintiff's argument that it would have been futile to engage in the zoning process, noting that, as in *Lost Trail, LLC*, the commission granted a subdivision application relating to the property in question, in which a subsequent owner of the property was permitted to subdivide the property.

Here, not only did the commission not dig in its heels and refuse to grant any subdivision proposals submitted by the plaintiff, but the plaintiff was directed at every turn, by every town representative with whom it spoke about the matter, to seek approval from the commission. It never did so. The plaintiff's futility argument is further belied by Walpuck's testimony that he did not apply for subdivision approval because it was a time-consuming and expensive process and because his attorney told him that it might impair the collateral to his loan or it could be viewed as a possible admission

that the lot line adjustments were invalid. As aptly noted by the trial court, if the plaintiff had applied to the commission seventeen years ago, when Hawkins advised it of the invalidity of its attempt to obtain a reconfiguration of the lots on its property by filing a map showing the lot line adjustments, it might have obtained approval from the commission, and would have avoided wasting many years and significant amounts of state and municipal resources. If the commission had denied its application, it could have established the jurisdictional basis for its judicial challenge that it now lacks. As in *Lost Trail, LLC*, the plaintiff put up its own obstacles. It cannot now hide behind those self-imposed obstacles and avail itself of the futility exception.

VI

The plaintiff next claims that the concept of ripeness for review does not apply to § 1983 claims for violations of equal protection and procedural due process. We disagree.

"The ripeness requirement of *Williamson* [*County Regional Planning Commission* v. *Hamilton Bank*, supra, 473 U.S. 172], although announced in a taking[s] context, has been extended to equal protection and due process claims asserted in the context of land use challenges. *Dougherty* v. [*North Hempstead Board*] *of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002); see also *Murphy* [v. *New Milford Zoning Commission*, supra, 402 F.3d 349] (discussing application of the *Williamson* finality rule to substantive due process, procedural due process, and equal protection challenges to zoning decisions)." (Internal quotation marks omitted.) *Lost Trail, LLC* v. *Weston*, supra, 485 F. Supp. 2d 64.

The plaintiff argues that its claims are not subject to ripeness analysis because they are not directly related to its takings or inverse condemnation claims. This

argument is belied by the plaintiff's complaint, in which the allegations underlying its takings or inverse condemnation claims mirror those set forth in its § 1983 claims, with the exception of a conclusory allegation at the end of each separate count that the facts therein pleaded gave rise to the legal cause of action claimed therein. Because the plaintiff's takings claims are inextricably intertwined with its § 1983 claims, this argument must fail.

VII

The plaintiff finally claims that the trial court's decision to grant the town's motion for articulation and to file a revised memorandum of decision, omitting any reference to the inapplicable exhaustion of administrative remedies doctrine, materially changed its June 9, 2015 decision in this case. We are unpersuaded.

As noted, the town moved for articulation of the trial court's June 9, 2015 memorandum of decision, seeking clarification of the basis for the dismissal of the plaintiff's claims. Specifically, the town sought clarification of any ambiguity as to the legal basis for the court's determination that the plaintiff's claims were not ripe for adjudication. In granting the town's motion for articulation, the trial court first stated its belief that the basis for its June 9, 2015 decision was clear. The court, nevertheless, issued a revised memorandum of decision to eliminate any references to the exhaustion of administrative remedies doctrine to avoid any ambiguity or confusion as to the basis of its decision. The plaintiff claims that in so doing, the court materially altered its decision.

It is well established that "[a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for

articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal. . . . In the absence of an articulation, we are unable to determine the basis for the court's decision, and we therefore decline to review this claim." (Internal quotation marks omitted.) *Priest* v. *Edmonds*, 295 Conn. 132, 140, 989 A.2d 588 (2010).

At the outset of the trial court's June 9, 2015 memorandum of decision, the court specifically stated that, because the plaintiff had "failed to prove that a final decision was rendered by any administrative body charged with allegedly depriving [the] plaintiff of its rights," or "that it would have been futile to pursue available administrative remedies," the plaintiff's claims were not ripe for adjudication, and thus the court lacked jurisdiction over them. A review of the trial court's June 9, 2015 memorandum of decision in its entirety reveals that the court's decision focused on (1) the requirement of finality for the plaintiff's state takings claim, (2) the requirement of ripeness (and the futility exception thereto) with respect to the plaintiff's federal claims and (3) the fact that the present case was similar to *Lost Trail, LLC*, which was essentially decided by this court and the federal courts on grounds of finality and ripeness. Although the court's June 9, 2015 memorandum of decision at times mentioned the exhaustion of administrative remedies, it did so only in passing without any discussion of that doctrine or how it would apply to the present case. Thus, a fair reading of the court's June 9, 2015 memorandum of decision does not indicate that the exhaustion of administrative remedies doctrine formed the basis for the trial court's decision in this case. Including no reference to that doctrine in the court's October 19, 2015 memorandum of decision thus served only to dispel any confusion concerning the basis of the court's original

decision, which is an appropriate use of the articulation process.

The judgment is affirmed.

In this opinion the other judges concurred.

SANTANDER BANK, N.A. *v.* ELIZABETH A. GODEK (AC 39007)

Lavine, Mullins and Beach, Js.

Argued May 17—officially released July 18, 2017

Procedural History

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Wahla*, *J.* granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment of foreclosure by sale; thereafter, the court, *Robaina*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Affirmed.*

Allison E. Murray, self-represented, the appellant (defendant).

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

Opinion

PER CURIAM. The self-represented defendant in this residential mortgage foreclosure action, Elizabeth A. Godek (also known as Allison E. Murray), appeals from the judgment of foreclosure by sale rendered against her in favor of the plaintiff, Santander Bank, N.A. On appeal, the defendant appears to raise issues regarding the court's judgment of foreclosure and its denial of her motion to open. We are unable to discern the analysis of the issues raised on appeal. Nothing that the defendant

has written in her appellate briefs persuades us of the existence of any error committed by the trial court, much less reversible error.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* ANTHONY CARTER (AC 39271)

Alvord, Prescott and Kahn, Js.

Argued June 1—officially released July 18, 2017

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, risk of injury to a child and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mulcahy, J.*; verdict of guilty; thereafter, the court, *Mulcahy, J.*, denied the defendant's motions for a judgment of acquittal and for a new trial, and rendered judgment in accordance with the verdict, from which the defendant appealed to this court, which affirmed the judgment of the trial court; subsequently, the court, *Dewey, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment*; *judgment directed.*

Anthony Carter, self-represented, the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Richard J. Rubino*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Anthony Carter, appeals from the judgment of the trial court dismissing

in its entirety his motion to correct an illegal sentence. Having thoroughly reviewed the defendant's claims on appeal, we conclude that they are wholly without merit. We agree with the state, however, that the trial court should have denied rather than dismissed the defendant's claim that the sentencing court, under the circumstances of this case, was not authorized by statute to impose consecutive sentences with respect to the defendant's convictions. The court properly dismissed the remainder of the defendant's claims.

The form of the judgment is, in part, improper, and the case is remanded with direction to render judgment denying that portion of the defendant's motion to correct an illegal sentence that claims that the court lacked statutory authority to impose consecutive sentences and dismissing the remainder of the motion.

FORTUNATA MALUCCIO *v.* EAST LYME ZONING BOARD OF APPEALS
(AC 38680)

Sheldon, Mullins and Pellegrino, Js.

Syllabus

The plaintiff property owner appealed to the trial court from the decision of the defendant, the East Lyme Zoning Board of Appeals, upholding the denial by the zoning enforcement officer of the plaintiff's application for a permit to build a single family residence on certain of her real property in the town of East Lyme. The plaintiff's property was originally designated on a subdivision plan map as a recreation area. When the developer of that subdivision submitted the plan to the East Lyme Planning Commission, the subdivision regulations gave the commission the discretion to require that the developer provide land to the town for open space for parks and playgrounds. The commission approved the subdivision plan as submitted, but did not explicitly require that it contain a recreation area as the commission deemed proper. On two occasions, the town rejected offers from the subdivision's developers to deed the property to the town, and the plaintiff later acquired the property at a tax sale. The zoning enforcement officer denied the plaintiff's subsequent application for a building permit for a single family

residence because the property had been designated as a recreation area on the original subdivision plan. The plaintiff then appealed that decision to the defendant, which concluded that the zoning enforcement officer had properly denied the building permit on that ground. On the plaintiff's appeal from that decision, the trial court found that the defendant's decision was illegal and not supported by the record. Specifically, the trial court reasoned that the recreation area notation on the subdivision plan created, if anything, a private right or restriction that could not be enforced by the zoning enforcement officer or the defendant. The court sustained the plaintiff's appeal and directed the defendant to reverse the decision of the zoning enforcement officer, and the defendant, on the granting of certification, appealed to this court. The defendant claimed that the trial court had improperly found that the recreation area designation on the subdivision map created only a private right or restriction unenforceable by zoning law. The defendant specifically argued that the subdivision regulations had required the developer to label the property as a recreation area and, therefore, the zoning enforcement officer had the power to deny the plaintiff's building permit application because the property was currently a recreation area. *Held* that the trial court properly sustained the plaintiff's appeal, as the defendant's decision to uphold the denial of the building permit application was illegal and unsupported by the record: the subdivision regulations did not require an open space parcel, but merely required that a developer allocate a parcel as open space so that the commission could decide whether such a parcel should be required, and here, based on the commission's silence in that regard, it could not be assumed that the commission had required that the parcel remain open space; moreover, because the subdivision regulations made no mention of the commission's power to require that a developer set aside a recreation area, and only allowed the commission to require open space for parks and playgrounds, the commission had lacked the authority to require the developer to designate a recreation area and, therefore, the plaintiff's building permit could not be denied on that ground; furthermore, the defendant could not prevail on its claim that the trial court erred in determining that the town was required to accept title to the property to effectuate the recreation area designation, as that claim was based on a misguided reading of that court's decision, which had focused on the illegality of the action taken and not what action the town could have taken to effectuate the recreation area designation.

Argued February 7—officially released July 18, 2017

Procedural History

Appeal from the decision of the defendant upholding the denial by the zoning enforcement officer of the plaintiff's application for a building permit, brought to

the Superior Court in the judicial district of New London and tried to the court, *Hon. Robert C. Leuba*, judge trial referee; judgment sustaining the appeal, from which the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Mark S. Zamarka, with whom, on the brief, was *Edward B. O'Connell*, for the appellant (defendant).

Eugene C. Cushman, for the appellee (plaintiff).

Opinion

PELLEGRINO, J. This appeal is brought by the defendant, the East Lyme Zoning Board of Appeals (board), from a decision of the trial court sustaining an appeal from the board's decision denying a building permit for a parcel of land owned by the plaintiff, Fortunata Maluccio, that was designated as a "recreation area" on an original subdivision plan. The defendant claims that the trial court improperly found that the designation of the parcel as a "recreation area" did not preclude the development of that parcel for residential use. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff purchased a lot with the address of 6 Red Fox Road (parcel) in the Green Valley Lakes subdivision in East Lyme (town) at a tax sale on May 26, 2006. The Green Valley Lakes subdivision was originally approved on July 13, 1970, by the East Lyme Planning Commission (commission). The East Lyme Subdivision Regulations (regulations), as they existed in 1970, gave the commission discretion to require developers to provide land to the town for "open space for parks and playgrounds as it may deem proper . . . ." East Lyme Subdivision Regs. (Rev. to June 5, 1967), § 3.5. Accordingly, the developer of Green Valley Lakes designated one lot as a "recreation area" on the subdivision plan he submitted for approval to

the commission. The lot labeled "recreation area" is the parcel at issue in this appeal.

At its meeting on July 13, 1970, the commission approved the subdivision plan that included the parcel labeled as a "recreation area." The vote on the subdivision, however, did not explicitly mention whether a recreation area would be required. On February 14, 1972, the developer recorded on the land records of the town a "Declaration of Restrictions" relating to the subdivision. No mention was made of the parcel, any special restrictions regarding the parcel, or any rights created for the use of the parcel by any lot owners.

On July 5, 1973, the original developer offered to deed the parcel to the town. The minutes of the town Board of Selectmen meeting state that, following a discussion, the selectmen voted unanimously to reject the offer. Once more, in 1979, a subsequent developer also offered to deed the parcel to the town, but the offer was rejected. The parcel has remained in its natural state since 1970, has not been classified as open space by the assessor, and does not appear as open space on the town's plan of development or comprehensive plan. No rights in the parcel were deeded to lot purchasers in the development, and no lot owner has filed a notice of claim as to any rights in the parcel pursuant to General Statutes § 47-33f.[1]

Following years of unpaid taxes on the parcel, it became the subject of a statutory tax sale by a public auction conducted by the town's tax collector. A public notice regarding the sale was issued on March 10, 2006. The notice indicated that the parcel was to be sold

[1] General Statutes § 47-33f (a) provides in pertinent part: "Any person claiming an interest of any kind in land may preserve and keep effective that interest by recording, during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. . . ."

subject to a utility easement and sloping rights, but made no mention of any encumbrance relating to open space for parks and playgrounds. The plaintiff purchased the parcel at the tax sale for $19,500.

In August, 2012, the plaintiff submitted an application to the town for a zoning permit to build a single family home on the parcel. The application and attached plans conformed to all specific requirements of the zoning regulations of the town.[2] The zoning enforcement officer, acting on behalf of the East Lyme Zoning Commission, denied the permit application, stating his reasons as follows: "[The] application is denied as property is designated as recreation area open space on the original subdivision plan."

The plaintiff appealed from the denial of her permit application to the defendant, which, following a hearing, upheld the zoning enforcement officer's decision. The defendant stated that the zoning enforcement officer "had properly denied the zoning permit for [the parcel], [and] that designations of the original subdivision map such as recreation area, open space, etc., were purely semantics as they all serve the same function and the opinion of the attorney was that they were synonymous as you are talking about language from 1970 and now. Further, it was recommended that the appropriate method of change for this item is through the [commission]."

Pursuant to General Statutes § 8-8 (b), the plaintiff appealed from the decision of the defendant to the Superior Court. The court sustained the plaintiff's

[2] Section 24.3B of the November 22, 2013 revision of the East Lyme Zoning Regulations provides in pertinent part: "The [z]oning [e]nforcement [o]fficer, acting on behalf of the [c]ommission, shall review applications to determine conformity with the [z]oning [r]egulations. . . . The [z]oning [e]nforcement [o]fficer will review the site plan to ensure compliance with the [z]oning [r]egulations and shall issue a permit within 30 days of receipt if all other applicable requirements of these regulations have been met. . . ."

appeal, holding that the decision of the defendant was illegal and not supported by the record. Specifically, the court reasoned that the notation of "recreation area" on the original subdivision plans submitted for approval in 1970 created only, if anything, a private right or restriction that cannot be enforced by the zoning enforcement officer or the defendant. Further, the court observed that the town had twice rejected offers from developers to deed the parcel to the town for recreational purposes, and therefore the parcel was never deeded or dedicated to the town as a "recreation area." The court remanded the case to the defendant with direction to reverse the ruling of the zoning enforcement officer. On the granting of certification, this appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the applicable standard of review. "In reviewing the actions of a zoning board of appeals, we note that the board is endowed with liberal discretion and that its actions are subject to review by the courts only to determine whether [they were] unreasonable, arbitrary or illegal. . . . The burden of proof to demonstrate that the board acted improperly is upon the party seeking to overturn the board's decision. . . .

"It is well settled that . . . [t]he court's function is to determine on the basis of the record whether substantial evidence has been presented to the board to support its findings. . . . Upon an appeal from the judgment of the trial court, we review the record to see if there is factual support for the board's decision, not for the contentions of the applicant . . . to determine whether the judgment was clearly erroneous or contrary to law." (Citations omitted; internal quotation marks omitted.) *Wing* v. *Zoning Board of Appeals*, 61 Conn. App. 639, 643–44, 767 A.2d 131, cert. denied, 256 Conn. 908, 772 A.2d 602 (2001).

"When a zoning agency has stated its reasons for its actions, a court should not reach beyond those stated purposes to search the record for other reasons supporting the commission's decision. . . . Rather, the court should determine only whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the authority was required to apply under the zoning regulations." (Citations omitted; internal quotation marks omitted.) *Harris* v. *Zoning Commission*, 259 Conn. 402, 420–21, 788 A.2d 1239 (2002).

A zoning enforcement officer acting on an application for a zoning permit has a purely ministerial function. See *Roraback* v. *Planning & Zoning Commission*, 32 Conn. App. 409, 412, 628 A.2d 1350, cert. denied, 227 Conn. 927, 632 A.2d 704 (1993); but see *Reardon* v. *Zoning Board of Appeals*, 311 Conn. 356, 364–65, 87 A.3d 1070 (2014) (enforcement of zoning regulations generally discretionary). If the application conforms to the requirements of the regulations, he has no discretion but to issue a permit. See *Langer* v. *Planning & Zoning Commission*, 163 Conn. 453, 456, 313 A.2d 44 (1972).

In the present case, we agree with the trial court's conclusion that the action taken by the defendant in upholding the denial of the plaintiff's permit was illegal and unsupported by the record. The defendant can exercise only such powers as are expressly granted to it by statute. *Moscowitz* v. *Planning & Zoning Commission*, 16 Conn. App. 303, 308, 547 A.2d 569 (1988). General Statutes § 8-6 (a) provides in pertinent part: "The zoning board of appeals shall have the following powers and duties: (1) [t]o hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter . . . ." General Statutes § 8-7 provides in relevant

part: "The board shall hold a public hearing on such appeal . . . . Such board may reverse or affirm wholly or partly or may modify any order, requirement or decision appealed from and shall make such order, requirement or decision as in its opinion should be made in the premises and shall have all the powers of the officer from whom the appeal has been taken but only in accordance with the provisions of this section. Whenever a zoning board of appeals . . . sustains or reverses wholly or partly any order, requirement or decision appealed from, it shall state upon its records the reason for its decision . . . ."

In upholding the decision made by the zoning enforcement officer, the defendant formally stated the reasons for its decision on the record. The reason provided was that the label "recreation area" on the subdivision map precluded the plaintiff from obtaining the building permit. As the trial court aptly noted, however, "[t]he law is well established that restrictive covenants in a deed as to use of property are distinct and separate from the provisions of a zoning law and have no influence or part in the administration of a zoning law . . . . *Anniello* v. *Vernon Planning & Zoning Commission*, Superior Court, judicial district of Tolland, Docket No. CV-93-52916-S [1995 WL 493781, *3] (August 14, 1995)." (Internal quotation marks omitted.); see also Am. Jur. 840, Zoning and Planning, § 1006 (1992). On appeal, the defendant contends that the court erred in determining that the label "recreation area" on the subdivision map created, if anything, a private right or restriction unenforceable by the zoning enforcement officer or the defendant. Instead, the defendant asserts that, because such label was required by the regulations in effect in 1970, the parcel is currently designated as a recreation area, and the zoning enforcement officer therefore has the power to deny a permit to build on the parcel.

The defendant's proposition fails in at least two regards. First, the regulations did not *require* an open space parcel, rather, the regulations merely required the developer to allocate a parcel as open space on the subdivision plan submitted for the application. The commission could then decide whether the open space parcel should be required. See East Lyme Subdivision Regs. (Rev. to June 5, 1967), § 3.5. In this case, the commission was silent on the matter, so it cannot be assumed that the commission eventually required the parcel to remain open space. Further, the developers twice offered to deed the parcel to the town but the town denied both offers. Had the town truly wished to ensure that the parcel would remain "open space" indefinitely under the regulations, it could have accepted title to the property. Second, the defendant's argument fails because, even if the regulations actually required the commission to designate the parcel as open space before approving the subdivision application, the designation of "recreation area" did not fall within the explicit confines of the regulations. Instead, the regulations allowed the commission the discretion to mandate that a developer provide land to the town for "open space *for parks and playgrounds* as it may deem proper . . . ." (Emphasis added.) East Lyme Subdivision Regs. (Rev. to June 5, 1967), § 3.5. The regulations made no mention of the commission's power to require the developer to set aside land for a "recreation area." Thus, because the commission lacked the authority to require the developer to designate a "recreation area," it follows that the zoning enforcement officer and the defendant could not deny the plaintiff a building permit for the parcel on the basis of its original "recreation area" designation on the subdivision plan.

The defendant's second claim on appeal, namely, that the court erred in determining that the town was

required to accept title to the property in order to effectuate the recreation area designation, also fails. The defendant's argument is based on a misguided reading of the court's decision. Although the court stated that the parcel was not deeded and perpetually dedicated to the town for recreation, the court was responding to the defendant's argument that § 1.61 of the November 22, 2013 revision of the East Lyme Zoning Regulations applied to the parcel.[3] Nowhere in its memorandum of decision did the court state that the town was *required* to accept title to the parcel to effectuate the recreation area designation. On the contrary, the court's review of the defendant's decision was not based on what action the town could have taken to effectuate the recreation area designation, but rather on the illegality of the action taken by the zoning enforcement officer and the defendant in denying the plaintiff a building permit. Accordingly, the court did not err, and the defendant's second claim fails.

We conclude that the court properly sustained the plaintiff's appeal and remanded the case to the defendant with direction to reverse the ruling of the zoning enforcement officer.

The judgment is affirmed.

In this opinion the other judges concurred.

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[3] In its October 31, 2014 trial court brief, the defendant had argued that § 1.61 of the November 22, 2013 revision of the East Lyme Zoning Regulations applied to the parcel and restricted its use, which provides in relevant part: "Land area within a subdivision deeded as a parcel or parcels separate from Building Lots and Streets and Perpetually dedicated for Conservation and/or Recreational purposes. The ownership and purpose of subdivision open space is specified by the Planning Commission in approving a Subdivision, and only recreational facilities, underground utility facility, or other improvements consistent with the approved purpose shall be permitted within subdivision open space."

STATE OF CONNECTICUT *v.* PATRICK YOUNG
(AC 37995)
(AC 37997)

Alvord, Keller and Beach, Js.

Syllabus

Convicted, after a jury trial, of the crimes of assault in the first degree and carrying a pistol without a permit in connection with an incident in which the defendant shot the victim, the defendant, whose probation was revoked in connection with his conviction, appealed to this court. The defendant's girlfriend, Z, had stolen a $6500 check, and she and the defendant asked the victim and M to assist them in cashing it. The victim and M were able to obtain $200 by depositing the check into an automated teller machine, but when they notified the defendant, he questioned whether they had received the full amount of the check and kept the remainder of the money. Z and the defendant thereafter picked up the victim and M in Z's car, and the defendant repeatedly questioned them regarding the money. Z drove to a wooded area and stopped the car. The defendant then retrieved a silver .38 caliber revolver from the car's glove compartment, again asked about the money, forced the victim to exit the car, and pointed the revolver at her head. At some point, the victim was able to flee into the woods, and the defendant returned to the car, told M to exit the car, and he and Z drove away. While the victim and M walked down the road to search for help, the defendant emerged from behind some bushes, pointed the revolver at the victim's head, and shot her with multiple bullets. At trial, the court permitted the state to introduce evidence of the names of certain felony convictions of which the defendant, who testified at his trial, previously had been convicted. The court permitted the admission of the evidence only for the purpose of impeaching the defendant's veracity. *Held*:

1. The defendant could not prevail on his claim that there was insufficient evidence to support his conviction of assault in the first degree because of inconsistencies between the trial testimony of the victim, M and Z, and their statements to the police, there having been ample evidence from which the jury reasonably could have found that the defendant had caused serious physical injury to the victim by means of a deadly weapon and that he had intended to cause such injury: the victim testified and the evidence established that the defendant had pointed a silver revolver at her head, that he had shot her in her hand and that the bullet existed through her wrist, that he had shot her under her arm, near her rib cage, that Z had directed the police to a the location in a marina where the defendant had discarded the revolver, that a silver .38 caliber revolver was recovered in that location, and that a .38 caliber bullet was surgically removed from the victim's torso.

2. There was no merit to the defendant's claim that the trial court had abused its discretion in admitting into evidence the names of certain of his prior felony convictions for the purpose of impeachment; the defendant's prior convictions for larceny and robbery related to his untruthfulness, and, therefore, they were relevant to the jury's evaluation of his veracity, the dissimilar nature of the crimes charged in the present case, as compared to the nature of the prior felony convictions, minimized the chance that the jury would view the prior convictions as propensity evidence, and this court could not conclude that the evidence of those convictions was likely to arouse the emotions of the jurors.

3. The trial court did not abuse its discretion by giving a supplemental charge to the jury in which it named the defendant's prior felony convictions, thereby highlighting those convictions, the charge having protected the defendant from the jury's improper use of his prior convictions as evidence that he had committed the charged crimes: the court, in its supplemental charge, properly instructed the jury that the defendant's prior convictions were to be used only for assessing the defendant's credibility, as the court in its main charge inadvertently had omitted to emphasize to the jury that the convictions were admitted for that limited purpose; moreover, contrary to the defendant's claim, the court did not improperly marshal the evidence by naming the defendant's prior felony convictions in its supplemental charge, as the names of the convictions already were in evidence, and the court's reference to them properly guided the jury in understanding the limitations on how such evidence could be used and, when viewed in context, served to protect the defendant against the improper use of the evidence rather than to highlight adverse evidence.

Argued January 31—officially released July 18, 2017

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of assault in the first degree, attempt to commit assault in the first degree, and carrying a pistol without a permit, and substitute information, in the second case, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Haven, where the first case was tried to the jury before *B. Fischer*, *J.*; thereafter, the court denied the defendant's motion to preclude certain evidence; verdict of guilty of assault in the first degree and carrying a pistol without a permit; subsequently, the second case was tried to the court; judgment in accordance with the verdict and judgment revoking the

defendant's probation, from which the defendant filed separate appeals with this court; thereafter, this court consolidated the appeals. *Affirmed.*

Mary Boehlert, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *John Doyle*, senior assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. In this consolidated appeal, the defendant, Patrick Young, appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and carrying a pistol without a permit in violation of General Statutes § 29-35, and the judgment revoking his probation. The defendant claims that (1) there was insufficient evidence to support his conviction for assault in the first degree, (2) the trial court abused its discretion by admitting into evidence the names of his prior felony convictions, and (3) the court abused its discretion by giving a supplemental charge to the jury in which it named the defendant's prior convictions. We disagree and affirm the judgments of the trial court.

The following facts, as reasonably could have been found by the jury, and procedural history are relevant to this appeal. The defendant's girlfriend, Maria Zambrano, worked as a home health care aide and stole a $6500 check from one of her patients. After Zambrano told the defendant about the stolen check, the defendant, who did not have a bank account, approached Diane Turner, his cousin, and Jessica McFadden, Turner's roommate, for assistance in cashing the check. Zambrano, Turner, McFadden, and the defendant rode together in Zambrano's car in order to cash the check.

McFadden was unable to cash the check at the first bank that she tried because the check was postdated; the defendant then had Zambrano alter the date on the check. At a second bank, McFadden was able to obtain $200 by depositing the check into an automatic teller machine. The bank later informed McFadden that the check was stolen and that she would be arrested if she did not repay the bank $200. The defendant became angry when he was told that the check would not be cashed for its entire amount. He thought that Turner and McFadden had lied to him, cashed the check, and kept for themselves the full amount of $6500.

On the night of the following day, June 24, 2013, Zambrano and the defendant picked up Turner and McFadden at their New Haven residence under the guise of driving to Hamden to retrieve $200 so that McFadden could repay the bank. While Zambrano drove, the defendant repeatedly questioned Turner and McFadden about what they did with the $6500 and why they had not given it to him. Zambrano stopped the vehicle on a dark road near a wooded area. The defendant again asked Turner and McFadden about the location of the money. The defendant reached into the car's glove compartment, retrieved a silver revolver, waved the revolver in the direction of the backseat where Turner and McFadden were seated, and again asked where the money was.

The defendant forced Turner to exit the car. The defendant pointed the revolver at Turner's head, and she pleaded for her life. At some point, Turner ran into the woods and yelled for McFadden to follow. The defendant then returned to the car, pointed the revolver at McFadden, told her to exit the car, and he and Zambrano drove away. McFadden found Turner in the woods, and they hid. They then left the wooded area and walked down the road to search for help. The defendant jumped out from behind bushes and pointed the gun

at Turner's head; Turner raised her hands. The defendant said that Turner was throwing him under the bus. He then shot Turner in her left palm, and the bullet exited by her wrist. The defendant fired more shots, and one bullet hit Turner under her right arm near her rib cage. The defendant then ran away, and McFadden and Turner hid in the woods before flagging down a work crew for assistance.

Turner was taken to Yale-New Haven Hospital and treated for her injuries. Doctors were unable to remove a .38 caliber bullet at that time, but it was surgically removed months later when it migrated near her spine. Zambrano informed the police that she had accompanied the defendant to a marina where he threw the revolver off the dock. A police dive team recovered the revolver, which was a .38 caliber stainless steel Smith & Wesson revolver.

Following a jury trial, the defendant was convicted of assault in the first degree and carrying a pistol without a permit.[1] The defendant was on probation at the time, and the court found him to be in violation of his probation. The defendant was sentenced to a total effective sentence of thirty-one years incarceration, execution suspended after twenty-four years, with five years of probation. This consolidated appeal followed.[2]

I

The defendant first claims that there was insufficient evidence to support his conviction of assault in the first degree. We disagree.

[1] The jury found the defendant not guilty of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (1).

[2] The defendant filed two separate appeals. Pursuant to Practice Book § 61-7 (3), this court sua sponte ordered that the appeals in AC 37995 and AC 37997 be consolidated. The appeal from the violation of probation raises no independent issues.

"In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Moreover, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 778, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

General Statutes § 53a-59 (a) (1) provides in relevant part: "A person is guilty of assault in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument . . . ." General Statutes § 53a-3 (6) defines "deadly weapon" as "any weapon, whether loaded or unloaded, from which a shot may be discharged . . . ." Thus, the state was required to prove that the defendant (1) intended to cause Turner serious physical injury and (2) caused such injury to her by means of a deadly weapon or dangerous instrument.

The defendant argues that the state's case rested largely on inconsistent and unreliable testimony of three witnesses—Turner, McFadden, and Zambrano. He argues that the trial testimony of Turner, McFadden, and Zambrano differed from statements that each had given to the police regarding the number of shots fired, whether the defendant left and then returned to the

crime scene, whether the defendant ordered Turner onto her hands and knees rather than to put her hands behind her back, whether the defendant pulled Turner out of the car or ordered her to do so herself, whether McFadden alone received the check from the defendant and Zambrano rather than Turner and McFadden together receiving the check, and whether the defendant fired shots at Turner and then left or whether Turner and McFadden ran into the woods before the defendant fired a shot and only upon Turner and McFadden leaving the woods did the defendant fire the gun at Turner. The defendant further contends that, because of the inconsistencies in the evidence presented by the state, the state failed to present sufficient evidence to sustain his conviction.

The defendant claims that the evidence was insufficient because of inconsistencies between the trial testimony of Turner, McFadden, and Zambrano, on the one hand, and their police statements, on the other hand. Such inconsistencies do not undermine the sufficiency of the evidence but more aptly affect the credibility of the witnesses.[3] See, e.g., *State* v. *Franklin*, 115 Conn. App. 290, 292, 972 A.2d 741, cert. denied, 293 Conn. 929, 980 A.2d 915 (2009). Credibility determinations rest with the jury. "[E]vidence is not insufficient . . . because it is conflicting or inconsistent. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Rodriguez*, 133 Conn. App.

[3] The defendant also argues that, according to his own testimony, Turner reached for the revolver, initiated a struggle during which the revolver fired a shot, and the defendant did not intend that Turner be shot. The existence of contrary testimony does not undermine the sufficiency of the evidence supporting the conviction. Credibility determinations are within the sole province of the jury. See *State* v. *Rodriguez*, 133 Conn. App. 721, 725–28, 36 A.3d 724 (2012), aff'd, 311 Conn. 80, 83 A.3d 595 (2014).

721, 726, 36 A.3d 724 (2012), aff'd, 311 Conn. 80, 83 A.3d 595 (2014).

There was ample evidence from which the jury reasonably could have found that the defendant caused serious physical injury to Turner by means of a deadly weapon and that he intended to cause such serious physical injury. Turner testified that the defendant pointed a silver revolver at her and that she pleaded for her life. She further testified that the defendant shot her on the top of her left hand and that the bullet exited near her wrist. She stated that the defendant also shot her under her right arm near her ribcage. Zambrano showed the police the location in a marina where the defendant had discarded the revolver, and the police recovered a .38 caliber stainless steel snub nose Smith & Wesson revolver from that location. Subsequently, a .38 caliber bullet was surgically removed from Turner's torso. The jury reasonably could have inferred from the defendant's conduct of pointing the revolver at Turner and pulling the trigger,[4] and from the resultant injury to Turner's wrist and torso, that the defendant intended to cause serious physical injury to her. See *State* v. *Papandrea*, 120 Conn. App. 224, 230, 991 A.2d 617 (2010) (intent may be inferred from conduct and jury may infer defendant intended natural consequences of actions), aff'd, 302 Conn. 340, 26 A.3d 75 (2011). Accordingly, there was sufficient evidence to support the defendant's conviction of assault in the first degree.

II

The defendant next claims that the trial court abused its discretion by admitting the names of his prior felony convictions into evidence.[5] We disagree.

[4] There was testimony that a minimum of ten to twelve pounds of pressure was required to pull the trigger.

[5] The defendant's attorney objected at trial only to the naming of the three prior felony convictions. There was no objection to the admission of those convictions without naming them. We review only the preserved claim of evidentiary error. See, e.g., *State* v. *Francis D.*, 75 Conn. App. 1, 11, 815 A.2d 191, cert. denied, 263 Conn. 909, 819 A.2d 842 (2003).

At the close of the state's case, the defendant's attorney referred to an in-chambers discussion and objected to the state's proposed admission into evidence of the names of the defendant's prior felony convictions during the cross-examination of the defendant. The court noted that, pursuant to § 6.7 of the Connecticut Code of Evidence, evidence of a felony conviction may be admissible for the purpose of impeachment. The court reasoned that it would allow the felonies to be named because the names of three felonies provided more specific guidance as to the defendant's veracity. In the course of his direct examination, the defendant testified that, in March, 2009, he was convicted of two felonies arising from one incident and that, in 2012, he was convicted of a third felony. On cross-examination by the state, the defendant testified that he had been convicted of conspiracy to commit larceny in the second degree, conspiracy to commit robbery in the first degree, and criminal attempt to commit robbery in the first degree. He further testified that he was aware that, as a result of his felony convictions, he was not permitted to possess a firearm.

"It is well settled that evidence that a criminal defendant has been convicted of crimes on a prior occasion is not generally admissible. . . . There are, however, several well recognized exceptions to this rule, one of which is that [a] criminal defendant who has previously been convicted of a crime carrying a term of imprisonment of more than one year may be impeached by the state if his credibility is in issue. . . . In its discretion a trial court may properly admit evidence of prior convictions provided that the prejudicial effect of such evidence does not far outweigh its probative value. . . . [Our Supreme Court] has identified three factors which determine whether a prior conviction may be admitted: (1) the extent of the prejudice likely to arise; (2) the significance of the commission of the particular crime

in indicating untruthfulness; and (3) its remoteness in time. . . . A trial court's decision denying a motion to exclude a witness' prior record, offered to attack his credibility, will be upset only if the court abused its discretion. . . . Those three factors have been incorporated in [the Connecticut] [C]ode of [E]vidence. Conn. Code Evid. § 6-7 (a)." (Citation omitted; internal quotation marks omitted.) *State* v. *Ciccio*, 77 Conn. App. 368, 385–86, 823 A.2d 1233, cert. denied, 265 Conn. 905, 831 A.2d 251 (2003).

There is no doubt that if evidence of a felony conviction is otherwise admissible, the name of the crime is generally also admissible. See Conn. Code Evid. § 6-7 (c) ("[i]f, for purposes of impeaching the credibility of a witness, evidence is introduced that the witness has been convicted of a crime, the court shall limit the evidence *to the name of the crime* . . . except that . . . the court *may* exclude evidence of the name of the crime . . . ." [emphasis added]). As indicated in § 6-7, the court has discretion to admit the prior conviction as an unnamed felony. Factors to consider include whether the prior crime reflects directly on credibility and whether the prejudice inherent in the name of the crime outweighs the probative impeaching value. See *State* v. *Crumpton*, 202 Conn. 224, 232–33, 520 A.2d 226 (1987); *State* v. *Geyer*, 194 Conn. 1, 16, 480 A.2d 489 (1984).

"[I]n evaluating the separate ingredients to be weighed in the balancing process, there is no way to quantify them in mathematical terms. . . . Therefore, [t]he trial court has wide discretion in this balancing determination and every reasonable presumption should be given in favor of the correctness of the court's ruling . . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . The burden lies with the party

objecting to the admission of evidence of prior convictions to demonstrate the prejudice that is likely to arise from its admission. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Muhammad*, 91 Conn. App. 392, 397–98, 881 A.2d 468, cert. denied, 276 Conn. 922, 888 A.2d 90 (2005).

The defendant argues that the admission into evidence of the names of the three prior felony convictions was more prejudicial than probative, and that the court thus abused its discretion in allowing the names of the felonies to be admitted into evidence. He contends that the theory of his defense was that he did not intentionally pull the trigger, but, instead, Turner initiated a struggle with him over control of the revolver, which caused Turner to be shot. He further argues that evidence regarding the convictions did not provide a material benefit to the jury and misled the jury to believe that he was more likely to have committed the crimes at issue in the present case because he had committed three felonies in the past.

Assault in the first degree and carrying a pistol without a permit, the crimes alleged in this case, are not strikingly similar to the crimes of conspiracy to commit larceny in the second degree, conspiracy to commit robbery in the first degree, and attempt to commit robbery in the first degree, the names of the prior convictions with which the defendant's credibility was impeached. Indeed, the defendant acknowledges in his appellate brief that the prior convictions bore "no similarity" to the crimes for which he was charged. The dissimilar nature of the crimes charged, as compared to the nature of the prior convictions, minimized the chance that the jury would view the convictions as propensity evidence. Cf. *State* v. *Nardini*, 187 Conn.

513, 522, 447 A.2d 396 (1982) ("[w]here the prior crime is quite similar to the offense being tried, a high degree of prejudice is created and a strong showing of probative value would be necessary to warrant admissibility").

The crimes involving larceny and robbery[6] for which the defendant was convicted on prior occasions were significant in indicating untruthfulness. "[Our Supreme Court] has recognized that crimes involving larcenous intent imply a general disposition toward dishonesty or a tendency to make false statements. . . . [I]n common human experience acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects on a [person's] honesty and integrity . . . ." (Internal quotation marks omitted.) *State* v. *Banks*, 58 Conn. App. 603, 616, 755 A.2d 279, cert. denied, 254 Conn. 923, 761 A.2d 755 (2000). "[C]rimes involving larcenous intent imply a general disposition toward dishonesty . . . . Convictions of this sort obviously bear heavily on the credibility of one who has been convicted of them. The probative value of such convictions, therefore, may often outweigh any prejudice engendered by their admission." (Citation omitted; internal quotation marks omitted.) *State* v. *Geyer*, 194 Conn. 1, 12, 480 A.2d 489 (1984).

The defendant argues that the naming of his prior convictions was of no material benefit to the jury. Because the prior convictions related to untruthfulness, however, the names of the prior convictions were relevant to the jury's evaluation of the defendant's veracity. See *State* v. *Crumpton*, supra, 202 Conn. 233. The court, therefore, did not abuse its discretion in allowing into evidence the names of the prior convictions. "Although the probative value of evidence of his prior convictions

[6] Larceny generally is an element of robbery. See, e.g., General Statutes § 53a-133.

is certainly damaging to [the defendant's] credibility, that does not necessarily impart an undue degree of prejudicial effect as well. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Muhammad*, supra, 91 Conn. App. 398. We are not persuaded that the evidence of the prior convictions was likely to arouse the emotions of the jurors.

We conclude that the trial court did not abuse its discretion in admitting evidence of the names of the defendant's prior convictions involving larceny and robbery for the purpose of impeachment.

III

The defendant last claims that the trial court abused its discretion by giving a supplemental charge to the jury in which it named the defendant's prior felony convictions after deliberations had begun, thus unduly highlighting the prior convictions. The defendant also argues that the court's supplemental charge unfairly prejudiced him by marshaling the evidence.[7] We disagree.

After the state rested, the defendant's attorney informed the court that the defendant decided to testify. Following closing arguments and outside the presence of the jury, the court invited comment from counsel on its draft jury charge, which had been sent to counsel by e-mail days earlier; the draft charge contained no

[7] The defendant also argues that the court abused its discretion in reading the supplemental charge without reading the entire charge again and inserting the additional language. The defendant did not raise this issue before the trial court, and we decline to review it. See, e.g., *State* v. *Francis D.*, 75 Conn. App. 1, 11, 815 A.2d 191, cert. denied, 263 Conn. 909, 819 A.2d 842 (2003).

instruction regarding the use of prior convictions. Later that day, the court instructed the jury, and the jury began deliberating. The next morning, the court informed counsel that it intended to supplement the jury charge by instructing the jury that it could consider the defendant's prior convictions only for the purpose of assessing the defendant's credibility. The defendant's attorney objected, arguing that the supplemental charge was prejudicial because it marshaled the evidence and because it would emphasize the prior convictions after deliberations had begun. The court stated that because the defendant's prior convictions were in evidence, it wanted to make clear to the jury that the prior convictions were to be used only for the purpose of assessing the defendant's credibility. The court did not want the jury to infer from the prior convictions that the defendant was likely to have committed the crimes charged. The court stated that the supplemental charge was "for . . . the protection of the defendant . . . ."

The court then instructed the jury as follows: "I have one more page of a charge that I inadvertently did not give you yesterday, a charge meaning this is the law that you're to apply to the facts that you find, and I'm going to read that to you now. It's going to be—It is part of the charge. We literally are going to plug it into the charge you have in there, its going to page 20a, and it's as follows, and this is the law. Impeachment, prior convictions of a witness. Evidence that one of the witnesses, [the defendant], was previously convicted of a crime or crimes is only admissible on the question of the credibility of that witness, that is, the weight that you will give the witness' testimony. The witness' criminal record bears only on this witness' credibility and the one witness was [the defendant] and the convictions are as follows: conspiracy to commit larceny in the second degree, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first

degree. It is your duty to determine whether this witness is to be believed wholly or partly or not at all. You may consider the witness' prior convictions in weighing the credibility of this witness and give such weight to those facts that you decide is fair and reasonable in determining the credibility of this witness."

"The standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 360–61, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). "In evaluating the propriety of a supplemental charge, we must examine both the main and supplemental charge as a whole." *State* v. *Miller*, 36 Conn. App. 506, 514, 651 A.2d 1318, cert. denied, 232 Conn. 912, 654 A.2d 357 (1995).

Practice Book § 42-24 provides in relevant part that "[t]he judicial authority . . . upon its own motion . . . may recall the jury to the courtroom and give it additional instructions in order to . . . [i]nstruct the jury on any matter which should have been covered in the original instructions." The decision whether to add a supplemental instruction lies within the sound discretion of the court; *State* v. *Fletcher*, 10 Conn. App. 697, 703, 525 A.2d 535 (1987), aff'd, 207 Conn. 191, 540 A.2d 370 (1988); and the additional instruction, like any other instruction, is to be read in the context of the charge as a whole. *State* v. *Wokoma*, 37 Conn. App. 35, 39,

656 A.2d 226, cert. denied, 233 Conn. 905, 657 A.2d 645 (1995).

The supplemental charge informed the jury of the proper use of evidence of the defendant's prior felony convictions. The court had admitted the evidence of the defendant's prior convictions for impeachment purposes only. Section 4-5 (a) of the Connecticut Code of Evidence provides that "[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person." The main charge apparently had inadvertently omitted the instruction emphasizing the limited purpose for which this evidence could be used. The court's supplemental charge, however, properly instructed the jury that the defendant's prior convictions were not to be used as evidence that he committed the crimes charged but, rather, were only to be used in assessing his credibility. The supplemental charge protected the defendant from the jury's use of his prior convictions as evidence of his guilt of the current charged offenses; giving the charge, therefore, was well within the court's discretion.

Further, the court did not improperly marshal the evidence by naming the defendant's prior convictions.[8]

[8] "A trial court has broad discretion to comment on the evidence adduced in a criminal trial. . . . A jury trial in which the judge is deprived of the right to comment on the evidence and to express his opinion as to the facts . . . is not the jury trial which we inherited. . . . A trial court often has not only the right, but also the duty to comment on the evidence. . . . The principal function of a jury charge is to assist the jury in applying the law correctly to the facts which they might find to be established . . . and therefore, we have stated that a charge must go beyond a bare statement of accurate legal principles to the extent of indicating to the jury the application of those principles to the facts claimed to have been proven. . . . The purpose of marshalling the evidence, a more elaborate manner of judicial commentary, is to provide a fair summary of the evidence, and nothing more; to attain that purpose, the [trial] judge must show strict impartiality." (Citations omitted; internal quotation marks omitted.) *State* v. *Hernandez*, 218 Conn. 458, 461–63, 590 A.2d 112 (1991).

In this case, the only "marshaling" was a recitation that the defendant had testified and that the named convictions had been introduced into evidence.

The names of the three prior convictions were in evidence. The court's reference to them properly guided the jury to understand the limitations on how such evidence could be used and, viewed in context, was part of an instruction to protect the defendant against improper use of the evidence, not an instruction merely to highlight adverse evidence. Accordingly, the trial court did not abuse its discretion in giving its supplemental charge.

The judgments are affirmed.

In this opinion the other judges concurred.

LUIS DIAZ *v.* COMMISSIONER OF CORRECTION
(AC 39134)

Lavine, Keller and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of murder and firearm offenses in connection with a shooting incident in Bridgeport, sought a writ of habeas corpus, claiming, inter alia, that the habeas court abused its discretion in denying his petition for certification to appeal because his right to due process and a fair trial were violated by the prosecutor's failure to disclose material evidence that was favorable to the defense as required by *Brady* v. *Maryland* (373 U.S. 83). During the petitioner's criminal trial, several witnesses, including O, gave testimony implicating the petitioner in the shooting. Specifically, O, who was incarcerated at the time of the petitioner's trial, testified that he had observed the petitioner shoot the victim. The habeas court rendered judgment denying the petition. Thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner failed to demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that his right to due process and a fair trial were violated by the prosecutor's failure to disclose material evidence that was favorable to the defense, namely, that an express or implied agreement existed between the state and O, in exchange for O's testimony at the petitioner's criminal trial; the petitioner's claim to the contrary notwithstanding, the habeas court focused on the claim as framed by the petitioner's amended petition, and did not limit its analysis to the existence of a written or formal agreement between the state

and O, or the existence of a plea agreement, as the court referred to the lack of any "undisclosed understandings" or "clandestine plea arrangements," and the fact that "no deals were struck" between the state and O, and the circumstantial evidence, including the fact that, several months after O testified for the state at the petitioner's criminal trial, the state agreed that O's sentence modification agreement should be considered by the sentencing court, did not compel a finding that, prior to the petitioner's criminal trial, the state and O had come to an understanding that required disclosure under *Brady*, because the testimony of both S, the senior assistant state's attorney who prosecuted the petitioner in his underlying criminal trial, and O was consistent in their denial that, prior to the petitioner's trial, any agreement had been reached or that any quid pro quo existed other than that which was disclosed to the jury at the petitioner's criminal trial, namely, that O hoped that the state would make O's cooperation known in the future; moreover, any evidence that S was motivated to acquiesce in O's sentence modification application following the petitioner's trial did not implicate a duty to disclose under *Brady* at the time of trial; furthermore, this court did not consider the petitioner's alternative claims that the state solicited O's false testimony that no agreement had made with the state and that the state failed to correct that false testimony because those claims were not distinctly raised before the habeas court and the court did not consider those claims in denying the petition for a writ of habeas corpus.

2. The petitioner failed to demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that counsel in the prior habeas proceeding rendered ineffective assistance because they failed to identify, understand, research, raise, or argue the *Brady* claim concerning O: even if the petitioner could demonstrate that counsel performed deficiently with respect to the *Brady* claim concerning O, the habeas court properly determined that the petitioner was unable to demonstrate that he was prejudiced by counsel's performance because no *Brady* violation occurred.

Argued March 7—officially released July 18, 2017

Procedural History

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

James E. Mortimer, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, was *John Smriga*, state's attorney, and *Craig Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Luis Diaz, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. First, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal because his right to due process and a fair trial were violated by the prosecutor's failure to disclose material evidence that was favorable to the defense, namely, that an express or implied agreement existed between the state and one of the state's witnesses, Eddie Ortiz, in exchange for Ortiz' testimony at the petitioner's criminal trial. In connection with this claim, the petitioner also claims that the state failed to correct false testimony provided by Ortiz concerning the existence of such an agreement. Second, the petitioner claims that his right to the effective assistance of counsel was violated by virtue of representation afforded to him by counsel in a prior habeas proceeding. The petitioner claims that prior habeas counsel failed to adequately pursue his claim that his right to due process was violated by the state's failure to disclose an agreement reached with Ortiz prior to the petitioner's trial. Because we conclude that the court's denial of the petition for certification to appeal reflected a proper exercise of its discretion, we dismiss the appeal.

The following underlying facts and procedural history are relevant to the present appeal. In 2007, following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a, carrying a pistol

without a permit in violation of General Statutes § 29-35, and criminal possession of a pistol in violation of General Statutes § 53a-217c. The petitioner was sentenced to a total effective term of incarceration of seventy years. Following the petitioner's direct appeal to our Supreme Court pursuant to General Statutes § 51-199 (b) (3), that court affirmed the judgment of conviction. *State* v. *Diaz*, 302 Conn. 93, 25 A.3d 594 (2011).

Our Supreme Court set forth the following facts underlying the petitioner's conviction: "On the evening of January 11, 2006, the victim, Philip Tate, was shot and killed outside a bar known as the Side Effect West in the city of Bridgeport. Thereafter, the [petitioner] was arrested and charged with murdering the victim, carrying a pistol without a permit and criminal possession of a pistol or revolver.

"In March, 2006, Corey McIntosh gave a statement to the police indicating that the [petitioner] had been the shooter. At that time, McIntosh was on federal probation and had received a three year suspended sentence for possessing narcotics in Connecticut. McIntosh testified at the [petitioner's] trial that he had seen the [petitioner] outside the Side Effect West immediately before the shooting and had heard shots as he entered the bar. He then ran out the back door and saw the [petitioner] running down the street with a gun in his hand. Additional state narcotics charges were pending against McIntosh at the time of trial. He testified that, while no promises had been made in connection with the pending charges, he was hoping to receive some consideration in exchange for his testimony.

"At some point after July, 2006, Eddie Ortiz wrote a letter to the prosecutor's office indicating that he had information about the murder. He was incarcerated at the time and stated in his letter that he was looking for some consideration in exchange for his testimony. Ortiz

testified at the [petitioner's] trial that he had seen the [petitioner] shoot the victim. He also testified that, during the trial, he had been placed in the same holding cell as the [petitioner], who said to him, 'You know what I did' and 'I know where you live at.' In addition, Ortiz testified that the [petitioner] had offered him $5000 not to testify. He further testified that the prosecutor's office had not promised him anything in exchange for his testimony and that he had been told that it would be up to a judge whether he would receive any benefit, such as a sentence modification. He had expectations, however, that his testimony would be taken into consideration.

"Approximately six months after the murder, James Jefferson asked his attorney to inform Harold Dimbo, a detective with the Bridgeport [P]olice [D]epartment, that Jefferson had information about the murder. Jefferson, who was incarcerated in Connecticut on domestic violence charges at the time, was subject to lifetime parole in New York in connection with a conviction on narcotics charges in that state. Dimbo visited Jefferson in prison and Jefferson agreed to give a statement about the shooting. Dimbo made no promises to Jefferson. In September, 2006, the domestic violence charges were dismissed for lack of evidence. Thereafter, Jefferson testified at the [petitioner's] trial that he had seen the [petitioner] and the victim outside Side Effect West immediately before the shooting. He also saw the [petitioner] shoot at someone, but he did not see the victim at that point. At the time of trial, Jefferson was incarcerated in Connecticut for violating his parole in New York.

"McIntosh, Ortiz and Jefferson were the only witnesses who identified or implicated the [petitioner] as the shooter. The [petitioner's] girlfriend, Shenisha McPhearson, testified that the [petitioner] had been with her at her apartment at the time of the shooting. The state presented no physical evidence to tie the

[petitioner] to the shooting and the gun used in the shooting was never recovered." (Footnote omitted.) Id., 95–97.

In a prior habeas corpus proceeding, in which the petitioner was represented by Attorneys William T. Koch, Jr., and W. Theodore Koch III, the habeas court denied the petitioner relief on May 16, 2012. After the habeas court denied the petitioner's petition for certification to appeal from that judgment, the petitioner appealed to this court, which dismissed the appeal. *Diaz* v. *Commissioner of Correction*, 152 Conn. App. 669, 100 A.3d 856, cert. denied, 314 Conn. 937, 102 A.3d 1114 (2014).

In the present action, on June 7, 2013, the petitioner filed a petition for a writ of habeas corpus. On February 9, 2015, the petitioner filed a three count amended petition. In count one, he alleged that prior habeas counsel rendered ineffective assistance in ten different ways. In count two, the petitioner alleged that his right to due process was violated because the prosecutor failed to disclose evidence that was favorable to the defense "with respect to an express or implied agreement" with state's witnesses Ortiz, McIntosh, and Jefferson. In count three, the petitioner, referring to evidence that he alleged to have discovered following his conviction, claimed that he was actually innocent of the charges underlying his conviction and incarceration. During the trial, the petitioner withdrew the third count of the petition.

In his return, the respondent, the Commissioner of Correction, denied the substantive allegations set forth in each count of the petition. By way of special defenses, the respondent alleged that the claims set forth in count two were barred by the doctrines of successive petition and abuse of the writ because the claims either were previously litigated in the prior habeas proceeding or

the petitioner had a full and fair opportunity to litigate such claims in that prior proceeding. Alternatively, the respondent alleged that the claims set forth in count two were barred by the doctrine of procedural default because the petitioner failed to raise such claims in the prior habeas proceeding. In reply, the petitioner denied the respondent's special defenses.

A trial before the habeas court took place on August 18, 2015, and October 22, 2015. In addition to receiving evidence that was nontestimonial in nature, the court heard testimony from Donald Collimore, an assistant state's attorney who prosecuted charges against McIntosh, beginning in 2006; Brian Kennedy, an assistant state's attorney who, at Collimore's direction, entered a nolle prosequi in McIntosh's prosecution; W. Theodore Koch III, who represented the petitioner in his prior habeas appeal; Howard Stein, a senior assistant state's attorney who prosecuted the petitioner in the criminal case underlying the present action; Ortiz; and Jefferson. Later, the petitioner and the respondent submitted post-trial briefs to the court.

In its memorandum of decision denying the amended petition, the court stated: "In the present action, the petitioner alleges, in the first count, that his previous habeas counsel . . . rendered ineffective assistance and, in the second count, that his due process rights as enunciated in *Brady* v. *Maryland*, [373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)], were breached."

First, the court addressed the merits of the petitioner's *Brady* claim. In relevant part, the court stated: "The petitioner asserts that three prosecution witnesses, viz. . . . Ortiz . . . McIntosh, and . . . Jefferson, were offered secret plea dispositions regarding their own criminal files in exchange for their testimony against the petitioner at his criminal trial in 2007. During the present habeas hearing . . . Collimore . . . Kennedy

. . . Stein . . . Ortiz . . . and . . . Jefferson . . . all testified that no such undisclosed understandings existed at the time their cases and the petitioner's criminal case were pending. [Koch] . . . also testified that he discovered no evidence supporting such clandestine plea arrangements when he represented the petitioner in his previous habeas case. No credible evidence was adduced during the present hearing to support these assertions of *Brady* violations nor attacking the credibility of the above listed witness' testimony to the contrary.

"Although certain favorable plea negotiations occurred with respect to Ortiz, McIntosh, and Jefferson sometime *after* the petitioner's criminal trial concluded, the court finds that no deals were struck between any of these witnesses and the prosecution in exchange for their testimony [at the petitioner's criminal trial]. Indeed, because Jefferson and McIntosh had given written statements to the police implicating the petitioner as the shooter *shortly after* the homicide, the prosecutor handling the petitioner's case had no pressing need to proffer promises to these witnesses because of the holding of *State* v. *Whelan*, 200 Conn. 743, 753 [513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598] (1986).

"Therefore, the court determines that the petitioner has failed to prove the factual underpinnings of his *Brady* violation claim, and the court denies the amended petition as to the second count." (Emphasis in original.)

Discussing the merits of the first count of the petition, alleging ineffective assistance of prior habeas counsel, the court began its analysis by setting forth relevant principles of law. The court observed that the petitioner had "a herculean task" of demonstrating that he was prejudiced by the deficient performance of prior habeas

counsel and trial counsel. (Internal quotation marks omitted.) Then, the court stated: "[T]he petitioner avers that his previous habeas counsel were professionally deficient by failing to discover and present evidence, in a variety of forms, as to the existence of implied plea agreements between the state and Ortiz, McIntosh, and Jefferson; by misadvising the petitioner with respect to the availability of sentence review; by failing to assert an ineffective assistance claim against appellate counsel . . . for her failure to lay a proper foundation for a *Brady* violation argument through rectification of the trial records; and by failing to present expert witnesses regarding the purported insufficiencies of trial and appellate counsel. . . .

"This court's factual findings that no *Brady* violation occurred, as elucidated above, also requires the court to deny habeas relief with respect to ineffective assistance premised on the existence of such violations. . . .

"Per stipulation between the litigants, the petitioner's opportunity for sentence review was restored. Therefore, this claim of ineffective assistance has been dealt with previously. . . .

"The final specification against habeas counsel is that they failed to engage legal experts to evaluate and testify as to the deficient performance of trial and/or appellate counsel. However, in this *present* habeas case, the petitioner also presented no such expert witnesses with respect to trial counsel, appellate counsel, or previous habeas counsel. Consequently, this averment lacks any factual foundation whatsoever. [This] court would be left to speculate as to whether such expert testimony would have been available [to prior trial, appellate, and habeas counsel], and as to the substance of such supposed testimony. It is incumbent upon the petitioner to establish the ways in which defense counsel's failure to present a witness negatively affected the pertinent

proceeding . . . . Therefore, this allegation of ineffective assistance fails." (Citation omitted; emphasis in original.) Subsequent to its denial of the petition for a writ of habeas corpus,[1] the court denied a petition for certification to appeal filed by the petitioner.

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

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *James* v. *Commissioner of Correction*, 170 Conn. App. 800, 807–808, 156 A.3d 89 (2017).

In evaluating the merits of the underlying claims on which the petitioner relies in the present appeal, we observe that "[when] the legal conclusions of the court

[1] The court denied the petition for a writ of habeas corpus "except for the restoration of sentence review as ordered previously."

are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Brewer* v. *Commissioner of Correction*, 162 Conn. App. 8, 13, 130 A.3d 882 (2015).

I

First, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal because his right to due process and a fair trial were violated by the prosecutor's failure to disclose material evidence that was favorable to the defense, namely, that an express or implied agreement existed between the state and Ortiz in exchange for Ortiz' testimony at the petitioner's criminal trial. In connection with this claim, the petitioner also claims that the state failed to correct false testimony provided by Ortiz concerning the existence of such an agreement. We disagree that the court abused its discretion in denying the petition for certification to appeal on this ground.

As stated previously in this opinion, the petitioner alleged that, at his criminal trial, the state violated *Brady* in that it "failed to disclose material favorable evidence to the petitioner with respect to an express or implied agreement with the state's witness . . . Ortiz." In support of this aspect of his claim, the petitioner alleged the following specific facts: (1) "[o]n July 12, 2006 . . . Ortiz was convicted of robbery in the

first degree and sentenced to eight years [of] incarceration"; (2) "[a]t the petitioner's criminal trial . . . Ortiz testified that he witnessed the petitioner murder . . . Tate and that the petitioner had attempted to bribe him not to testify"; (3) "[a]fter testifying at the petitioner's criminal trial . . . Ortiz' sentence was modified to three years"; (4) "Ortiz testified at the petitioner's criminal trial that he was promised no consideration. Furthermore . . . Stein stated in the state's closing argument that . . . Ortiz was told that he would get no benefit in exchange for his testimony"; and (5) "[w]hen . . . Ortiz testified at the petitioner's criminal trial, an undisclosed express or implied agreement that the state would concur with his sentence modification application in exchange for his favorable testimony existed, in violation of the petitioner's constitutional rights."

As detailed previously in this opinion, the court rejected the petitioner's assertion that any "clandestine plea arrangement" or "undisclosed understandings" existed between the state and the witnesses at issue in the petition, including Ortiz, at the time that the cases of the petitioner and Ortiz were pending. The court found that "[n]o credible evidence was adduced during the present hearing to support . . . assertions of *Brady* violations . . . ." The court found that "no deals were struck" between the witnesses at issue, including Ortiz, and the prosecution in exchange for their testimony.

The petitioner argues that "the habeas court entirely misunderstood the nature of the petitioner's claim concerning Ortiz. . . . The petitioner did not assert that Ortiz was offered secret plea dispositions regarding [Ortiz'] own criminal file in exchange for [his] testimony . . . . Rather, the gravamen of the petitioner's complaint, as advanced through his pleadings, his pretrial brief, through the questioning of witnesses, his posttrial brief, and now on appeal, is that the prosecuting author-

ity explicitly or implicitly promised Ortiz consideration, in the form of a promise of acquiescence to a sentence modification application, prior to his testimony. Further, the petitioner argued that the prosecuting authority's advancement of Ortiz' testimony concerning the same was false and misleading and stood uncorrected." (Citations omitted; internal quotation marks omitted.)

The petitioner argues that the evidence presented at the habeas trial "demonstrated [that] the state extended a pretestimonial offer of consideration to Ortiz for a more favorable outcome in his criminal case in exchange for his testimony at the petitioner's criminal trial. The agreement the petitioner finds fault with arose by virtue of the state's implied promise of acquiescence to Ortiz' *sentence modification application*." (Emphasis in original.)

The petitioner draws our attention to Ortiz' testimony during the habeas trial that when he wrote to the prosecutor's office in 2006, after he received an eight year sentence of incarceration for robbery in the first degree, he hoped that by coming forward to testify against the petitioner he could "get out early."[2] Ortiz testified that,

[2] At the habeas trial, the petitioner's counsel examined Ortiz in relevant part, as follows:

"Q. So prior to testifying in the petitioner's case, what understanding did you have about how an individual might get released earlier . . . than the sentence date?

"A. Well, that was never brought up.

"Q. What was your understanding of that process?

"A. My understanding [in] coming forward [was that] Stein said it's not a promise. . . . So I'm going up there willingly myself. . . .

"Q. Well, I'm asking you about your understanding of the process by which you could have been released early from prison. . . . Did you understand that there was some way to get out early?

"A. No . . . it was a hopeful thing I'd get out early, but it was not a promise.

"Q. But did you have an understanding [as] someone who had been involved in the criminal justice system how you might be able to get out early?

"A. Yes. . . . Well, my understanding is . . . I come forward and testif[y]. That was my hope to get out early, but other than that, I came forward myself."

when he met with Stein prior to testifying, a topic of conversation was how his sentence could be changed, and that he learned that the only person that could change his sentence was a judge. Ortiz testified, however, that "there was nothing promised." Ortiz testified that Stein told him that he would be willing to make his participation in the petitioner's criminal trial known, but that Stein did not specify to whom he would make it known. Ortiz testified, as well, that, after he testified against the petitioner, he contacted a public defender, Attorney Joseph Bruckmann, for assistance because he was "being threatened" in jail. He testified that, ultimately, his sentence was reduced by five years.

The petitioner also draws our attention to Stein's testimony. Stein testified that when he met with Ortiz initially, Ortiz requested consideration for his testimony. Stein testified, however, that the state did not offer Ortiz any consideration in exchange for his testimony. Stein testified: "[Ortiz] was not a necessary witness and . . . I explained to him that there would be no consideration. I did explain to him that if he did testify, if he did the right thing, that if he felt that that had value in the future somehow and he wanted me to affirm that to somebody, whoever that might be, that I would be happy to do that, to affirm the fact that he testified, but that there was no consideration, no accommodation to sentence, just that I would state the

The examination of Ortiz by the petitioner's counsel continued in relevant part, as follows:

"Q. [B]ut you understood that if you participate in a criminal proceeding, there's some chance . . . something could happen that . . . would get [you] out of prison early.

"A. When I participated in it, it was promised—it was hopeful that something would happen, but it was, like Stein said, there's nothing promised.

"Q. So at the conclusion of your discussions . . . with . . . Stein way back before the petitioner's trial, did you leave there with an understanding that you would have an opportunity to get in front of a judge at some point?

"A. No."

affirmative, that he testified as a state's witness in a homicide case." Stein acknowledged that "there are many ways for a state's attorney to acknowledge a person's cooperation," and that these ways did not necessarily relate to sentence modification. Stein testified that "[s]entence modifications were not discussed," but he told Ortiz that he would be willing to make a formal acknowledgement of Ortiz' cooperation with the state to any party, including a judge. Stein testified that, after he spoke with Ortiz, he believed that he would be an effective witness for the state.

In attempting to demonstrate the existence of an agreement concerning Ortiz' application for sentence modification, the petitioner refers to Stein's testimony that, in fact, he was aware that Ortiz, who had been sentenced to a term of incarceration of more than three years, could not have such application considered by the court without the approval of the state's attorney. See General Statutes § 53a-39 (b).[3] Yet, Stein testified that he did not represent to Ortiz that he would agree to support a sentence review application if Ortiz sought to pursue such a remedy. Stein testified that following Ortiz' testimony, on August 9, 2007, he "signed off" on a sentence review application that was filed on Ortiz' behalf. Stein testified that his decision regarding the application was made only after he had learned that Ortiz was being threatened in jail by the petitioner and others on behalf of the petitioner, and that Ortiz had sought the assistance of Bruckmann. Stein testified that Bruckmann related that information to him and filed the application on Ortiz' behalf. Stein testified that,

[3] General Statutes § 53a-39 (b) provides: "At any time during the period of a definite sentence of more than three years, upon agreement of the defendant and the state's attorney to seek review of the sentence, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced."

subsequently, he received a letter from Ortiz, which was admitted in evidence, in which Ortiz thanked him for keeping his "promise." Stein testified that it was only after he learned from Bruckmann that Ortiz' life was in danger as a consequence of his testimony against the petitioner that he indicated to Bruckmann that he would concur in the sentence modification application so that Ortiz could appear before the court. Stein testified that, in referring to a promise, Ortiz may have been referring to what Stein told him during his initial meeting with him, when he informed Ortiz that he would acknowledge the fact that he had testified against the petitioner on behalf of the state.[4] Stein testified as to his belief that Ortiz' letter was not evidence that any type of deal had been made with him to secure his testimony.

The evidence was undisputed that Ortiz testified against the petitioner in April of 2007. Transcripts from the petitioner's criminal trial, admitted in evidence, reflect that, during his direct examination by Stein for the state, Ortiz testified that the topic of sentence modification had not been discussed with him previously and that "no promises" were made to him in exchange for his testimony. With respect to Ortiz' expectations, the following relevant examination of Ortiz by Stein transpired at the petitioner's criminal trial:

"Q. So basically you were told that . . . it's expected you would cooperate. And what, if anything, came from it was up to a judge one day to decide if it had any value?

"A. Yes, sir.

"Q. And you were promised nothing?

"A. Yes, sir.

[4] Ortiz testified that in the letter he intended to thank Stein for working on his behalf and that Stein had not promised him anything.

"Q. Certainly, do you have expectations or would you hope that someone would take this into consideration?

"A. Yes, sir.

"Q. But other than that, you're here with no promises and no consideration?

"A. Yes, sir."

Later, Stein inquired of Ortiz, as follows:

"Q. As you sit here today, do you have any expectations that you will receive any favorable treatment for your testimony here today?

"A. Yes, sir.

"Q. And with that, do you expect that there's some type of a preset thing that's going to happen, or you're just hoping someone will take this into consideration?

"A. Hoping someone will take it into consideration.

"Q. But as you sit here now, you have absolutely no promise or any deals that have been set in exchange for your testimony?

"A. Yes, sir."

Ortiz also testified with respect to his belief that the state's attorney was "not capable of promising [him] anything" in relation to his previously imposed eight year sentence. During cross-examination, Ortiz reiterated that he had not been offered any consideration, but stated that, in contacting the state's attorney, he was looking for some type of an accommodation with respect to his sentence.

During closing arguments at the petitioner's criminal trial, defense counsel pointedly suggested that the evidence demonstrated that Ortiz' testimony was not credible, but was motivated by his desire to receive a lesser

sentence. Defense counsel referred to Ortiz as "the classic example of the savvy lifetime criminal," and in relevant part stated that the jury should "not . . . believe that Ortiz was at the scene of the shooting that night and that he is just providing us with what he thinks the state would want to hear . . . to get some accommodation on his sentence . . . ." Stein referred to Ortiz' testimony. Then, in an attempt to cast doubt on defense counsel's argument that Ortiz' testimony was motivated by self-interest, he argued in relevant part: "How cold a person do you have to be to point an accusatory finger and say I saw this man commit murder when you're doing it for your own motivation? How cold do you have to be? What is the benefit that would cause a person to be that cold? [He] ha[s] been promised nothing. Flat out told you [that he] get[s] no benefit. It's expected that [he] would cooperate as a good citizen and a good person."

The petitioner presented undisputed evidence that the court granted the sentence modification application on September 6, 2007.[5] A transcript of the August 20, 2007 hearing on the sentence modification application was admitted in evidence. At the hearing, Stein referred to his discussions with Bruckmann that preceded the application for sentence review. Stein, referring to his posttrial "agreement" with Ortiz to acquiesce in the application for sentence review, represented to the court that his "agreement with Ortiz . . . was that [Stein] would not object to the modification and then [he] would leave them on their merits with . . . Bruckmann and . . . Ortiz to convince this court as to what, if any, the appropriate modification should be." In support of the application, Bruckmann represented that

[5] A copy of the completed application was admitted in evidence. The portion of the application entitled "reason for request" states: "[Ortiz] was a prosecution witness in a murder case that resulted in a murder conviction. As a result of his cooperation, [Ortiz'] life has been threatened while he remains incarcerated."

Ortiz had told him that he was being threatened in jail, he was labeled as "a snitch," and he was told that there was "a contract out for his life based on his testimony [against the petitioner]." Stein represented to the court that when he met with Ortiz prior to the petitioner's trial, he found Ortiz to be "extremely credible" and that he believed his testimony was "clearly influential" in terms of the conviction obtained by the state against the petitioner. Stein testified that during his pretrial meeting with Ortiz, Stein told him that he "was not in a position to promise him anything other than the fact that [he] would make known at the appropriate point in time about the cooperation that [Ortiz] gave to the state with regard to the [petitioner's] homicide case, which is where we're at now, fulfilling [Stein's] agreement with . . . Ortiz." Stein testified that Ortiz had contacted him to let him know that he has been "facing continuous threats" as a result of his cooperation with the state.

On appeal, in challenging the court's findings of fact, the petitioner argues: "It is unquestionable—in light of the evidence presented to the habeas court—that Ortiz was looking for consideration when he first wrote to the state. Secondly, it is unquestionable that the prosecuting authority promised Ortiz to make his cooperation known prior to testifying, be it to a judge or another person. Thirdly, it is unquestionable that Stein recognized Ortiz' status as a sentenced prisoner at the time that this promise was made. Fourthly, it is unquestionable that, at the petitioner's trial, Ortiz testified that it was his understanding that only a judge could effectuate a change upon his sentence. Fifthly, it cannot reasonably be disputed that the only reasonable means for Stein's acknowledgement of cooperation to a judge to have any conceivable effect on Ortiz' sentence is by means of a sentence modification hearing.[6] Sixthly, the

[6] "At the time of the petitioner's trial, it may have been possible for Ortiz to pursue a petition for a writ of [error] coram nobis or . . . a motion to

passage of time between the conclusion of the petitioner's criminal proceedings and Ortiz' sentence modification cannot be disputed. Seventhly, it cannot be disputed that, despite Ortiz' sentence modification application being predicated upon 'threats,' Ortiz never sought protective custody while incarcerated. Finally, it is undisputable that the state's acquiescence was necessary for a judge to hear Ortiz' application for a sentence modification, as Ortiz' sentence exceeded three years." (Footnote in original.)

Having discussed relevant evidence before the court, we turn to some principles of law applicable to claims of this nature. "[T]he law governing the state's obligation to disclose exculpatory evidence to defendants in criminal cases is well established. The defendant has a right to the disclosure of exculpatory evidence under the due process clauses of both the United States constitution and the Connecticut constitution. . . . In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material. . . .

"It is well established that [i]mpeachment evidence as well as exculpatory evidence [fall] within *Brady*'s definition of evidence favorable to an accused. . . . [An express or implied] plea agreement between the state and a key witness is impeachment evidence falling within the definition of exculpatory evidence contained in *Brady* . . . .

"The [United States] Supreme Court established a framework for the application of *Brady* to witness plea agreements in *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct.

correct an illegal sentence, but there is no evidence that either were even considered, nor that Stein's acknowledgement could have had an appreciable effect on either mechanism of relief. . . ."

1173, 3 L. Ed. 2d 1217 (1959), and *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). . . . Drawing from these cases, this court has stated: [D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. . . . Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. . . . A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . .

"The prerequisite of any claim under the *Brady*, *Napue* and *Giglio* line of cases is the existence of an undisclosed agreement or understanding between the cooperating witness and the state. . . . Normally, this is a fact based claim to be determined by the trial court, subject only to review for clear error." (Citations omitted; internal quotation marks omitted.) *State* v. *Ouellette*, 295 Conn. 173, 185–87, 989 A.2d 1048 (2010).

"[T]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . . Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . . Because a plea agreement is likely to bear on the motivation of a witness who has agreed to testify for the state, such

agreements are potential impeachment evidence that the state must disclose. . . .

"Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . . In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. [The] . . . touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. . . .

"When . . . a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant. [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . .

applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt. . . . This strict standard of materiality is appropriate in such cases not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. . . . In light of this corrupting effect, and because the state's use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is readily shown . . . such that reversal is virtually automatic . . . unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–73, 71 A.3d 512 (2013).

Our Supreme Court has recognized that evidence that merely *suggests* an informal understanding between the state and a state's witness may constitute impeachment evidence for purposes of *Brady*. *State* v. *Floyd*, 253 Conn. 700, 740, 756 A.2d 799 (2000). Such evidence is by no means limited to the existence of plea agreements. "Any . . . understanding or agreement between any state's witness and the state police or the state's attorney clearly falls within the ambit of *Brady* principles. . . . An unexpressed intention by the state not to prosecute a witness does not. . . .

"The question of whether there existed an agreement between [a witness] and the state is a question of fact . . . . When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . .

A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . A petitioner bears the burden of proving the existence of an agreement between the state or police and a state's witness." (Citations omitted; internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 152–53, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011).

The petitioner argues that the court's finding that no pretestimonial agreement existed was clearly erroneous and that "[t]he habeas court's findings should impress upon this court the definite conviction that a mistake has been committed." The petitioner correctly suggests that the evidence of what transpired between Stein and Ortiz generally is not in dispute. The import of that evidence, that is, whether it reflected the existence of an unwritten or informal understanding that implicated *Brady*, is highly disputed. That factual issue is at the heart of the petitioner's *Brady* claim.

As an initial matter, the petitioner argues that the court misinterpreted or failed to understand the import of his claim. The petitioner argues that the court focused solely on whether a plea agreement between Ortiz and the state existed, rather than on whether any agreement that would have benefitted Ortiz existed and,

thus, reasonably might be viewed as motivating his testimony. The court's decision reflects otherwise. Despite its brevity, the court's opinion reflects that it did not limit its analysis to the existence of a written or formal agreement between Stein and Ortiz or the existence of a plea agreement. Instead, the court referred to the lack of any "*undisclosed understandings*," the lack of "clandestine plea arrangements," and the fact that "no deals were struck" between Stein and the witnesses at issue, including Ortiz. (Emphasis added.) Thus, it appears that the court focused on the claim as framed by the petitioner's amended petition.[7]

Essentially, the petitioner's disagreement with the court's findings of fact concerns the court's failure to interpret the evidence consistently with his allegations. The petitioner relies heavily on the timing of the events at issue and argues that it is circumstantial evidence that compelled a finding that, prior to the petitioner's criminal trial, Stein and Ortiz had come to an understanding that merited disclosure under *Brady*. Ortiz received an eight year prison sentence. Ortiz testified for the state at the petitioner's criminal trial. Several months later, Stein agreed that Ortiz' sentence modification application should be considered by the sentencing court. Thereafter, the court granted Ortiz' application and reduced his sentence by five years.

In reaching its factual findings, the court had the opportunity to consider the testimony of Ortiz and Stein with respect to their conversations prior to the petitioner's trial. Both were consistent in their denial that, prior to the petitioner's trial, any agreement had been reached or that any quid pro quo existed beyond that which was

[7] The petitioner alleged that implied plea agreements existed between the state, on the one hand, and McIntosh and Jefferson, on the other hand. To the extent that, in its findings of fact, the court referred to plea agreements, it is reasonable to interpret such references as pertaining to these allegations, not the allegations pertaining to Ortiz.

unambiguously disclosed to the jury at the petitioner's criminal trial—that Ortiz, looking for some type of benefit, hoped that Stein would make his cooperation with the state known in the future, and that Stein agreed to confer no benefit to Ortiz beyond making his cooperation known.[8] The petitioner did not present evidence that Stein's promise to acknowledge Ortiz' cooperation either explicitly or implicitly conveyed that Stein would convey any benefit to Ortiz with respect to a sentence review application. The petitioner did not present evidence that compelled a finding that, prior to the petitioner's trial, Stein knew that he would give favorable treatment to Ortiz' sentence modification application or that Ortiz expected Stein to sign off on his application in exchange for his testimony. To the contrary, Stein testified that his decision to acquiesce in the application was based on communications that he had with Ortiz and Bruckmann, concerning Ortiz' well-being in prison, *following the petitioner's trial.* Cf. *Elsey* v. *Commissioner of Correction*, supra, 126 Conn. App. 155–57 (evidence that court modified sentence of state's witness two weeks prior to his testimony suggested existence of informal understanding between witness and state under second prong of *Brady*). The evidence that Stein was motivated to acquiesce in Ortiz' sentence modification application following the petitioner's trial did not implicate a duty to disclose under *Brady* at the time of trial.

The evidence amply supported the inferences that the court drew from it, and we are not persuaded that a mistake was committed. In the absence of a showing that any understanding existed with respect to sentence

[8] As discussed previously in this opinion, to the extent that, at the hearing on the application for sentence modification, Stein testified that he had reached an "agreement" with Ortiz not to object to the application, it is clear that such agreement was reached following the petitioner's trial and was based on events that occurred following the petitioner's trial.

modification, as claimed by the petitioner, he is unable to demonstrate that it should have been disclosed under *Brady*.[9] For the foregoing reasons, we conclude that the petitioner has failed to demonstrate that the court abused its discretion in denying the petition for certification to appeal with respect to this claim.[10]

[9] Intertwined in the analysis of the petitioner's *Brady* claim, which is based upon the state's failure to disclose certain information concerning Ortiz, is an argument that the state "knowingly solicited Ortiz' false testimony concerning 'no promises' and allowed this testimony to stand uncorrected." He argues that the state failed to disclose certain evidence and that the prosecutor failed to correct Ortiz' testimony. It does not appear that the latter aspect of the claim raised on appeal, which is not based upon the state's failure to disclose information concerning Ortiz, but rather on the state's failure to correct allegedly perjured testimony given by Ortiz under *Napue* v. *Illinois*, supra, 360 U.S. 264, was distinctly raised before the habeas court or that the court considered this claim in denying the petition for a writ of habeas corpus.

"A petition for a writ of habeas corpus must set forth specific grounds for the issuance of the writ. Practice Book § 23-22 (1) specifically provides that the petition shall state the specific facts upon which each specific claim of illegal confinement is based and the relief requested . . . . A reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court. . . . Appellate review of claims not raised before the habeas court would amount to an ambuscade of the [habeas] judge." (Internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 131 Conn. App. 336, 351, 27 A.3d 404 (2011), aff'd, 312 Conn. 345, 92 A.3d 944 (2014). "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Internal quotation marks omitted.) *Abdullah* v. *Commissioner of Correction*, 123 Conn. App. 197, 201–202, 1 A.3d 1102, cert. denied, 298 Conn. 930, 5 A.3d 488 (2010). The petitioner argues that he raised the *Napue* issue sufficiently in his pretrial and posttrial briefs, yet he does not dispute that he did not raise this issue in his amended petition, which framed the issues before the court, or that the court did not address the issue, the resolution of which requires distinct factual findings, it in its memorandum of decision. Accordingly, we will not consider this claim in our analysis of the court's decision to deny the petition for certification to appeal.

[10] Additionally, the petitioner argues that this court "should exercise its supervisory authority to require a jury instruction concerning the sentence modification procedure in Connecticut any time the state represents to a sentenced inmate that the state will make the witness' cooperation known."

II

Second, the petitioner claims that his right to the effective assistance of counsel was violated by virtue of representation afforded him by counsel in a prior habeas proceeding. The petitioner argues that prior counsel rendered ineffective assistance because they failed to identify, understand, research, raise, or argue the *Brady* claim analyzed in part I of this opinion. We disagree.

As stated previously, the habeas court determined that, in light of its finding that no *Brady* violations occurred, the petitioner was not entitled to relief with respect to the present claim. This analysis is sound. Even if the petitioner could demonstrate that counsel performed deficiently with respect to the *Brady* claim concerning Ortiz, our analysis set forth in part I of this opinion necessarily leads us to conclude that the court properly determined that the petitioner was unable to demonstrate that he was prejudiced by counsel's performance because no *Brady* violation occurred. See *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–64, 150 A.3d 729 (2016) (petitioner bears burden of proving deficient performance and prejudice resulting therefrom), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017). Accordingly, we conclude that the

"[O]ur supervisory authority . . . is not a form of free-floating justice, untethered to legal principle. . . . [T]he integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . [O]ur supervisory powers are invoked only in the rare circumstance where [the] traditional protections are inadequate to ensure the fair and just administration of the courts . . . ." (Internal quotation marks omitted.) *State* v. *Kuncik*, 141 Conn. App. 288, 292–93, 61 A.3d 561, cert. denied, 308 Conn. 936, 66 A.3d 498 (2013). As discussed previously in this opinion, *Brady* requires the disclosure of evidence that is favorable and material to the defense, including impeachment evidence. *State* v. *Ouellette*, supra, 295 Conn. 185–87. The petitioner has not persuaded us that the protections afforded under *Brady* do not adequately protect his right to a fair trial.

petitioner has failed to demonstrate that the court abused its discretion in denying the petition for certification to appeal with respect to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

STEPHANIE REYES *v.* MEDINA LOVERAS, LLC
(AC 38682)

Lavine, Keller and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, M Co., for alleged negligence when she was in the men's bathroom on M Co.'s premises and the bathroom sink collapsed, causing her to fall and land upon the shattered pieces of the sink and sustain injuries to her buttock. At trial, it was contested whether at the time the sink collapsed, the plaintiff was standing at the sink taking a picture of herself or attempting to urinate in the sink. Following a trial, the jury returned a verdict finding the plaintiff 90 percent liable and the defendant 10 percent liable, and the trial court rendered judgment for the defendant, from which the plaintiff appealed to this court. The plaintiff claimed that the trial court improperly admitted into evidence a photograph of the plaintiff's uninjured buttock because it was irrelevant, and a certain portion of her hospital emergency room records stating that she was trying to urinate into the sink because it was inadmissible hearsay. *Held*:

1. The trial court did not abuse its discretion in admitting into evidence the photograph of the plaintiff's uninjured buttock; photographs of the plaintiff's injury and subsequent scarring were also admitted into evidence, and the photograph of the uninjured buttock therefore was relevant to helping the jury compare the two buttocks.
2. The trial court properly admitted into evidence the portion of the plaintiff's hospital records stating that she was trying to urinate into the sink as a statement by a party opponent, an exception to the rule barring hearsay, because there was credited testimony by the hospital physician who prepared the challenged report attributing the statement to the plaintiff, and the plaintiff admitted to having told hospital staff how the accident occurred; alternatively, the statement was also admissible under the hospital records exception to the hearsay rule, because it was part of the plaintiff's medical history in the emergency room report used to check for any injuries that may initially have been missed by the treating

physician due to the nature of the accident, and thus the statement was pertinent to the plaintiff's diagnosis and treatment.

Argued April 10—officially released July 18, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Lee*, *J.*, denied in part the plaintiff's request for leave to amend the complaint; thereafter, the matter was tried to the jury; verdict and judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Maxwell W. Barrand, for the appellant (plaintiff).

Cynthia A. Watts, for the appellee (defendant).

Opinion

PELLEGRINO, J. The plaintiff, Stephanie Reyes, appeals from the judgment, rendered after a jury trial, in favor of the defendant, Medina Loveras, LLC. The plaintiff claimed that she sustained serious physical injuries when a bathroom sink on the defendant's premises collapsed beneath her. The plaintiff claims on appeal that the trial court improperly admitted into evidence (1) a photograph of the plaintiff's uninjured buttock, and (2) certain portions of her hospital records. We affirm the judgment of the trial court.

The facts giving rise to the plaintiff's claim are contested. It is uncontested that on the night of January 7, 2013, the plaintiff was in the men's bathroom on the premises of the defendant[1] when the bathroom sink collapsed, causing the plaintiff to injure her buttock. Whether the plaintiff was standing at the sink, or

[1] The defendant owns and operates a restaurant in Stamford known as the Discovery Café (premises).

whether the plaintiff was urinating in the sink at the time that the sink collapsed, however, was a disputed issue at the trial. The plaintiff testified at trial that while she was using the men's bathroom, she steadied herself on the bathroom sink in order to take a picture of herself. Thereafter, the sink came off the wall, breaking on the floor and causing the plaintiff to fall upon the shattered shards, injuring her right buttock.[2] An employee of Discovery Café testified at trial that he was near the men's bathroom, heard a loud noise from within, pushed the door open, and found the plaintiff with her pants down to her knees on top of the broken sink. In contradiction to the plaintiff's testimony, a report by a Stamford Hospital employee stated that the plaintiff was trying to urinate in the sink before it collapsed, causing her to fall. It is undisputed that the plaintiff received treatment for her injuries at Stamford Hospital.

On January 28, 2014, the plaintiff commenced the present action against the defendant. In her amended complaint filed on February 6, 2015, she alleged that the defendant was negligent in failing to properly inspect, secure, and maintain its premises in a reasonably safe condition and that she suffered serious harm as a result of this negligence. Following a trial, the jury returned a verdict finding that the plaintiff was 90 percent liable for her injuries and the defendant was 10 percent liable. The court accepted the verdict and rendered judgment on behalf of the defendant. This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth our standard of review for both of the evidentiary claims the plaintiff has raised

[2] We note that the record is less than clear as to which side of her buttocks the plaintiff injured. The plaintiff testified at trial that she injured her right buttock, yet claims in her brief that she injured her left buttock. For clarity and consistency purposes, we will refer to the plaintiff's right buttock as the injured buttock, and the plaintiff's left buttock as the uninjured buttock.

on appeal. "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . . To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Milford Bank* v. *Phoenix Contracting Group, Inc.*, 143 Conn. App. 519, 532–33, 72 A.3d 55 (2013).

I

The plaintiff first claims that the court abused its discretion in admitting a photograph of her uninjured left buttock into evidence at trial.[3] She argues that the photograph was irrelevant to the facts of the case and that it unduly prejudiced the jury by creating "the illusion that the plaintiff's injury completely healed, when she in fact retains a large scar." We disagree.

At trial, the defendant moved to have the photograph of the plaintiff's uninjured buttock admitted as a full

[3] The plaintiff testified at trial that the photograph was taken during the summer of 2014, after her accident occurred. She further testified that it depicted her left buttock and did not document her injuries.

exhibit. The court asked the plaintiff: "[D]o you have any problem with the picture itself," to which the plaintiff replied, "[n]o, Your Honor." Once the photograph was admitted into evidence, but before it was marked as a full exhibit, however, the plaintiff's attorney changed his mind and objected to the photograph on the ground that it was not relevant. The court overruled the objection, and the photograph was admitted as a full exhibit.

"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 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 . . . ." (Internal quotation marks omitted.) *Drake* v. *Bingham*, 131 Conn. App. 701, 708, 27 A.3d 76, cert. denied, 303 Conn. 910, 32 A.3d 963 (2011).

On the basis of our review of the record, we conclude that the court did not abuse its discretion in admitting the photograph of the plaintiff's uninjured buttock into evidence. Photographs of the plaintiff's injury and subsequent scarring were also admitted into evidence, and, thus, the photograph of the plaintiff's uninjured buttock was relevant to helping the jury compare the plaintiff's injured and uninjured buttocks. The plaintiff only objected to the photograph after she specifically told the court that she did not have a problem with the photograph, and after the photograph had been admitted into evidence. Accordingly, the plaintiff's first claim fails.

II

The plaintiff's next claim is that the court abused its discretion when it allowed the tertiary trauma report[4] containing the statement "21 y/o female who was drunk and trying to urinate into a sink, which broke and she fell" into evidence as an exception to the rule against hearsay. The tertiary trauma report was prepared by Kristina Ziegler, a physician at Stamford Hospital, following a surgical procedure in which the plaintiff's wound was stapled shut. Ziegler testified at trial regarding her preparation of the report. The plaintiff argues that the statement could not fall within the admission of a party opponent exception to the hearsay rule[5] because the physician who wrote the report did not place the sentence in quotation marks and could not specifically recall speaking with the plaintiff. In addition, the plaintiff asserts that the statement could not fall within the hospital records exception[6] to the hearsay rule because the statement had no bearing on the diagnosis or treatment of the patient. We disagree with both of the plaintiff's assertions.

On November 18, 2015, the plaintiff filed a motion in limine to preclude all entries concerning liability in the plaintiff's hospital records and any testimony based on those entries. In her request, the plaintiff stated that the tertiary trauma report should be precluded, insofar as it pertains to liability, as inadmissible hearsay because it was not relevant to the plaintiff's diagnosis or treatment and because the report directly contradicted the plaintiff's own deposition testimony and other hospital records. The defendant objected to the plaintiff's motion, arguing that the tertiary trauma

[4] A tertiary trauma report is a document prepared after a patient's emergency room visit to alert medical staff to any possible related or consequential injuries that were not reported by the patient.

[5] See Conn. Code Evid. § 8-3 (1) (A).

[6] See General Statutes § 52-180.

report should be admissible either as a hospital record or as an admission of a party opponent. The court sustained the defendant's objection and admitted the tertiary trauma report into evidence as a statement of a party opponent, noting: "[A]lmost all admissions that come in as an exception to the hearsay rule are paraphrases . . . . The declarant may well have said it differently or in slightly different words, but the import of what the declarant said is what comes in. And because the declarant is an adverse party and is in court, she is in a position to refute it and that's why it's fair."

"Whether evidence offered at trial is admissible pursuant to one of the exceptions to the hearsay rule presents a question of law. Accordingly, our review of the [plaintiff's] claim is plenary." *State* v. *Gonzalez*, 75 Conn. App. 364, 375, 815 A.2d 1261 (2003), rev'd, 272 Conn. 515, 864 A.2d 847 (2005). It is an "elementary rule of evidence that an admission of a party may be entered into evidence as an exception to the hearsay rule." *Fico* v. *Liquor Control Commission*, 168 Conn. 74, 77, 358 A.2d 353 (1975). "There is no requirement that the statement be against the interest of the party when made or that the party have firsthand knowledge of its content. Basically, the only objection to an admission of a party/opponent is that it is irrelevant or immaterial to the issues, or its admission violates a party's constitutional rights." C. Tait and E. Prescott, Connecticut Evidence (5th Ed. 2014) § 8.16.4 (a), p. 533.

On appeal, the plaintiff argues that the statement in the tertiary trauma report was improperly admitted as a statement by a party opponent. Specifically, she points to Ziegler's deposition testimony, which the plaintiff believes establishes that Ziegler did not have a clear enough recollection of the statement to establish that it was indeed given by the plaintiff. The deposition transcript, however, was not admitted into evidence at

trial because Ziegler appeared in person and provided live testimony. Accordingly, the deposition transcript is not a part of the record on appeal and we refuse to consider any testimony from the deposition.

Turning to the evidence that was admitted at trial, Ziegler testified regarding her recollection of the plaintiff and the preparation of the tertiary trauma statement. The defendant asked Ziegler specifically if "it would have been [the plaintiff] that the information came from," to which Ziegler responded "correct." The defendant then asked Ziegler if the information could have "come from anywhere else?" Ziegler replied that she probably spoke with the physicians who performed the surgery, and that although she did not recall specifically, "this documentation would have come from the patient's own statement." In addition, the plaintiff testified that she "did tell somebody" at the hospital regarding how the accident happened. When the defendant asked the plaintiff to reiterate whether her answer "was, yes, I told them exactly how it happened," the plaintiff responded, "yeah, when—right."

On the basis of our review of this record, we conclude that the court properly admitted the statement from the tertiary trauma report as a statement by a party opponent. Ziegler specifically testified that the statement would have come from the plaintiff, and the plaintiff admitted to having told hospital staff how the accident occurred. Because there is testimony attributing the statement to the plaintiff, it was correctly classified by the court as a statement by a party opponent and was properly admitted into evidence.

Alternatively, the statement was also admissible under the hospital records exception to the hearsay rule. The admissibility of hospital records is governed by General Statutes § 52-180, which provides in relevant part: "(a) Any writing or record, whether in the form

of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." Additionally, under General Statutes § 4-104, hospital records are admissible without any preliminary testimony as to authenticity.

"It should initially be pointed out that a hospital record as a whole is not necessarily admissible for all purposes or as proof of all facts found therein. . . . The real business of a hospital is the care and treatment of sick and injured persons. It is not to collect and preserve information for use in litigation. Accordingly, even though it might be the custom of a hospital to include in its records information relating to questions of liability for injuries which had been sustained by its patients, such entries . . . would not be made admissible by the statute unless they also contained information having a bearing on diagnosis or treatment." (Citation omitted; internal quotation marks omitted.) *Marko* v. *Stop & Shop, Inc.*, 169 Conn. 550, 561–62, 364 A.2d 217 (1975).

In the present case, the medical history at issue in the tertiary trauma report, namely, the portion stating "21 y/o female who was drunk and trying to urinate into a sink, which broke and she fell," was admissible under the hospital records exception to the hearsay rule so long as it had a bearing on the diagnosis or treatment of the plaintiff. Ziegler testified at trial that the purpose of preparing a tertiary trauma report is to "check on [the patient] again to make sure [they] haven't missed any small injuries like a broken finger or anything like that and basically do a top to bottom exam

again. It's a way to prevent missed injuries." Given the nature of the accident, it was important for the treating physician to know what had happened to the plaintiff in order to check for "small injuries . . . ." For example, if the plaintiff had been sitting on the sink when it broke, she could have suffered injuries consistent with that specific type of fall. Alternatively, if the plaintiff had been standing at the sink when it fell, she may have suffered a different set of injuries. Moreover, drunkenness is often medically germane to treatment and is therefore admissible evidence. See *D'Amato* v. *Johnston*, 140 Conn. 54, 61–62, 97 A.2d 893 (1953). Accordingly, we conclude that the entire statement in the tertiary trauma report was pertinent to the plaintiff's diagnosis and treatment and that the court did not abuse its discretion by admitting it into evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

MARY ANN RING *v.* LITCHFIELD BANCORP (AC 39111)

DiPentima, C. J., and Keller and Graham, Js.

Syllabus

The plaintiff sought to recover damages from the defendant bank for its alleged violation of the Connecticut Unfair Trade Practices Act (§ 42-110 et seq.). The plaintiff had made a $40,000 payment to C Co. pursuant to an agreement to remediate water damage at the plaintiff's home, and although C Co. failed to provide labor or materials to the plaintiff, it deposited the payment into its account with the defendant. The defendant subsequently exercised its right to a setoff against the funds in C Co.'s bank account and informed C Co.'s owner of the setoff, who responded that certain of the funds in its account belonged to the plaintiff. The defendant refused the plaintiff's demand for the return of the payment she had made to C Co., and the plaintiff brought the present action alleging that the defendant's conduct in offsetting the funds in C Co.'s account that included her payment to C Co. violated the act. The trial court granted the defendant's motion to strike the complaint,

concluding that the allegations were insufficient to support the requisite elements of a claim under the act. The court reasoned that, in the absence of a seasonable stop payment order or a designation that the money was being held for the benefit of someone other than C Co., once the plaintiff's payment had been deposited in C Co.'s account, it became the property of C Co. and the defendant could exercise its right to a setoff against those funds. The plaintiff thereafter filed an amended complaint again alleging that the defendant had violated the act by offsetting the funds in C Co.'s account. The trial court granted the defendant's motion to strike the amended complaint. The court recognized that the substance of the plaintiff's claim in the original complaint and the amended complaint was not materially different and concluded that the allegations in the amended complaint continued to be insufficient to support a claim under the act. On appeal, the plaintiff claimed that the trial court erred in concluding that she had failed to plead a cognizable cause of action under the act and striking her amended complaint. The defendant argued on appeal that the plaintiff's claim was waived because her amended complaint was not materially different from the original complaint. *Held* that the plaintiff waived her right to appeal from the trial court's ruling granting the motion to strike her amended complaint, as the amended complaint merely reiterated the claim in her original complaint previously disposed of by the court, and the additional alleged facts did not materially alter the allegations in the original complaint: the new factual allegations in the amended complaint did not correct the deficiencies identified by the trial court when it granted the motion to strike the original complaint, and although there were some differences between the two complaints, those differences primarily pertained to the communications between the defendant and C Co.'s owner after the defendant had exercised its right to a setoff, and did not pertain to how the defendant's actions had violated the act.

Argued April 25—officially released July 18, 2017

Procedural History

Action to recover damages for violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *J. Moore*, *J.*, granted the defendant's motion to strike the complaint; thereafter, the court granted the defendant's motion to strike the amended complaint; subsequently, the court granted the defendant's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Charles F. Brower, for the appellant (plaintiff).

Linda Clifford Hadley, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, Mary Ann Ring, appeals from the judgment of the trial court rendered in favor of the defendant, Litchfield Bancorp, following the granting of the defendant's motion to strike her amended complaint. On appeal, the plaintiff claims that the court improperly granted the motion to strike because she sufficiently alleged a cause of action against the defendant for violating the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110 et. seq. We conclude that the plaintiff waived her right to appeal from the granting of the motion to strike the amended complaint. Accordingly, we affirm the judgment of the trial court.

As a preliminary matter, we note that "[i]n ruling on a motion to strike, we take the facts alleged in the complaint as true." *St. Denis* v. *de Toledo*, 90 Conn. App. 690, 691, 879 A.2d 503, cert. denied, 276 Conn. 907, 884 A.2d 1028 (2005). Here, the allegations include the following facts. Water pipes in the plaintiff's home froze and caused significant water damage to the property. The plaintiff engaged the services of a contractor, Chamberlin Kitchen & Bath, LLC (Chamberlin),[1] to repair her home. On May 23, 2015, Chamberlin presented a proposal for the work to be performed, which estimated that the cost to remediate the water damage would be $84,636. The plaintiff accepted that proposal.

After executing a contract with Chamberlin to perform the repairs, the plaintiff made a series of payments to Chamberlin. On June 9, 2015, the plaintiff paid Chamberlin the sum of $10,000. On June 29, 2015, the plaintiff made another payment of $10,000 to Chamberlin.

[1] Chamberlin is not a party to the present action.

Finally, on July 30, 2015, the plaintiff paid Chamberlin the sum of $40,000. That final payment is the only sum of money in dispute in the present action. Following the final payment on July 30, 2015, Chamberlin did not provide the plaintiff with any materials or perform any labor.

At all relevant times, Chamberlin held a banking account with the defendant. On August 4, 2015, Chamberlin's account had $42,037.36 on deposit, which included the plaintiff's July 30, 2015 payment of $40,000. On that date, the defendant exercised its setoff rights[2] against Chamberlin's account by offsetting the balance in the sum of $42,037.36.

The defendant's setoff of Chamberlin's account was confirmed by a letter sent to Chamberlin's owner, Tyson Chamberlin (Tyson), dated August 4, 2015. That same day, Tyson contacted the defendant's special assets officer, Dan Casey, and informed him that $40,000 of the deposited money in the Chamberlin account belonged to the plaintiff. Casey told Tyson that there was nothing that could be done. Tyson also spoke with the defendant's president, Paul McLaughlin, and claimed that the defendant was not entitled to the setoff. In addition, the plaintiff, through counsel, made several demands to the defendant and its counsel to return the $40,000 that was deposited in Chamberlin's account. The defendant refused to return the deposited money.

On August 24, 2015, the plaintiff commenced the present action with a one count complaint against the

[2] "Connecticut law, like law generally, treats a deposit in a bank as a promise to pay from the bank to the depositor. If the depositor is also indebted to the bank, such debts of the depositor and the bank are mutual, and the bank may set off a past due debt with deposits held by the bank, provided there is no express agreement to the contrary and the deposit is not specifically applicable to some other particular purpose." *In re Colonial Realty Co.*, 208 B.R. 616, 618 (Bankr. D. Conn. 1997), citing *Southington Savings Bank* v. *Rodgers*, 40 Conn. App. 23, 29, 668 A.2d 733 (1995), cert. denied, 236 Conn. 908, 670 A.2d 1307 (1996).

defendant, alleging that its conduct in offsetting the funds in Chamberlin's account violated CUTPA. On September 9, 2015, the defendant filed a motion to strike the plaintiff's complaint, which the court granted by memorandum of decision issued on December 7, 2015. On December 15, 2015, the plaintiff filed an amended complaint, again alleging that the defendant violated CUTPA by offsetting the account.[3] Thereafter, the defendant filed a motion to strike the amended complaint, which the court granted on February 29, 2016. The court rendered judgment in favor of the defendant on April 11, 2016. This appeal followed.

On appeal, the plaintiff claims that the court erred in striking her amended complaint and concluding that she had failed to plead a cognizable cause of action under CUTPA. In response, the defendant argues that the court's ruling was proper because the facts alleged in the amended complaint do not support a cause of action under CUTPA. The defendant also argues that the plaintiff's claim on appeal was waived because her amended complaint was not materially different from the original complaint.[4] We agree with the defendant that the plaintiff waived her claim on appeal.

With respect to the waiver argument, we are guided by the following legal principles and standard of review. "After a court has granted a motion to strike, the plaintiff may either amend his pleading or, on the rendering of judgment, file an appeal. . . . The choices are mutually exclusive [as] [t]he filing of an amended pleading

[3] The plaintiff's amended complaint initially contained two counts: (1) a violation of CUTPA; and (2) a claim for unjust enrichment. During the pendency of the defendant's motion to strike the amended complaint, the plaintiff withdrew the unjust enrichment claim.

[4] We note that the plaintiff has not filed a reply brief in this court addressing the defendant's waiver claim. At oral argument, however, the plaintiff simply argued that the additional facts pleaded in the amended complaint materially altered the original complaint.

operates as a waiver of the right to claim that there was error in the sustaining of the [motion to strike] the original pleading." (Citation omitted; internal quotation marks omitted.) *St. Denis* v. *de Toledo*, supra, 90 Conn. App. 693–94; see also Practice Book § 10-44. "Furthermore, if the allegations in a complaint filed subsequent to one that has been stricken are not materially different than those in the earlier, stricken complaint, the party bringing the subsequent complaint cannot be heard to appeal from the action of the trial court striking the subsequent complaint." *Caltabiano* v. *L & L Real Estate Holdings II, LLC*, 128 Conn. App. 84, 90, 15 A.3d 1163 (2011). "Construction of pleadings is a question of law. Our review of a trial court's interpretation of the pleadings therefore is plenary." *Kovacs Construction Corp.* v. *Water Pollution & Control Authority*, 120 Conn. App. 646, 659, 992 A.2d 1157, cert. denied, 297 Conn. 912, 995 A.2d 639 (2010).

We first examine the ruling striking the original complaint to determine whether the waiver rule applies. *St. Denis* v. *de Toledo*, supra, 90 Conn. App. 694. In that ruling, the court concluded that the complaint alleged insufficient facts to support the requisite elements of a CUTPA claim.[5] With respect to the defendant exercising its setoff rights, the court noted that "once a check has been endorsed, has cleared, and has been deposited into an account, absent a seasonable stop payment order or a designation known to the [defendant] on the account or the money held therein that informs the [defendant] that the money is being held for the benefit of a person other than the account owner, the deposited money becomes the money of the account owner. After

[5] The court identified several deficiencies from which the original complaint suffered, including the failure to identify an act or practice that violated public policy, an act or practice that was immoral, unethical, oppressive or unscrupulous, or a conscious departure from known, standard business norms, among other things.

that time, the [defendant] may treat it as the account owner's money and exercise its right to a setoff." Ultimately, the court concluded that the alleged facts were insufficient to establish a CUTPA claim and granted the motion to strike.

We next examine the court's ruling on the amended complaint. In granting the defendant's motion to strike the plaintiff's amended complaint, the trial court recognized that the substance of the plaintiff's CUTPA claim in the original complaint and as claimed in the amended complaint were not materially different by stating: "The court will not reiterate its legal discussion of either a motion to strike or of the legal sufficiency of CUTPA claims. Rather, in both of these regards, the court incorporates by reference its December 7, 2015 memorandum of decision striking the original complaint." The court further stated that "the allegations of the substituted complaint are actually less sufficient than those of the original complaint, which at least alleged an unfounded legal conclusion of misappropriation."

On the basis of our review of the relevant pleadings and the court's rulings in granting the defendant's motions to strike, we conclude that the plaintiff failed to allege any new facts in her amended complaint that materially altered the original complaint. In short, none of the new factual allegations in the plaintiff's amended complaint corrected the deficiencies identified by the court when it granted the motion to strike the original complaint. For example, the alleged facts in the amended complaint do not suggest that the defendant owed a duty to the plaintiff as a consumer, that the defendant engaged in an act or practice that was against public policy, or in an act or practice that was immoral, unethical, oppressive or unscrupulous, or alleged a conscious departure from known, standard business norms. See *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 287 Conn. 208, 217–18, 947 A.2d 320 (2008)

(discussing elements plaintiff must prove to prevail on CUTPA claim); see also *Ulbrich* v. *Groth*, 310 Conn. 375, 409–410, 78 A.3d 76 (2012). Moreover, the plaintiff failed to allege any facts as to whether the defendant, prior to exercising its setoff rights, was aware or should have been aware that the funds deposited by Chamberlin belonged to the plaintiff.[6] We further note that, although there are some differences in the two complaints, the primary differences in the original complaint from the amended complaint pertain to Tyson's communications with the defendant subsequent to the defendant exercising its right to a setoff, as opposed to how the defendant's actions violate CUTPA. In our view, those additions do not materially alter the allegations set forth in the original complaint.

Because the amended complaint merely reiterates the CUTPA claim that was previously disposed of by the court, and the additional alleged facts do not materially alter the original complaint, we conclude that the plaintiff has waived her right to appeal from the court's ruling granting the motion to strike the amended complaint. Thus, we need not reach the merits of her claim.[7]

[6] In its memorandum of decision granting the defendant's second motion to strike, the court concluded, as it did in ruling on the first motion to strike, that there were "no allegations at all that the [defendant] even knew of any relationship between the plaintiff and Chamberlin prior to the setoff." In that same ruling, the court also concluded, for the second time, that "[o]nce the $40,000 was deposited into the Chamberlin account and cleared . . . it became Chamberlin's money and was available for the setoff." The amended complaint simply did not cure the deficiencies identified by the court because it was not alleged that the defendant was aware, prior to the setoff, that the funds were held for the benefit of the plaintiff. Moreover, the funds were furnished to Chamberlin for services rendered in repairing the plaintiff's home. Nothing about that transaction suggests that the funds were held in trust or for the benefit of the plaintiff. Nonetheless, the plaintiff's allegation that the defendant was not entitled to exercise its setoff right is legally unsound. See *In re Colonial Realty Co.*, 208 B.R. 616, 618 (Bankr. D. Conn. 1997), citing *Southington Savings Bank* v. *Rodgers*, 40 Conn. App. 23, 29, 668 A.2d 733 (1995), cert. denied, 236 Conn. 908, 670 A.2d 1307 (1996).

[7] We note, however, that even if we were to reach the merits, her claim would likely fail in light of this court's prior decision in *Southington Savings*

See *St. Denis* v. *de Toledo*, supra, 90 Conn. App. 691 n.1. Accordingly, the court properly granted the motion to strike the amended complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

CLINTON S.* *v.* COMMISSIONER OF CORRECTION (AC 38530)

Keller, Mullins and Harper, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree and sexual assault in the third degree, sought a writ of habeas corpus claiming that his defense counsel had rendered ineffective assistance by failing to adduce certain evidence at his criminal trial, which he alleged caused him to plead guilty under the *Alford* doctrine during jury deliberations following that trial. At his criminal trial, defense counsel sought to challenge the credibility of the victim, who was the defendant's stepdaughter, regarding her motivation to fabricate the allegations. In his petition for a writ of habeas corpus, the petitioner alleged that defense counsel had failed to present evidence that the victim had disclosed the assault to a witness, G, only after G told the victim that the petitioner, who was a registered sex offender, would go to jail if he had touched the victim inappropriately. Moreover, the petitioner alleged that defense counsel failed to adequately investigate and present evidence of his employment history and that of M, the victim's mother, which he claimed would have revealed that he had no opportunity to assault the victim at the time and place she claimed. The habeas court denied the petition and denied the petition for certification to appeal, from which the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal on the basis of defense counsel's failure to introduce evidence of the conversation between the victim and G, the petitioner having failed to demonstrate that defense counsel's performance was deficient in that regard; the decision to not present the evidence of the conversation between G and the victim was a matter

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Bank v. *Rodgers*, 40 Conn. App. 23, 29, 668 A.2d 733 (1995), cert. denied, 236 Conn. 908, 670 A.2d 1307 (1996).

* In accordance with our policy of protecting the privacy interests of the 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.

of sound trial strategy, as defense counsel had successfully moved to exclude evidence of the petitioner's criminal history and his status as a registered sex offender and introducing evidence of the victim's conversation with G would have opened the door to the jury hearing that damaging evidence, and this court declined to second guess that strategic decision.

2. The petitioner failed to demonstrate that the issues that he raised on appeal concerning defense counsel's alleged failure to investigate and present evidence concerning his or M's work history were debatable among jurists of reason or raised questions that deserved encouragement to proceed further; contrary to the petitioner's assertion that he would not have pleaded guilty had the evidence of his work history been presented at trial because the evidence would have undermined the victim's claim that the assaults happened "all of the time," there was ample evidence before the jury that the petitioner had innumerable opportunities to be alone with the victim, and evidence of the petitioner's employment history would have confirmed rather than refuted that evidence, as the alleged assaults occurred during divers dates within a broad timeframe and, accordingly, defense counsel's performance was not deficient; although the habeas court misstated the applicable prejudice standard when determining whether he was prejudiced by defense counsel's failure to produce evidence of M's employment records, the habeas court properly made the determination that that evidence would not have changed the outcome of the petitioner's criminal trial had the jury finished its deliberations, in light of M's testimony, which the habeas court found to be credible, that the petitioner had numerous opportunities to be alone with the victim.

Argued March 9—officially released July 18, 2017

Procedural History

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

Vishal K. Garg, for the appellant (petitioner).

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Adrienne Russo*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Clinton S., appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because the record established that his criminal trial counsel had rendered ineffective assistance by (1) failing to present evidence of an alternative exculpatory explanation for the allegations made by the victim and (2) failing to investigate adequately and present evidence of the employment records of the petitioner and his wife, M. Additionally, in connection with the claim regarding M.'s employment records, the petitioner claims that the habeas court applied the wrong standard with respect to whether he was prejudiced by counsel's allegedly deficient performance. We conclude that the court did not abuse its discretion in denying the petition for certification to appeal. Accordingly, we dismiss the appeal.

The record discloses the following relevant facts. The petitioner was charged with several offenses, including sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1). The victim, who was M's daughter and the petitioner's stepchild, alleged that the petitioner sexually assaulted her between July, 2003, and January, 2005. She claimed that the assaults occurred when she arrived home from school around 2:45 p.m. and that it happened "basically all the time." The victim stated that, during the relevant time period, the petitioner was the only one home and that, if her siblings were home, the petitioner would lock them in a bedroom and tell them not to come out until told to do so.

The victim reported the sexual assaults to Luz Garcia. The victim and Garcia met through the New Haven Police Department's youth program, for which Garcia was the coordinator. On January 24, 2006, the victim and Garcia engaged in a conversation in which the victim disclosed to Garcia that the petitioner had sexually assaulted her. Garcia told the victim that the petitioner was a registered sex offender and that if the petitioner ever touched her inappropriately, he would go to jail. Garcia reported the abuse to the police.

At trial, the petitioner was represented by Attorneys Scott Jones and Tejas Bhatt. He elected a jury trial. Trial commenced on July 23, 2009. Evidence closed on July 28, 2009. Then, on July 31, 2009, the third day of jury deliberations and before the jury had reached a verdict, the petitioner decided to enter a guilty plea under the *Alford*[1] doctrine to the charges of sexual assault in the first degree and sexual assault in the third degree.

In response to questions by the trial court, the petitioner stated that he understood that he could not revoke his plea, that he was satisfied with his representation, and that he was pleading guilty voluntarily. When asked by the trial court one final time whether he was sure that he wanted to plead guilty, the petitioner responded, "Your Honor, I don't have a choice." In response, the trial court stated, "You don't have a choice because you're afraid the jury is [going to] come back and convict you. . . . No one is forcing you, right?" The petitioner responded, "Nobody's forcing me, Your Honor." The trial court then asked, "You don't have a choice because you're between a rock and hard place [and] you're taking this as a way out, right?" The petitioner answered, "That's right." After accepting the petitioner's plea, the court sentenced him to a total effective

[1] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

sentence of twenty years incarceration, execution suspended after fifteen years, followed by ten years probation.

On January 20, 2015, the petitioner filed an amended petition for a writ of habeas corpus, in which he alleged numerous ways in which his trial counsel had rendered ineffective assistance. The only claims relevant to this appeal, however, are the petitioner's claims that his trial counsel rendered ineffective assistance by failing "to adequately present an alternative innocent explanation for the [victim's] allegations of sexual abuse," failing to "investigate and present evidence concerning the petitioner's employment records," and failing "to investigate and present evidence concerning [M.'s] employment records." On October 13, 2015, the habeas court denied the amended petition. The petitioner then filed a petition for certification to appeal, which the habeas court denied. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because the record established that his trial counsel had rendered ineffective assistance primarily in two ways. First, the petitioner claims that his trial counsel rendered ineffective assistance by failing to present evidence of the conversation between the victim and Garcia. He argues that as a result of that conversation, the victim learned from Garcia that the petitioner could go to jail if he inappropriately touched her. The petitioner claims that evidence of this conversation would have supported the alternative exculpatory explanation that the victim fabricated the allegations of sexual assault only after she learned from Garcia that he could be incarcerated for touching her inappropriately.

Second, the petitioner claims that his trial counsel rendered ineffective assistance by failing to investigate

adequately and present evidence of the employment records of the petitioner and M. Specifically, he argues that these records would have undermined the victim's allegations and credibility by showing that the petitioner's opportunity to be alone with the victim was either limited or nonexistent. With respect to M.'s employment records in particular, the petitioner also claims that the habeas court applied the wrong prejudice standard when it applied the *Strickland* standard instead of the *Strickland-Hill* standard. We are not persuaded.

We first set forth our standard of review. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"[As it relates to the petitioner's substantive claims] [o]ur standard of review of the habeas court's judgment

on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 448–49, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

"[I]n order to determine whether the petitioner has demonstrated ineffective assistance of counsel [when the conviction resulted from a guilty plea], we apply the two part test annunciated by the United States Supreme Court in *Strickland* and *Hill*. . . . In *Strickland*, which applies to claims of ineffective assistance during criminal proceedings generally, the United States Supreme Court determined that the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. *Strickland* v. *Washington*, [466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. . . . Under the test in *Hill*, in which the United States Supreme Court modified the prejudice standard of the *Strickland* test for claims of ineffective assistance when the conviction resulted from a guilty plea, the evidence must demonstrate that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. *Hill* v. *Lockhart*, [474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Johnson* v.

Commissioner of Correction, 285 Conn. 556, 575–76, 941 A.2d 248 (2008).

"To satisfy the performance prong under *Strickland-Hill*, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that the advice was not within the range of competence demanded of attorneys in criminal cases. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Reasonably competent attorneys may advise their clients to plead guilty even if defenses may exist. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance. . . .

"To satisfy the prejudice prong [under *Strickland-Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Norton* v. *Commissioner of Correction*, 132 Conn. App. 850, 854–55, 33 A.3d 819, cert. denied, 303 Conn. 936, 36 A.3d 695 (2012).

In determining whether the habeas court abused its discretion in denying the petition for certification to appeal, we must consider the merits of the petitioner's underlying claims. Accordingly, we now turn to the merits of the petitioner's claims.

I

The petitioner first claims that trial counsel rendered ineffective assistance by failing to present evidence of an alternative exculpatory explanation for the allegations of sexual assault made by the victim. Specifically, he argues that evidence of the conversation between

the victim and Garcia, wherein the victim disclosed the sexual assaults, which he claims occurred prior to the victim's allegations,[2] significantly would have strengthened the defense's theory that the victim was motivated to make false allegations. Thus, he argues that trial counsel's failure to present that evidence was deficient performance.[3] Moreover, the petitioner claims that trial counsel's failure to present the evidence prejudiced the defense because, had the evidence of the conversation been included, a reasonable probability exists that he would have been satisfied with trial counsel's performance and would not have pleaded guilty.

The respondent, the Commissioner of Correction, asserts that trial counsel did not render ineffective assistance.[4] Specifically, the respondent argues that trial counsel's performance was not deficient because trial counsel's decision to not present evidence of the conversation between the victim and Garcia was a reasonable strategic decision. The conversation included information about the petitioner's prior sexual assault convictions and his being a registered sex offender. Had the conversation been presented, the petitioner risked the admission of such evidence, which trial counsel determined was highly damaging. Moreover, the respondent argues that this court cannot resolve whether trial counsel's failure to present the conversation prejudiced the defense because the habeas court did not make a finding on prejudice.

[2] The evidence presented at the petitioner's criminal trial did not clearly establish whether the victim made the allegations of sexual abuse before or after Garcia told her that the petitioner would go to jail for touching her inappropriately.

[3] The conversation was documented in an investigative report.

[4] The respondent also argued that the petitioner explicitly waived any claim of ineffective assistance of counsel when he explicitly acknowledged and agreed that, by entering a guilty plea, he would not be able to return to court, challenge the performance of his attorneys, and withdraw his plea. On March 8, 2017, however, the respondent withdrew his waiver argument.

At the habeas trial, Attorney Jones testified that the defense's primary theory was to challenge the credibility of the victim and highlight the inconsistencies in her testimony. In support of this theory, trial counsel argued that the victim was motivated to fabricate the allegations. Such motivation included her wanting the petitioner out of the house because they did not get along, her feeling alienated from her mother's affection, her resenting the disciplinary role of the petitioner in the household, and her responding to an incident between herself and the petitioner for which she was arrested.

Jones testified that he considered whether the evidence of the conversation would support an argument that the victim had made the allegations against the petitioner only after being informed that such allegations would lead to the petitioner's going to jail. Ultimately though, he decided not to use the evidence because part of the conversation between the victim and Garcia involved information related to the petitioner's criminal history, particularly to his being a registered sex offender, which Jones already had excluded successfully through a motion in limine. Jones opined that it was too challenging to present evidence only of Garcia's telling the victim that the petitioner would go to jail while at the same time continuing to exclude any mention of the petitioner's criminal history. Jones felt that evidence of the conversation could undermine his previous efforts to exclude the information because it came too close to opening the door for the state to get into evidence the petitioner's prior criminal history. As a result, he concluded that it was best not to present any evidence of the victim's conversation with Garcia.

Following the close of evidence at the habeas trial, the court denied the amended petition for a writ of habeas corpus on the ground that trial counsel's performance was not deficient. The court concluded that

"counsel was aware of the evidence, carefully considered its value to the defense and made a strategic decision not to offer it at trial." Specifically, the habeas court concluded that trial counsel had reasonable strategic reasons for not offering evidence of the conversation. The court further concluded that trial counsel thoroughly presented alternative evidence to the jury of motive and bias to support the defense's theory of an alternative exculpatory explanation. We agree with the habeas court and conclude that the petitioner has failed to demonstrate that trial counsel's performance was deficient.

It is clear from the record that the decision to not introduce evidence of the conversation between the victim and Garcia was a matter of trial strategy. Trial counsel did not want the members of the jury to become aware that the petitioner was a registered sex offender, which trial counsel deemed as damaging information. "It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and

made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 104 Conn. App. 557, 571–72, 935 A.2d 162 (2007), cert. denied, 285 Conn. 911, 943 A.2d 470 (2008).

Simply put, trial counsel made a reasonable strategic decision that the risk associated with presenting evidence of the conversation was not justified. The defense already had taken steps through the motion in limine to prevent the introduction of damaging information related to the petitioner's criminal history. After investigating and discussing the advantages and disadvantages of presenting evidence of the victim's conversation with Garcia, trial counsel determined that such evidence could jeopardize the earlier ruling and potentially lead to the jury's learning of the petitioner's damaging criminal history. Given the potential risk, trial counsel's decision was reasonable. Thus, we decline to second guess such strategic decisions by trial counsel. See *Watson* v. *Commissioner of Correction*, 111 Conn. App. 160, 171–72, 958 A.2d 782 (counsel's decision to not introduce investigative report because it would "invite difficult questions" fell "within the category of strategic decisions that our courts consistently refuse to second guess"), cert. denied, 290 Conn. 901, 962 A.2d 128 (2008).

We conclude that the habeas court properly determined that the petitioner's trial counsel had not performed below an objective standard of reasonableness with respect to the petitioner's claim regarding counsel's failure to present evidence of the conversation between the victim and Garcia. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

The petitioner next claims that trial counsel rendered ineffective assistance by failing to investigate adequately and present evidence of the petitioner's employment records and M.'s employment records. The petitioner argues that trial counsel's performance was deficient because such evidence would have supported the argument that he had almost no opportunity to be alone with the victim during the relevant time period. Specifically, the petitioner argues that his employment records would have demonstrated that during substantial portions of the relevant time period, he was working when the victim arrived home, thus giving him no opportunity to be home alone with the victim. Furthermore, he argues that M.'s employment records would have demonstrated that, even when the petitioner was home before 3 p.m., it was not uncommon for M. to be home, and, therefore, he would have had limited opportunity to be alone with the victim.

The petitioner also claims that the habeas court applied the wrong prejudice standard with respect to its conclusion on M.'s employment records. He argues that the habeas court improperly applied the *Strickland* standard instead of the *Strickland-Hill* standard. The petitioner argues that, when applying the correct *Strickland-Hill* standard, a reasonable probability exists that he would not have pleaded guilty had the employment records been investigated and presented. He claims that this evidence would have undermined the victim's testimony and shown the untruthfulness of her allegations.

The respondent asserts that trial counsel did not render ineffective assistance. Specifically, the respondent argues that trial counsel's performance was not deficient because the employment records of both the petitioner and M. showed that the petitioner had innumerable opportunities to be alone with the victim.

Moreover, the respondent argues that, although the habeas court incorrectly stated its conclusion on the claim regarding M.'s employment records by setting forth the wrong prejudice standard, it set forth the correct prejudice standard when it outlined the relevant law in its memorandum of decision.

The respondent further argues that, as recognized by the United States Supreme Court in *Hill*, the prejudice standard under the *Strickland* test is very similar to the prejudice standard under the *Strickland-Hill* test, particularly in circumstances where a petitioner claims a failure to investigate or to discover potentially exculpatory evidence. The respondent finally argues that the petitioner has not met the prejudice standard of the *Strickland-Hill* test for both of his employment records claims because, in showing that the petitioner had innumerable opportunities to be alone with the victim, the employment records would have corroborated much of the victim's testimony.

The habeas court was presented with evidence of the following additional facts, which are relevant to the petitioner's claim. At the criminal trial,[5] M. testified that, in the beginning of the relevant time period, July, 2004 to January, 2005, she would work from 3 p.m. to 11 p.m. and, therefore, would not be home when the victim arrived home from school around 2:45 p.m. From June, 2004, to July, 2004, she was on maternity leave. When M. returned to work, initially her work hours continued to be 3 p.m. to 11 p.m. Then, in October, 2004, M.'s schedule changed to 7 a.m. to 3 p.m. After this change in her schedule, if M. received a ride home from work, she would arrive home at 3:30 p.m., but, if she rode the bus, she would not arrive home until 4 p.m.

[5] The criminal trial transcripts were admitted as full exhibits at the habeas trial.

At the habeas trial, the petitioner testified that he worked at a Popeye's restaurant for a month and one-half beginning in September, 2003. He further testified that from November, 2003, to March, 2004, he worked at a Valvoline. The work records presented by the petitioner, however, showed that the petitioner worked at Valvoline from November, 2003, to January, 2004. The petitioner also testified that after Valvoline, he was self-employed as a landscaper, and then he was employed by Chuck and Eddie's, an auto parts store, from November, 2004, to February, 2005, where he worked from 7 a.m. to 5:30 p.m. every day except Sunday. According to the petitioner, he asked trial counsel to obtain records of his employment at these various businesses and to speak to the people with whom he worked because such evidence would have shown that the petitioner was not at home during the relevant time period. M., however, testified that during the relevant time period, the petitioner was not working consistently and was mostly home alone with the victim when M. arrived home from work.

Jones testified that part of the defense's strategy was to present evidence that the petitioner and the victim were not alone during much of the relevant time period. Jones further testified, however, that he did not think that the petitioner's employment records were going to help the petitioner because there were significant amounts of time where the petitioner was not working. In addition, Jones had difficulty obtaining the petitioner's employment records and narrowing down what records to obtain. With regard to the employment records of M., Jones testified that even when she began to work from 7 a.m. to 3 p.m. in October of 2014, whether she would be home when the victim was home with the petitioner depended on whether M received a ride or took the bus.

Following the close of evidence at the habeas trial, the court denied the amended petition for a writ of habeas corpus on the ground that trial counsel did not provide ineffective assistance. With regard to the petitioner's employment records, the habeas court determined that the petitioner failed to establish both deficient performance and prejudice because "any employment records would have limited value as the charging document alleged that the crimes occurring during divers dates within a broad timeframe" and that the records would have had "little to no favorable evidentiary value" due to the petitioner's sporadic work history.

With regard to M.'s employment records, the habeas court did not make any finding on the performance prong. Instead, the habeas court determined that the petitioner failed to establish prejudice. Specifically, the court determined that the petitioner had not demonstrated prejudice because M.'s testimony clearly established the opposite of what the petitioner contended the employment records would support, namely, that he would have had limited opportunity to be alone with the victim.

"[C]onstitutionally adequate assistance of counsel includes competent pretrial investigation. . . . However, counsel need not track down each and every . . . evidentiary possibility before choosing a defense and developing it." (Citation omitted; internal quotation marks omitted.) *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 694, 27 A.3d 86, cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011). "The burden to demonstrate what benefit additional investigation would have revealed is on the petitioner." (Internal quotation marks omitted.) *Norton* v. *Commissioner of Correction*, supra, 132 Conn. App. 859.

Here, the record supports the habeas court's conclusion that trial counsel reasonably determined that it was

best not to challenge the victim's credibility through the petitioner's employment records. First, trial counsel determined that the records were difficult to obtain; the charging document alleged a broad range of dates, and trial counsel was unable to narrow down what employment records to investigate and present. In addition, the petitioner was self-employed during part of the relevant time period such that the precise hours he worked would have been difficult to prove.

Second, trial counsel did not discover information related to the petitioner's employment during the relevant time period that would have challenged the victim's claim that she was often home alone with the petitioner, and, therefore, counsel determined that the employment records would not have supported the defense's theory. Even the Valvoline records that were presented to the habeas court showed that on multiple days the petitioner left work at 3 p.m. or earlier, which would have allowed him to be home with the victim after school. Trial counsel, therefore, determined that the records did not have any value in supporting the defense's argument and instead showed that, at times, the petitioner could have been home alone with the victim.

We conclude that the habeas court properly determined that trial counsel's decisions regarding the investigation and presentation of the petitioner's employment records at the criminal trial did not render their performance deficient. Because we agree with the habeas court that trial counsel's performance was not deficient, we need not address the prejudice standard of the *Strickland-Hill* test. See *Norton* v. *Commissioner of Correction*, supra, 132 Conn. App. 855. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification as to this claim.

Turning now to M.'s employment records, we first address the petitioner's claim that the habeas court

applied the wrong standard when assessing whether trial counsel's alleged failure to investigate and introduce the employment records of M. prejudiced the defense.[6] We agree with the petitioner that the habeas court, in its conclusion, set forth the wrong prejudice standard, phrasing its conclusion using the *Strickland* standard instead of the *Strickland-Hill* standard. In its memorandum of decision, the habeas court set forth the following: "It is well established that this court has a duty, in deciding prejudice, to focus on the ultimate outcome, the verdict and sentence, as opposed to merely a portion of the criminal proceedings. . . . Here, the petitioner has failed to establish that the content of the employment records of [M.] would have resulted in a more favorable result in the trial of his criminal matter. Accordingly, the petitioner has failed to prove prejudice."

The habeas court, however, earlier in its decision clearly quoted the correct *Strickland-Hill* standard when it set forth the relevant law, which requires the petitioner to demonstrate that a reasonable probability exists that, but for counsel's errors, he would not have pleaded guilty and, instead, would have insisted on going to trial; see *Hill* v. *Lockhart*, supra, 474 U.S. 59; *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 576; or, in this case, allow the jury to reach its verdict. A reasonable probability is a probability sufficient to undermine the court's confidence in the outcome. *Norton* v. *Commissioner of Correction*, supra, 132 Conn. App. 855.

In considering the prejudice standard under *Strickland-Hill*, this court has noted "that [i]n many guilty

[6] As discussed subsequently in this opinion, the habeas court did not make a finding as to deficient performance with regard to trial counsel's failure to investigate and present M.'s employment records. Rather, the habeas court found that the petitioner failed to prove that he was prejudiced by trial counsel's failure to present M.'s employment records.

plea cases, the prejudice inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate . . . the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence *likely would have changed the outcome of a trial*." (Emphasis added; internal quotation marks omitted.) Id.

In the present case, the habeas court, in its prejudice analysis, determined that M.'s employment records supported the theory that the petitioner had the opportunity to be home alone with the victim on numerous occasions. Supporting the habeas court's conclusion was its specifically crediting the testimony of M. Indeed, the court made a finding that M.'s testimony established that the petitioner would have had the opportunity to be home alone with the victim "mostly all of the time" because the petitioner was not working consistently, and M. was working consistently. Thus, the habeas court found that the employment records likely would not have changed the outcome of the petitioner's criminal trial had the jury finished deliberations, which, as articulated in *Norton*, is a central question in determining whether the petitioner otherwise would have pleaded guilty. *Norton* v. *Commissioner of Correction*, supra, 132 Conn. App. 855. Accordingly, although the habeas court incorrectly phrased its conclusion using the *Strickland* standard, the fact that the court made the finding that M.'s employment records would not have changed the outcome at trial persuades us that the court's analysis supported a determination consistent

with the *Strickland-Hill* standard, and, thus, the court's misstatement was not reversible error.

We next address the petitioner's claim that he was prejudiced by trial counsel's failure to investigate and present M.'s employment records. Following our Supreme Court precedent, the habeas court chose to dispose of the petitioner's claim on the prejudice prong. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Internal quotation marks omitted.) *Aillon* v. *Meachum*, 211 Conn. 352, 362, 559 A.2d 206 (1989).

The petitioner claims that M.'s employment records would have challenged the credibility of the victim's testimony that the sexual assaults occurred almost all the time, and, therefore, he would have not pleaded guilty. Although M.'s employment records would have established that the sexual assaults did not happen "all of the time," because there were times within the relevant time period that M. would have been home, the records also would have established that M. frequently was not home during the relevant time period, and, therefore, the petitioner would have had numerous opportunities to be alone with the victim. Consequently, M.'s employment records would have had the effect of corroborating much of the victim's testimony, rather than challenging it. Accordingly, we conclude that the petitioner has failed to demonstrate that he was prejudiced by trial counsel's performance. Because M.'s employment records appear to corroborate much of the victim's testimony, it is not reasonably probable that, but for trial counsel's alleged failure to investigate and present M.'s employment records at the petitioner's

criminal trial, the petitioner would not have pleaded guilty.

As a result, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal as to this issue. The petitioner has not demonstrated that the issues he raises on appeal are debatable among jurists of reason, that the court could resolve the issues in a different manner, or that the questions raised deserve encouragement to proceed further.

The appeal is dismissed.

In this opinion the other judges concurred.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

KATHLEEN KUCHTA, ZONING ENFORCEMENT OFFICER *v.*
EILEEN R. ARISIAN, SC 19730
Judicial District of Ansonia-Milford

Zoning; Whether Municipalities are Authorized to Regulate Only Signs that Promote Business; Whether Regulation of Signs Violates Free Speech Rights; Whether Trial Court Erred in Refusing to Enjoin Occupancy Until Defendant Obtains Zoning Certificates. The defendant, dissatisfied with construction work performed on her Milford home, erected three signs on the property that were critical of the contractor that had performed the work. The town's zoning enforcement officer (the plaintiff) brought this action asking that the defendant be ordered to remove the signs. The plaintiff also claimed that the defendant was occupying the premises in violation of the zoning regulations in that she had not obtained a certificate of zoning compliance or a certificate of occupancy, and the plaintiff sought that the defendant be enjoined from continuing to occupy the premises until she acquired the required certificates. The trial court refused to order that the defendant remove the signs or that she be enjoined from continuing to occupy the premises. The court ruled that the city had no authority to regulate the signs, rejecting the plaintiff's claim that a municipality can rightfully regulate any sign that publicly conveys a message. The court ruled that, while General Statutes § 8-2 (a) authorizes municipalities to regulate "the height, size and location of advertising signs," the defendant's signs were not "advertising signs" as contemplated by that statute. The court interpreted the phrase "advertising signs" to connote "signs that promote or emphasize qualities or attributes that are used in order to solicit or encourage participation or patronage," and held that the defendant's "protest signs" did not encourage any such participation or patronage. Next, the trial court ruled that, while the defendant did not possess the necessary zoning certificates, the equities did not favor granting the injunctive relief sought by the plaintiff. In so concluding, the court found it significant that the main reason for the city's continued refusal to issue the zoning certificates, an alleged lot size violation, had not been asserted in the complaint and had not been subject to the applicable administrative enforcement procedures. The plaintiff appeals, claiming that the trial court improperly held that § 8-2 (a) authorizes municipalities to regulate only signs that promote business patronage. The plain-

tiff contends that the plain language of § 8-2 (a), as well as the legislative purpose underlying the statute, supports interpreting the phrase "advertising signs" to include all signs that publicly convey a message. The plaintiff also claims that because the zoning regulations provide that a person cannot occupy a building without first obtaining the necessary zoning certificates, the trial court erred in not enjoining the defendant from continuing to occupy her home. The defendant asks that, should the Supreme Court determine that the city has the authority to regulate her signs, it nonetheless affirm the trial court's judgment on the alternative ground that the signs are protected speech under the federal and state constitutions.

KEVIN EPPS *v.* COMMISSIONER OF CORRECTION, SC 19773
Judicial District of Tolland

Habeas; Whether, in Habeas and Other Collateral Proceedings, the Harmless Error Standard or Some More Stringent Standard of Harm Should Apply. In 2005, the petitioner was convicted of assault in the first degree and kidnapping in the first degree. He brought this habeas action challenging the kidnapping conviction on the ground that the trial court failed to properly instruct the jury on the elements of the crime of kidnapping in accordance with *State* v. *Salamon*, 287 Conn. 509 (2008). In *Salamon*, the Supreme Court held that "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." The habeas court granted the habeas petition, vacated the kidnapping conviction, and remanded the case for a new trial on that charge. The respondent appealed, and the Appellate Court (153 Conn. App. 729) affirmed the habeas court's judgment. The Appellate Court rejected the respondent's claim that the petitioner failed to prove that he was prejudiced by the trial court's failure to give a *Salamon* jury instruction. It observed that a petitioner is almost invariably prejudiced when the jury is not instructed on an essential element of an offense and that such error can be deemed harmless only when the reviewing court, in examining the entire record, is satisfied beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error. The Appellate Court found that, here, the allegations that gave rise to the kidnapping charge were not uncontested and supported by overwhelming evidence and accordingly that it had no reasonable assurance that the petitioner's kidnapping

conviction was not based on restraint of the victim that was incidental to the petitioner's assault of the victim. The respondent has been granted certification to appeal the Appellate Court's judgment. The Supreme Court will decide whether, in a collateral proceeding where the petitioner claims that the trial court erred in omitting an element of a charged crime in its jury instructions, harm should be measured in accordance with *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), or *Neder* v. *United States*, 527 U.S. 1 (1999). In *Brecht*, the United States Supreme Court held that a federal habeas court must find that a constitutional error had a "substantial and injurious effect" on the verdict before granting habeas relief. In *Neder*, the United States Supreme Court held that, on direct appeal, a claim that a jury instruction omitted an essential element of a charged crime is subject to harmless error analysis, that is, "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." If the Supreme Court adopts the *Brecht* standard, it will decide whether the evidence in this case established that the absence of a *Salamon* instruction had a substantial and injurious effect on the jury's verdict of guilty on the kidnapping charge. If the Supreme Court adopts the *Neder* standard, it will decide whether the Appellate Court erred in holding that it had no reasonable assurance that the kidnapping conviction was not based on a restraint of the victim that was incidental to the assault.

A PIECE OF PARADISE, LLC *v.* BOROUGH OF FENWICK ZONING BOARD OF APPEALS, SC 19890

Judicial District of Hartford

Zoning; Variances; Whether Applicant's Hardship Self-Created; Whether Denial of Variance Confiscatory; Whether Variance Would Substantially Affect Comprehensive Zoning Plan that Incorporates Coastal Site Plan Requirements. A Piece of Paradise, LLC (Paradise) owns a parcel of land (the West Lot) located in the borough of Fenwick in the town of Old Saybrook. The West Lot was once part of a larger parcel and, in 2006, the owners of the larger parcel divided the property, retaining the East Lot and conveying the smaller West Lot to Paradise. In 2011, the borough's zoning regulations were amended to impose new setback requirements in relation to Long Island Sound and in relation to the beach and dunes, and to include a coastal vegetation buffer zone. Paradise sought a variance of the new setback requirements in order to build a single-family home, claiming that the amendments to the regulations effectively prevented

any building on the property. The zoning board denied the variance, and Paradise appealed to the Superior Court. The court dismissed the appeal, holding that the board properly denied the variance because Paradise failed to prove that the new setback requirements caused a hardship or that the variance would not substantially affect the borough's comprehensive zoning plan. The court found that any hardship was self-created because Paradise acquired a lot that was not protected from zoning changes and that was not approved for building because it had not been subject to coastal site plan review, which was required before any improvements to the property could be made. The court also found that the denial of the variance was not confiscatory because the West Lot could be used as a side yard to a house located on the East Lot. The court further found that Paradise's proposal did not comply with the comprehensive zoning plan, which incorporated coastal site plan requirements, reasoning that Paradise must first obtain coastal site plan approval and that its proposal would have a negative effect on coastal resources. Paradise appeals, claiming that the trial court improperly found that its hardship was self-created rather than caused by the 2011 amendments to the zoning regulations, that the effects of the 2011 amendments were not confiscatory, and that Paradise's variance application was inconsistent with the borough's comprehensive zoning plan.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES

Small Claims Decentralization

Effective Monday, October 16, 2017, the Centralized Small Claims Office located at 80 Washington Street, Hartford, CT 06106 will be closed. No new small claims writs or any other documents on small claims cases can be filed at the Centralized Small Claims Office in person, by fax or by mail as of that date. The decentralization process will begin in August, 2017, and be completed effective October 16, 2017. The following is a brief summary of the changes. For more information on small claims decentralization, go to the Judicial Branch website at www.jud.ct.gov or a clerk's office, court service center, public information desk or law library.

Effective Friday, September 1, 2017 and after:

1. All small claims cases filed *with the Centralized Small Claims Office* or electronically through Small Claims E-Filing will have an answer date on or after October 16, 2017, and will be transferred to the small claims docket at the appropriate judicial district or housing session.

2. Any existing (pending or post-judgment) small claims case that (1) requires a hearing date after September 1, 2017; or (2) has a final date for compliance ordered by a magistrate after September 1, 2017, will be transferred to the small claims docket in the appropriate judicial district or housing session.

3. When a case is transferred, the court will send to counsel and self-represented parties notice of the court location and a new docket number that must be used on any documents filed with the court for these cases. Paper documents must include the new docket number and be filed with the clerk of the appropriate location. Electronically-filed documents must be filed through *Superior Court E-filing*, using the new docket number.

4. Any new cases, or documents filed on existing cases that have not been transferred, shall be filed electronically through Centralized Small Claims E-Filing or on paper with the Centralized Small Claims Office or at the appropriate court location, until 5:00 p.m. on October 13, 2017.

Effective October 16, 2017, and after:

1. When you are filing a new small claims case after the defendants have been served, you must file the small claims writ with the appropriate judicial district or housing session location clerk's office as set forth in Section 51-345 and 51-346 of the Connecticut General Statutes.

2. If you are filing any document *on paper* (including an application for an execution filed by a self-represented party) on an existing case that has not been transferred to a judicial district or housing session location, you must file the paper document with the appropriate judicial district or housing session clerk's office. The clerk will then have the case transferred from Centralized Small Claims to the appropriate judicial district or housing session location.

3. If you are filing an application for an execution *electronically* on a small claims case that has *not* been transferred and assigned a new docket number, you must use the existing small claims docket number and file it through

Centralized Small Claims E-Filing, not Superior Court E-Filing. Once the execution is filed, the case will be transferred to the small claims docket in the appropriate judicial district or housing session location and assigned a new docket number.

4. If you want to view a file that has not been transferred and assigned a new docket number, you must contact the appropriate judicial district or housing session location for assistance.

For more information on where to file small claims cases, go to the Judicial Branch website:
http://www.jud.ct.gov/directory/directory/directions/smallclaims.htm.

BAR EXAMINING COMMITTEE

Notice of Amendment of Regulations

At its meeting on July 7, 2017, the Connecticut Bar Examining Committee voted to amend Articles I, III, and X of its Regulations to allow for different application fees for bar examination applicants based upon when an application is received, to allow for an examination applicant with a UBE score who is deemed withdrawn to then file an application for admission by transfer of the UBE score attained in CT, and to set forth the fees for those filing for temporary licensing under Practice Book Section 2-13A. These amendments are effective 90 days from publication in the Law Journal.

Jessica F. Kallipolites
Administrative Director
Connecticut Bar Examining Committee

ARTICLE I

ORGANIZATION OF THE COMMITTEE

. . . . .

Art. I-4. SUBCOMMITTEE ON NON-STANDARD TESTING.

(a) There shall be a subcommittee on non-standard testing for each examination, which shall have the power to act for the committee, to be appointed by the chair, which subcommittee shall have the duty, power and authority to consider and act upon all petitions for non-standard testing and to determine the terms and conditions upon which non-standard testing will be provided to applicants.

(b) Petitions for non-standard testing shall be in writing on a form prescribed by the committee and shall be filed, together with such attachments as the committee may require, with the administrative director on or before ~~the filing deadline for applications for admission to the bar~~ 30 April for a July examination and on or before 30 November for a February examination. The subcommittee may, in its discretion, hold a hearing on such petitions. The committee shall notify the applicant of its decision in writing.

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ARTICLE III

ADMISSION BY EXAMINATION AND ADMISSION BY TRANSFER OF A UNIFORM BAR EXAMINATION SCORE ~~ATTAINED IN ANOTHER JURISDICTION~~

Art. III-1.

(A) The application to take the bar examination and for admission to the bar (for which the official forms obtainable from the administrative director must be used) shall be filed between 01 March and 30 April for a July examination and between 01 October and 30 November for a February examination~~, together with the fee prescribed by Article X (1)~~. Applications filed between 01 March and 31 March for a July examination or between 01 October and 31 October for a February examination shall be filed together with the fee prescribed by Article X(1)(a). Applications filed between 01 April and 30 April for a July examination or 01 November and 30 November for a February examination shall be filed together with the fee prescribed by Article X(1)(b).

(B) The application for admission by transfer of a Uniform Bar Examination (UBE) score ~~attained in another jurisdiction~~ (for which the official forms obtainable from the administrative director must be used) shall be filed within 3 years after attaining a total scaled score of 266 or higher on the UBE taken in ~~another~~ any jurisdiction, together with the fee prescribed by Article X (2). A score is considered to have been attained on the date of the administration of the UBE that resulted in the score. It is the applicant's responsibility to ensure that his or her qualifying UBE score is transferred to the administrative director by the National Conference of Bar Examiners (NCBE). Applicants shall submit official transcripts of undergraduate and legal education sufficient to satisfy the committee that the applicant's educational qualifications meet the requirements of Section 2-8 of the Rules.

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ARTICLE X

Schedule of Fees

Art. X. The following shall be the fees in connection with applications for admission to the bar:

~~(1) The application fee for admission by examination: $800~~

(1) The application fee for admission by examination:

(a) First filing deadline: $800

(b) Final filing deadline: $900

(2) The application fee for admission by UBE score transfer: $750

(3) Application fee for admission without examination: $1,800

(4) Investigation under Sec. 2-8(8): $50

(5) Copy of prior examination questions: $15

(6) Copy of prior examination answers (includes questions): $35

(7) Copy of applicant's application for admission by examination: $15

(8) Copy of applicant's exam answers: $20

(9) Transmittal of applicant's MBE score to another jurisdiction: $25

(10) Replacement of examination scores and information: $15

(11) Replacement of admission certificate: $20

(12) Application fee for foreign legal consultant: $500

(13) Application fee for registration as authorized house counsel: $1000.

(14) Petition for determination on foreign education: $500

(15) Military Spouse Temporary Licensing:

(a) Application Fee: $750

(b) Renewal Fee: $300

All fees must be made payable to the Connecticut Bar Examining Committee by certified check or money order; personal checks are not accepted.

Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on 5/9/17 in docket number FBTCV166059632S in regard to Raymond Heche, juris number 027075, of Bridgeport, CT for the reasons articulated on the record on today's date, the court issues a reprimand, with the requirement that the respondent will have no access to the firm's IOLTA account.

By the Court,
Bellis, J.

Notice of Inactive Status of Attorney

The application for inactive status pursuant to PB Section 2-58 for Steven Wright, juris number 306556, is granted. Attorney James M. Nugent, juris number 101986, is appointed as Trustee, pursuant to Practice Book Section 2-64, to inventory the files, secure the clients fund account, review the office mail and take such action as is necessary to protect the interests of clients, and to provide accounting(s) and report(s) to the court.

By the Court,
Bellis, J.
5/19/17

Notice of Suspension of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on 5/25/17 in docket number FBTCV166058698S in regard to Peter L. Craft, juris number 301042, of Fairfield, CT the court issues the following orders:

In accordance with Practice Book Section 2-40, the court orders an order of suspension for 2 1/2 years, retroactive from the date the respondent was placed on interim suspension, November 2, 2016.

The respondent is required to apply for reinstatement pursuant to Practice Book Section 2-53(d)(4), and may do so upon successful completion of his sentence, including the three year period of probation.

No trustee is appointed pursuant to Practice Book Sections 2-40 and 2-64, as the respondent has no current clients.

By the Court,
Bellis, J.

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimands

April 21, 2017: Mark J. Kovack, Stamford, Connecticut - #303932

April 28, 2017: Gerald Hecht, Danbury, Connecticut - #100651

Copies of the full text of the decisions of the Statewide Grievance Committee areavailable through the Committee's offices at Second Floor, Suite Two, 287 Main Street, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decisions is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:
Michael P. Bowler
Statewide Bar Counsel